Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?

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The framers of the United States Constitution recognized the need for a process to amend the new Constitution.[1] Two independent methods of amending the Constitution were chosen to balance the desire for a powerful central government with the desire for autonomous state governments.[2] The first method gives amending power to the federal government by permitting Congress to propose amendments whenever two-thirds of both houses deem it necessary.[3] The second method delegates amending power to the states by authorizing an amendment-proposing convention upon application to Congress by two-thirds of the states.[4]

All twenty-six of the present constitutional amendments have resulted from the congressional method of amendment.[5] Despite nearly

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1. Hawke v. Smith No. 1, 253 U.S. 221, 226 (1920); L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 2 (1942).

2. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, in THE ARTICLE V CONVENTION PROCESS 39, 45-46 (L. Levy ed. 1971); Kauper, *The Alternative Amendment Process*, in THE ARTICLE V CONVENTION PROCESS 67, 69 (L. Levy ed. 1971).

3. U.S. CONST. art. V provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the 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.

4. *Id.*

5. Common Cause, *Is the U.S. Ready for a Constitutional Convention?*, IN COMMON, Winter, 1979, at 4. *See* American Enterprise Institute, A Convention to Amend the Constitution: Questions Involved in Calling a Convention Upon Applications by State Legislatures, *reprinted in Proposed Bill to Provide Constitutional Convention Procedures: Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 111 (1967) [hereinafter cited as *Hearings on S. 2307*]. The American Enterprise Institute considered the first twenty-five amendments. The twenty-sixth amendment was proposed by Congress on March 23, 1971 and certified as ratified on July 5, 1971. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 44 n.18 (1973) [hereinafter cited as THE CONSTITUTION].

400 state applications,[6] including at least one application from each state,[7] the sole United States experience with a national constitutional convention is the 1787 convention, which met to revise the Articles of Confederation but developed our present constitution instead.[8] The most recent attempt to invoke the state-initiated amendment process involves the demand by the states for a balanced federal budget.[9]

The demand for a balanced-budget convention is one of an increasing number of attempts to assemble a federal constitutional convention.[10] The increase is best illustrated by the fact that only 10 convention applications were made in the first 100 years after the constitution was ratified,[11] while more than 300 have been made since 1889.[12]

When the number of convention applications approaches thirty-four—the total currently required to give rise to the congressional duty to call a convention—considerable concern surfaces about the nature, scope, and procedures of the convention itself.[13] Considerably less attention, however, has been paid to the procedures used by the states to apply for a convention. The application process merits careful examination and regulation as the crucial first step in the convention process.

This Note will initially examine the history of the amendment provision in the Constitution. Second, the convention method of amendment will be examined. Finally, five important areas of convention application procedures will be addressed: (1) the scope of convention

6. Hucker, *Constitutional Convention Poses Questions*, 37 CONG. Q. WEEKLY REP. 273, 273 (1979).

7. AMERICAN BAR ASSOCIATION, SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V, at 2 (1974) [hereinafter cited as ABA REPORT].

8. *See* Common Cause, *supra* note 5, at 4.

9. The first applications for a balanced-budget convention were made in 1957 and 1961. Buckwalter, *Constitutional Conventions and State Legislators*, 20 J. PUB. L. 543, 548 (1971) (Indiana and Wyoming, respectively). In 1975 the National Taxpayers Union [NTU] began a campaign to persuade the states to apply to Congress for a constitutional convention to propose a balanced-budget amendment. Berlow, *Group Wants to Balance Nation's Checkbook*, 37 CONG. Q. WEEKLY REP. 277, 277 (1979). By April 1979, NTU claimed that thirty states—four short of the needed two-thirds—had requested a convention. D. HUCKABEE, CONSTITUTIONAL CONVENTION APPLICATIONS: ADDRESSING THE CONTROVERSY OF COUNTING STATE APPLICATIONS RELATING TO A DEFICIT SPENDING AMENDMENT 1 (1979) (published by the Library of Congress, Congressional Research Service).

10. *See* Buckwalter, *supra* note 9, at 547.

11. *Id.* at 546.

12. Praeger & Milmore, *Article V Applications Submitted Since 1789: A Tabulation of Applications by States and Subjects*, in ABA REPORT, *supra* note 7, at 59, 60-61. Praeger and Milmore counted as a convention application any application recognized as such by the sources they surveyed. *Id.* at 59. Prior to the concern with a balanced federal budget, the issues of state legislative apportionment, limiting federal taxes, direct election of Senators, polygamy, and revenue sharing generated considerable state support for constitutional conventions. *See* Buckwalter, *supra* note 9, at 547-49.

13. *See generally* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, in THE ARTICLE V CONVENTION PROCESS 113, 116-40 (L. Levy ed. 1971).

applications; (2) the voting procedures in the convention application process; (3) the participation of state governors in the process; (4) the transmission of convention applications to Congress, and (5) the recission of convention applications.

HISTORY OF ARTICLE V

Article V of the Constitution, which sets forth the procedures for amendment, was a direct response to the inflexible amendment provision in the Articles of Confederation. The Articles of Confederation, which were in effect from 1781 until 1787, could be amended only upon the approval of every state.[14] This unanimity requirement made amendment virtually impossible.[15] To remedy this problem, one of the amendment plans first proposed at the Constitutional Convention of 1787 provided for a constitutional convention whenever applications were made by two-thirds of the states.[16] This plan quickly fell into disfavor.[17] Advocates of a system of strong state governments feared that the plan made it too easy for a convention to be convened to subvert state constitutions.[18] Proponents of a strong central government also opposed the plan because they feared a state initiated convention could be used to increase the powers of the states.[19]

The second plan proposed by the framers eliminated the convention method of amendment.[20] Instead, Congress was to propose amendments either upon a two-thirds vote of its members or upon receipt of applications from two-thirds of the states.[21] In either event the amendments would be valid only when ratified by three-fourths of the states.[22] This plan did not fare any better than the first. Concern was expressed that the second plan made amendment dependent upon Congress.[23] Since the states were without power to enforce compliance with their applications, it was feared that Congress would prevent the

14. U.S. ARTS. OF CONFED'N art. XIII.

15. *See* Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1299; G. BACON, THE CONSTITUTION OF THE UNITED STATES 6 (1928). Bacon indicates that "[t]he clause requiring unanimous consent to amend proved an insurmountable obstacle to effective government. In two cases, at least, a single state blocked a proposal by Congress to raise revenue by the imposition of a duty on imports, and this in the face of a financial situation extremely critical." *Id.*

16. *See* I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (M. Farrand rev. ed. 1937). The first plan for a constitution stated that there should be a provision for the amendment of the Articles of the Union "whenever it shall seem necessary." *Id.* The plan specifically provided that the national legislature need not give its assent to the amendment process. *Id.*

17. *See* II *id.* at 557-59.

18. *Id.* at 557-58.

19. *Id.* at 558.

20. *See id.* at 559.

21. *Id.*

22. *Id.*

23. J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 737 (E.H. Scott ed. 1970).

states from altering the Constitution by simply refusing to act.[24]

To resolve the problem with this latter plan, the framers reinserted a provision giving the states absolute power over one method of amendment.[25] The provision requiring that a convention be called upon the application of two-thirds of the states was reinserted.[26]

The final version of article V permitted initiation of the amendment process upon either a two-thirds vote of Congress or upon application for a constitutional convention by two-thirds of the states.[27] The two approved methods of amendment represented a compromise between a powerful federal government and powerful state governments.[28] Both methods eliminated the objectionable unanimity requirement contained in the Articles of Confederation.[29] The congressional method of amendment established a coordinate process: Congress can propose amendments by a two-thirds vote of both houses but ratification is left to the states.[30] The state method granted an absolute power to amend to the states. Upon application of two-thirds of the states, Congress is unconditionally required to call a convention.[31] Amendments proposed by a convention are to be ratified by the states.[32]

THE CONVENTION METHOD OF AMENDING THE CONSTITUTION

The framers of the Constitution anticipated wide use of the amendment power.[33] Indeed, during the ratification process, the ease of amendment was promoted as a point in favor of adoption of the Constitution.[34] The Constitution was said to provide for amendment in

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24. *See id.*

25. *See id.*

26. *Id.* It is clear that Congress is required to call a convention when valid petitions are received from two-thirds of the states. THE FEDERALIST No. 85 (A. Hamilton) at 544 (H. Lodge ed. 1888). Hamilton indicated that the words in article V were "peremptory" and that Congress would be "obliged" to call a convention when two-thirds of the states apply for one. *Id.* at 550. *See* Ervin, *supra* note 2, at 49-50 for a discussion of the requirement that Congress call a convention.

27. *See* J. MADISON, *supra* note 23, at 737-38.

28. Kauper, *supra* note 2, at 69; Ervin, *supra* note 2, at 45-46. According to Ervin, "the final form of article V was dictated by a major compromise between those delegates who would utilize the state legislatures as the sole means of initiating amendments and those who would lodge that power exclusively in the national legislature." *Id.* at 45.

29. *See* text & note 14 *supra*.

30. U.S. CONST. art. V.

31. *Id.* The second method of amendment originates "on the Application of the legislatures of two thirds of the several states. . . ." *Id.* For a discussion of the requirement that Congress call a convention, see note 26 *supra*.

32. U.S. CONST. art. V.

33. Hawke v. Smith No. 1, 253 U.S. 221, 226 (1920); *see* L. ORFIELD, *supra* note 1, at 2-3. John Madison remarked "[t]hat useful alterations will be suggested by experience, could not but be foreseen." THE FEDERALIST No. 43 (J. Madison) at 267, 274 (H. Lodge ed. 1888).

34. *See* L. ORFIELD, *supra* note 1, at 118. *Cf.* Bacon, *supra* note 15, at 30. Samuel Adams was "won over by assurances that amendments to the Constitution would cure the defects which troubled him." *Id.*

"an easy, regular, and constitutional way."[35] The provision in the Articles of Confederation requiring unanimous consent for amendment had been viewed as a major stumbling block to necessary change.[36] Since the Constitution eliminated the unanimity requirement in the amendment process, it was seen as superior to the Articles of Confederation.[37] Moreover, when opponents of the Constitution brought up its shortcomings, proponents argued that such shortcomings could easily be changed through amendment.[38]

Since the Constitution was adopted, thousands of amendments have been introduced in Congress.[39] Hundreds of state applications have requested a constitutional convention.[40] Despite these numbers, however, only twenty-six amendments have been added to the Constitution, and each amendment has been congressionally proposed.[41]

The earliest state applications for a constitutional convention were submitted during the debate over ratification of the Constitution,[42] but fewer than a dozen applications reached Congress in the century that followed ratification.[43] The first major attempt to call a convention began in 1893 when Nebraska sought an amendment providing for the direct election of United States Senators.[44] In 1900, the House of Representatives voted overwhelmingly in favor of such an amendment but the Senate failed to act.[45] Many states reacted by applying to Congress for a convention. By 1905, twenty-five of the forty-five states had made application for a convention.[46] Finally, in 1912, with state applications continuing to mount, the Senate and House concurred, and proposed the seventeenth amendment providing for the direct election of Senators.[47] The amendment was submitted to the states for ratification re-

35. V.J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 182 (1888).

36. *Hearings on S. 2307*, *supra* note 5, at 102 (remarks of Charles Pinckney). *See* text & notes 14-15 *supra*.

37. *Hearings on S. 2307*, *supra* note 5, at 102 (remarks of Charles Pinckney).

38. *See* THE FEDERALIST No. 85 (A. Hamilton).

39. *See* Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1, 19 (1963) (more than 3,000).

40. *See* Hucker, *supra* note 6, at 273.

41. *See* note 5 *supra*.

42. Martig, *Amending the Constitution: Article V: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1267 (1937). Virginia and New York petitioned Congress for a convention in 1789. Both states desired a bill of rights for the Constitution. They included proposed amendments with their notices of ratification of the Constitution. These first petitions were mooted when Congress presented the states with the Bill of Rights for ratification. *Id.*

43. Buckwalter, *supra* note 9, at 546.

44. *Id.* Senators were elected by state legislatures prior to the adoption of the 17th amendment. U.S. CONST. art. I, § 3.

45. Hucker, *supra* note 6, at 273. The House voted 240 to 15 to submit an amendment to the states on the direct election of Senators. *Id.*

46. Buckwalter, *supra* note 9, at 547 (compiled from listing entitled "Direct election of Senators").

47. Hucker, *supra* note 6, at 273-74.

sulting in final state approval in 1913.[48]

Congressional reaction to the state applications for a direct-election-of-Senators convention is illustrative of the "prodding" effect that state applications for a constitutional convention may have on Congress.[49] Convention applications have such an effect because of the congressional fear that a convention might repeal parts of the Constitution.[50] Indeed, four constitutional amendments have resulted from the prodding effect of state convention applications.[51] That effect is evident in the attempt to call a convention to propose a balanced federal budget. Congressional reaction to state application has included proposals for both a balanced budget amendment and legislative regulation of constitutional convention processes.[52]

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48. THE CONSTITUTION, *supra* note 5, at 34 n.9.

49. *See* Hucker, *supra* note 6, at 273. Hucker lists direct election of Senators (17th amendment), the repeal of prohibition (18th amendment), the limitation of Presidential terms (22nd amendment) and the Presidential succession plan (25th amendment) as congressionally proposed amendments resulting directly from state applications for a convention. *Id.* at 273-74.

50. *See Hearings on S. 2307*, *supra* note 5, at 20 (remarks of Sen. Proxmire). The remarks of Senator William Proxmire exemplify the fear of many. Proxmire spoke of "the damage that could be done to our Constitution by a constitutional convention that could act to provide repeal of so many parts of our Constitution that are so precious and so sacred to many of us. . . ." *Id.*

51. *See* note 49 *supra*. A second effect of state convention applications is the introduction of legislation to regulate the application and convention processes. Although a constitutional convention procedures bill has not yet passed Congress, state convention applications have prompted members of Congress to introduce such bills. *See* Ervin, *supra* note 2, at 39. For example, the legislation that serves as the current model for convention procedures bills resulted from the attempt to overturn the reapportionment decisions of the United States Supreme Court. The Supreme Court decisions in Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); and Baker v. Carr, 369 U.S. 186 (1962), promulgated the "one-person-one-vote" principle and applied it to the apportionment of state legislatures. Ervin, *supra* note 2, at 40. Led by the Council of State Governments, a national organization for representatives of state governments, the states began to petition Congress for a convention to propose an amendment that would remove apportionment cases from federal jurisdiction. *Id.* at 41. In 1964, the focus of the movement shifted in an attempt to persuade Congress to propose an amendment that would exempt one house of a state legislature from the "one-person-one-vote" rule. *Id.* After the failure to induce Congress to propose such an amendment, the states again petitioned for a convention; it was reported that thirty-two states applied for such a convention. N.Y. Times, Mar. 18, 1967, at 1, col. 6 (city ed.).

As a result of the large number of convention applications, Senator Sam Ervin introduced a bill to regulate procedures for calling a constitutional convention. *See Hearings on S. 2307*, *supra* note 5, at 2. Senator Ervin noted that "very little exists in the way of precedent or learning relating to the unused alternative method in article V." Ervin, *supra* note 2, at 39. In discussing his reason for introducing the bill, Ervin stated:

> The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within Congress and outside of it—and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth—prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V.

Id.

52. In the first session of the 96th Congress, eighty balanced-budget amendments were introduced in the House and fifteen in the Senate. 96th Congress, 1 CONG. REC. INDEX (1979-80). Considerably fewer bills were introduced to regulate convention procedures. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

STATE APPLICATION PROCESS

The problems involved in a state initiated constitutional convention have been widely discussed. Almost all of the attention, however, has centered upon the problems that would arise if and when the required number of states apply for a convention. Thus, the problems of how to choose the delegates to the convention, how to apportion the delegates and votes among the states, and the nature of the congressional power to call the convention and to limit its scope have all received considerable attention.[53] The procedure for calling a convention, on the other hand, has received relatively little attention.[54] Until the procedure for state applications is made clear, there will be doubt about the circumstances under which Congress is unequivocally mandated to call a convention.[55] If Congress can refuse to call a convention because of uncertainty about the validity of the state applications it receives, the intent of the framers that the states be able to initiate constitutional change will be frustrated.[56]

The wisdom of state initiated constitutional change and the power of Congress to provide procedures for calling a constitutional convention serve as starting points for analysis of the convention application process. Recent history indicates that the states are making more frequent use of their right to call for a constitutional convention.[57] Whether or not the current attempt to convene a convention succeeds, the states are likely to continue to apply to Congress for conventions on various subjects of concern. Since applications can be anticipated, the wise congressional policy would be to prepare. Procedures to determine whether the petitions are valid should be established before there is a question of whether there are enough applications to require a convention. If Congress delays until it has recorded thirty-four applications, rules concerning the validity of the applications will undoubtedly be influenced by the political question at issue.[58] Such a lack of safe-

53. *E.g.*, *Hearings on S. 2307*, *supra* note 5, at 111; Bonfield, *supra* note 13, at 116-40; Dirksen, *The Supreme Court and the People*, in THE ARTICLE V CONVENTION PROCESS 1, 28-38 (L. Levy ed. 1971).

54. *See* Buckwalter, *supra* note 9, at 543.

55. *See* Bonfield, *supra* note 13, at 116-40; Dirksen, *supra* note 53, at 28-31. This uncertainty argument is likely to be raised against calling a convention by those fearful of a general convention or those opposed to the kind of amendment desired by the states seeking a limited convention. In the controversy over the state applications for a convention to overturn the Supreme Court reapportionment decisions, for instance, opponents and proponents of a convention argued over the validity of the convention applications passed by the states. *Compare* Bonfield, *supra* note 13, at 116-40 (applications invalid) *with* Dirksen, *supra* note 53, at 28-31 (applications valid).

56. *See* text & notes 20-28 *supra*.

57. *See* text & notes 9-12 *supra*. One source notes that there were nearly four times as many convention applications in 1963 alone as there were in the first 100 years of the Constitution. Carson, *Disadvantages of a Federal Constitutional Convention*, in THE ARTICLE V CONVENTION PROCESS 85, 85 (L. Levy ed. 1971).

58. *See* Ervin, *supra* note 2, at 58.

guards to guarantee impartial and careful consideration may result in bad law.

The source of congressional power to regulate the procedures used by the states to call a convention is not clearly established. Although article V gives Congress the power to call a convention and to choose the method by which the states may ratify amendments, it does not explicitly give Congress the power to regulate state convention application procedures.[59] Two arguments support congressional power to regulate convention application procedures: (1) neither the states, the courts, nor the convention itself is competent to regulate the application procedures; and (2) Congress is implicitly authorized to fill in the details left unsettled in article V.[60]

The states are not competent to regulate convention application procedures because a state may not judge the validity of its own application.[61] Furthermore, procedures that give rise to a congressional duty to call a convention should be uniform from state to state.[62] This uniformity is difficult to obtain at the state level because one state cannot impose convention application requirements upon another state.[63] Finally, when the states participate in the amending process, they are involved in a federal rather than a state function and federal rules will apply.[64] The federal-function reasoning is derived from the United States Supreme Court's decision in *Leser v. Garnett*.[65] The *Leser* decision involved the validity of the nineteenth amendment, extending suffrage to women.[66] The State of Maryland had refused to ratify the amendment, and plaintiffs, Maryland residents, argued that the amendment had not become part of the Constitution.[67] Plaintiffs argued that several of the states that ratified the nineteenth amendment had provisions in their constitutions that made their ratifications inoperative.[68]

59. *See* U.S. CONST. art. V. See note 3 *supra*.

60. Both arguments presume that Congress *must* call a convention when two-thirds of the states submit valid applications for a convention. See discussion of the congressional duty to call a convention at note 26 *supra*.

61. *See Ervin*, *supra* note 2, at 43.

62. *See id.* at 43-44.

63. The supremacy clause in U.S. CONST. art. VI, cl. 2 forces the states to yield to the federal government in some instances, but in the absence of a full faith and credit issue, art. IV, § 1, one state need not yield to another state. *See* Nevada v. Hall, 440 U.S. 410, 421-22 (1979).

64. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922); Hawke v. Smith No. 1, 253 U.S. 221, 230 (1920). The federal function argument is also discussed in *Hearings on S. 2307*, *supra* note 5, at 26-27. In support for his argument that state governors should be excluded from state convention application proceedings, Senator Hruska noted that the convention application is not a normal procedure of the states. *Id.* at 27. Moreover, since Congress has the duty to call a convention upon application of two-thirds of the states, Congress—and not the states—must determine when its duty has arisen. *See* Kauper, *supra* note 2, at 70-71.

65. 258 U.S. 130 (1922).

66. *Id.* at 135-36.

67. *Id.* at 136.

68. *Id.* at 136-37. The provisions relied upon are not set out in the case, but it may be that

The Court rejected this argument by holding that state legislatures exercise a federal rather than a state function when they ratify an amendment. The Court held that the federal function transcended any limitations imposed by the people of the state.[69]

The notion that a determination of convention application procedures should not be left to the courts can be inferred from a broad reading of the Supreme Court's decision in *Coleman v. Miller*.[70] In *Coleman*, the Court was asked to invalidate the Kansas legislature's ratification of the proposed Child Labor Amendment. The amendment had been sent to the states for ratification in 1924 and had been rejected immediately by the Kansas legislature.[71] In 1937, however, the Kansas legislature reconsidered the amendment and voted to ratify. Kansas legislators who opposed the 1937 ratification brought suit to have the ratification invalidated. The reasons given for invalidation were the previous rejection of the amendment and the length of time between the proposal of the amendment and ratification.[72] The *Coleman* Court refused to decide whether these reasons were sufficient to invalidate the amendment.[73] The Court held that the validity of a state's ratification was a political question for Congress to answer.[74] Some commentators have urged that *Coleman* be read expansively as a conclusion by the Court that virtually all questions relating to the amending process are nonjusticiable political questions.[75] Finally, the convention itself cannot determine the validity of the applications because a convention is not called until Congress is satisfied that there are valid applications from two-thirds of the states.[76]

Thus, by a process of elimination Congress is the authority most likely to pass on the validity of the convention application process. This is especially apparent because of the need for uniformity.[77] Furthermore, the proposition that Congress is authorized to fill in the details for article V is support for the conclusion that Congress has the power to prescribe the procedures the states must follow in applying for a con-

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the plaintiffs were referring to provisions such as the one in the Maryland constitution that limited suffrage to men. *Id.* at 135.

69. *Id.* at 137.

70. 307 U.S. 433 (1939).

71. *Id.* at 435-37.

72. *Id.* at 435-36.

73. *Id.* at 456.

74. *Id.*

75. Ervin, *supra* note 2, at 44; Kauper, *supra* note 2, at 72. At one point Kauper stated: "Certainly *Coleman v. Miller* goes far in holding that questions going to the amendment process itself are nonjusticiable in the sense that Congress has the final authority on these matters." *Id.*

76. *See* Ervin, *supra* note 2, at 43.

77. *Id.* at 43-44. Senator Ervin believes that "[a]ll that is left, therefore, is the Congress, which, in respect to this and other issues not specifically settled by the Constitution, has the residual power to legislate on matters that require uniform settlement." *Id.*

vention. The filling-in-the-details proposition is drawn from an analogy to the Supreme Court's decision in *Dillon v. Gloss*.[78] In *Dillon*, the defendant was charged with violation of a law enacted pursuant to the eighteenth amendment's prohibition of the sale of intoxicating liquors. The defendant challenged the validity of the amendment on the ground that Congress had prescribed a seven-year ratification period for the amendment. The Supreme Court acknowledged that article V did not specify a ratification period for amendments but held that a reasonable ratification period was implied in the article.[79] The Court also held that Congress had the power to deal with "subsidiary matters of detail" that arise from article V. As a result, the Court entertained "no doubt" that Congress had the power to fix a definite ratification period, because such an act was within the congressional power to supply details where the Constitution speaks in general terms.[80]

Given the proposition that Congress can fill in the details necessary to exercise its article V powers, the power to prescribe convention application procedures follows logically. Since Congress is required to call a convention upon application of two-thirds of the states, Congress must have the power to determine when the requisite number of valid applications have called for a convention.[81] By regulating state convention applications, Congress is merely providing a method for determining when it is necessary to exercise its duty to call a convention.[82] Such regulation amounts to the filling in of "subsidiary matters of detail" approved in *Dillon v. Gloss*.[83]

Five matters of detail essential to the convention application procedure will be discussed: (1) the scope of amendments that a convention may address; (2) the voting procedures used by the states; (3) the role of state governors; (4) the transmission of convention applications; and (5) the possibility of rescinding a transmitted application.

Convention Scope

The first question to be considered is whether a convention application must request a convention that is limited in authority or whether an application can be made for a convention that is free to consider all manner and number of amendments. There are three schools of thought about the nature of the convention that may be called. One

78. 256 U.S. 368 (1921).
79. *Id.* at 370-71.
80. *Id.* at 376.
81. Kauper, *supra* note 2, at 70-71. See discussion at note 26 *supra*.
82. *See* Kauper, *supra* note 2, at 70-71.
83. 256 U.S. at 376.

school holds that only unlimited conventions may be called.[84] A second school holds that only limited conventions may be called.[85] Finally, there is a school of thought that believes that both limited and unlimited conventions are the proper subject of a state constitutional convention application.[86]

One theory favoring an unlimited convention holds that a convention, once assembled, has the attributes of a sovereign.[87] As a result, neither the states nor the Congress can restrict the convention. The states may not limit the scope of the convention by their applications because the power of the states is limited to initiating the convention process.[88] Although article V provides for the convention method of amendment as an alternative to congressionally proposed amendments, no provision was made for state control after Congress calls the convention. At that point, it is a federal proceeding and the states have no reserve of power to limit its scope.[89] Likewise, Congress has no authority to restrict the convention.[90] Congress does have sole authority over the process by which Congress itself proposes amendments,[91] but the convention method was intended to be independent of Congress.[92] An independent convention was thought to be necessary to cure congressional abuses of power and to propose amendments that Congress would not propose.[93] If Congress could restrict the scope of a convention, the independent function of the convention would be negated.[94]

The "limited conventions only" school of thought asserts that the framers were concerned with specific amendments to the Constitution rather than general revisions.[95] Arguably, the two exceptions to the amendment power included in article V demonstrate an intent that

84. *See Hearings on S. 2307*, *supra* note 5, at 108 (referring to the work of constitutional law scholar Walter Dodd and others).

85. The current congressional proposals to regulate the constitutional convention process all permit a limited convention only. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

86. ABA REPORT, *supra* note 7, at 9.

87. *Hearings on S. 2307*, *supra* note 5, at 108.

88. *Id.* *See* Ervin, *supra* note 2, at 45.

89. *See Hearings on S. 2307*, *supra* note 5, at 108; Ervin, *supra* note 2, at 45.

90. See *Hearings on S. 2307*, *supra* note 5, at 107.

91. *See* J. MADISON, *supra* note 23, at 737.

92. Kauper, *supra* note 2, at 76.

93. *See id.*

94. One proponent of the unlimited convention argues that Congress should disregard state applications calling for a limited convention because such applications do not call for an article V convention. *See* Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 199-200 (1972).

95. Ervin, *supra* note 2, at 46. A special problem is raised by the convention application that requests a convention limited to consideration of a specific amendment rather than to a specific subject matter area. Delaware, for instance, included a specific amendment in its balanced-budget convention application. 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979). The Delaware resolution includes an interpretation of article V that would permit a state to limit a constitutional convention to the specific amendment included in the state's convention application. The Delaware ap-

general revisions were not to be made.[96] This school of thought is embraced by each of the constitutional convention procedures bills surveyed.[97] Each bill requires a state to specify in its application the nature of amendments that the convention may propose. The convention is limited to the subject matter specified, and the delegates must take an oath that they will not propose amendments outside the scope of that subject matter. Finally, Congress may disapprove any proposed amendments falling outside the subject matter scope and may refuse to submit them to the states for ratification.[98]

The third school of thought advances the proposition that both limited and unlimited conventions are permissible.[99] This theory is based upon the premise that amendments flow from a national consensus. Article V is interpreted as requiring agreement among the states on the subject matter of a convention before Congress is required to call a convention.[100] If the consensus is for a general revision of the Constitution, a general convention is called. If the consensus is for a convention to deal with specific grievances, a limited convention is called.[101]

Analysis of the history of the original constitutional convention and of article V suggests that states should be permitted to petition for either a general or a limited convention. The history of the original

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plication would not permit the convention to vary the text of the amendment or to propose "other amendments on the same or different propositions." *Id.*

Delaware argued that the power to propose amendments by the convention method is a matter of a state's sovereign rights. The interpretation of a state's power to propose amendments is said to rest with the state. The Delaware resolution concludes that the right to use the convention method of amendment in full includes the right to use the method in part. *Id.* Thus, a state can limit the convention to considering a specific amendment.

A second argument in favor of a convention limited to a particular amendment is that article V does not preclude such a convention. *Hearings on S. 2307*, *supra* note 5, at 107. Under this approach, article V is treated as creating the convention method of amendment to provide the states with a safeguard against a Congress that would not propose specific amendments. When Congress fails to propose a specific amendment desired by the states, the states can achieve the same result by calling a convention to propose the amendment. *Id.*

The argument against a convention called to consider a specific amendment is that article V contemplates a deliberative convention convened for the purpose of proposing amendments. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1631-33 (1979). Consideration of a single, specified amendment is seen as eliminating the deliberative function of the convention. *Id.* at 1631-33. Dellinger specifically refers to the Delaware convention application. *Id.* at 1631. Such a convention would be limited to voting "yes" or "no" on the specific amendment and would not be empowered to propose amendments as provided in article V. *Id.* at 1632.

96. *See* Ervin, *supra* note 2, at 46.

97. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

98. See note 97 *supra*. At first blush the requirements of the bills seem to go counter to the notion that the convention method of amendment was designed to bypass the Congress. *See* text & notes 19-26 *supra*. The requirements are defended on the ground that the interests of the states can only be protected if the convention is limited to the subject matter proposed by the states. *See* Ervin, *supra* note 2, at 47-49.

99. ABA REPORT, *supra* note 7, at 9.

100. *Id.* at 11.

101. *See id.* at 9.

convention reveals that a general revision of the Articles of Confederation was required because the Articles no longer properly served the needs of the people and of the states.[102] The history of article V demonstrates a concern by the framers that the states be able to correct abuses of power by the national government and to propose changes made necessary by experience.[103] The framers contemplated a constitutional convention that could not only make specific changes that Congress was reluctant to make but also correct abuses of power in the new national government.[104] Consequently, there is little support for the idea that the framers thought that only limited or only unlimited conventions could deal with such abuse of power.

Procedurally, state applications for a constitutional convention should specify whether the call is for a limited or a general convention. If the petition is for a limited convention, the state should also specify whether the application can be included among the applications for a general convention. Thus, State A may desire a balanced-budget amendment. State B may wish a prayer-in-the-schools amendment. State C may want an amendment making abortion illegal except to save the life of the mother. States D and E may desire a general convention. State A should be permitted to apply for a limited convention and such a convention should be called if thirty-four states make the same request. State A might also be willing to have its petition included with the requests of states desiring a general convention. Even though State A might generally resist an unlimited convention because of opposition to the prayer and abortion amendments, a general convention could also deal with a balanced-budget amendment.

State B may oppose a general convention because it does not support any of the other proposed amendments. In such a case, State B should request a limited convention and indicate that its application is not to be considered with those of states requesting a general convention.

Thus, if eleven states request a balanced-budget amendment, eleven request a prayer amendment, twelve request an abortion amendment, and all indicate that their petitions are also to be counted as applications for a general convention, Congress is required to call a general convention if the applications are otherwise valid. Such a convention, however, is permitted to propose amending the Constitution in

102. *See* J. ELLIOTT, *supra* note 35, at 120. A convention was called in Annapolis, Maryland, to discuss the problems inherent in the Articles of Confederation. *Id.* at 116. The Annapolis delegates suggested that "speedy measures" be taken to call a convention of all of the states to consider problems of commercial regulation "and such other purposes as the situation of public affairs may be found to require." *Id.* at 117.

103. *See* THE FEDERALIST No. 43 (J. Madison).

104. *See* Ervin, *supra* note 2, at 46-47.

any manner it chooses. The Convention would not be limited to proposing only amendments relating to a balanced federal budget, prayer in the schools, or abortion.

Voting Practices

Article V requires Congress to call a convention "on the application of the legislatures of two-thirds of the several states. . . ."[105] The language of the article suggests inquiry into three areas of state voting practices involved in the application process: (1) approval of the application by each house of a state legislature; (2) approval by a given number or percentage of votes; and (3) approval by a particular form or mode of voting.

Article V specifies that applications are to be made by state legislatures. In states with bicameral legislatures[106] article V would appear to contemplate action by both houses since application by a single house is not an application by the legislature as a whole.[107] Apparently, the states are not entirely clear about the necessity of obtaining the approval of both houses of the state legislature. Two states sent Congress applications for a balanced-budget convention that had been approved by only one house.[108]

Not only must both houses of a state legislature approve a convention application but both houses probably must approve the same application.[109] An application would be invalid where one house approved an application for a limited convention and the other house

105. U.S. CONST. art. V.

106. Nebraska is the only state that has a unicameral rather than a bicameral state legislature. W. CRANE & M. WATTS, STATE LEGISLATIVE SYSTEMS 62-63 (1968).

107. *See* Fensterwald, *Constitutional Law: The States and the Amending Process—A Reply*, 46 A.B.A.J. 717, 718 (1960). Fensterwald states that Maryland's application for a federal income tax limitation convention was invalid because it was adopted by only one house of the state legislature. *Id. See* Huckabee, *supra* note 9, at 5.

108. Huckabee, *supra* note 9, at 5 (Arkansas & Indiana). Unless otherwise specified, references to state applications for a balanced-budget federal convention included those applications recorded in the *Congressional Record*. *See* 125 CONG. REC. S8182 (daily ed. June 21, 1979) (Iowa); *id.* at S6085 (daily ed. May 16, 1979) (New Hampshire); *id.* at S5017 (daily ed. May 1, 1979) (Indiana); *id.* at S2363 (daily ed. Mar. 8, 1979) (Utah); *id.* at S1932 (daily ed. Mar. 1, 1979) (Idaho); *id.* at S1931 (daily ed. Mar. 1, 1979) (South Dakota); *id.* at S1313 (daily ed. Feb. 8, 1979) (Wyoming); *id.* at S1312 (daily ed. Feb. 8, 1979) (Tennessee, Texas & Virginia); *id.* at S1311 (daily ed. Feb. 8, 1979) (Pennsylvania & South Carolina); *id.* at S1310 (daily ed. Feb. 8, 1979) (New Mexico, North Dakota, Oklahoma, & Oregon); *id.* at S1309 (daily ed. Feb. 8, 1979) (Nebraska & Nevada); *id.* at S1308 (daily ed. Feb. 8, 1979) (Maryland & Mississippi); *id.* at S1307 (daily ed. Feb. 8, 1979) (Delaware, Florida, Georgia, Kansas & Louisiana); *id.* at S1306 (daily ed. Feb. 8, 1979) (Alabama, Arizona & Colorado); *id.* at S1123 (daily ed. Feb. 6, 1979) (North Carolina).

109. *Cf.* STAFF OF HOUSE COMMITTEE ON THE JUDICIARY, 82ND CONG., 2ND SESS., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAXES 6 (Comm. Print 1952) (problem where both houses of Texas legislature passed identical bills but neither concurred in the bill of the other) [hereinafter cited as PROBLEMS RELATING TO STATE APPLICATIONS].

approved an application for a general convention.[110] Nor would a valid application result where one house called for a limited convention dealing with abortion and the other house called for a limited convention dealing with prayer in public schools.[111] The more difficult case arises when both houses of a state legislature pass the same resolution calling for a convention but neither house concurs in the resolution of the other.[112] As impractical as it seems, such an application may not be valid.[113] This situation arose in Texas when both houses of the state legislature approved identically worded resolutions calling for a convention to limit federal taxes. Since neither house concurred in the resolution of the other, the actions of the state did not result in a valid application for a convention.[114]

Each of the current congressional proposals to regulate constitutional convention procedures appears to require that state convention applications pass both houses of a state legislature in the same form.[115] The bills refer to the adoption of a single resolution and require the signature of the presiding officer of each house of the state legislature to be affixed to the resolution calling for a convention.[116] To these proposals should be added a requirement that the states forward to Congress a single resolution reached through the process used by that state to approve concurrent or joint resolutions.[117]

The second and third areas of concern in state voting practices involve the percentage of votes required to approve a resolution calling for a convention and the manner in which the vote is taken. Currently, the vote required to approve a convention request is governed by state law and varies from state to state.[118] In some states a majority vote is sufficient to pass a resolution to apply for a convention, while others require the approval of sixty-five percent of those voting.[119] Since

110. Two applications would result and neither would be valid unless it received the concurrence of the other house of the state legislature.

111. In the event that one house calls for a limited convention to deal with one subject and the other house calls for a limited convention dealing with a different subject matter, there is concurrence only with regard to the fact that the convention that might be called should be limited as opposed to general, but the state has not validly completed an application.

112. *See* PROBLEMS RELATING TO STATE APPLICATIONS, *supra* note 109, at 6.

113. *See id.* Article V appears to contemplate state application in some form of joint or concurrent resolution where each house of a state legislature agrees to a single resolution applying for a convention. *See id.*

114. *See* Fensterwald, *supra* note 107, at 718.

115. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

116. *See* note 115 *supra*.

117. One of the proposed bills requires states to follow the procedures they would use in adopting a concurrent resolution. H.R. 2587, 96th Cong., 1st Sess., 125 CONG. REC. H1055 (daily ed. Mar. 1, 1979).

118. Buckwalter, *supra* note 9, at 551.

119. *Id.*

amending the constitution is a federal function that affects every state, there should be uniformity among the states with regard to the vote required to apply for a convention.[120] Without such uniformity, the vote could be set high enough to negate the intent of the framers that the states be able to initiate amendments[121] or low enough to preclude the kind of significant contemporaneous support mandated by the Supreme Court in *Dillon v. Gloss*.[122]

A problem also arises when states permit voice votes on resolutions calling for a constitutional convention. In Colorado, for instance, the Senate agreed to a resolution calling for a balanced-budget convention but there was no recorded vote.[123] If thirty-three other states request a balanced-budget convention, Congress might be called upon to determine the validity of the Colorado application. Congressional opponents of a constitutional convention might seize upon the Colorado unrecorded vote as a reason to reject the Colorado petition as invalid. Since Congress cannot verify the number of Colorado state senators subscribing to the resolution via a voice vote, the Colorado petition might be found unacceptable.

None of the current congressional proposals that seek to regulate the constitutional convention process deal explicitly with state voting procedures.[124] The bills all require the states to use procedures normally used to enact state legislation.[125] The rationale for the use of state procedures seems to come from the rule that "legislative bodies should have control over their own proceedings."[126]

Two arguments can be raised in opposition to the rule favoring state regulation of voting procedures in the convention application process.[127] First, Congress may provide for state voting procedures as a

120. See discussion at text & notes 61-64 *supra*.

121. See discussion at text & notes 19-26 *supra*.

122. *See* text & notes 199-201 *infra*.

123. *See* Common Cause, *supra* note 5, at 5.

124. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

125. *See* note 124 *supra*.

126. *Hearings on S. 2307*, *supra* note 5, at 134 (analysis of Dr. Cyril Brickfield). Beyond the rule requiring use of state procedures, however, there is concern with the power of Congress to regulate the voting requirements in the states. *Id.* at 47 (remarks of Sen. Ervin). Senator Ervin doubts that Congress has the power to impose voting requirements. He apparently believes that specifying the majority needed for a state to adopt a petition for a convention would itself require a constitutional amendment because it would restrict the ability of the states to exercise their article V power to initiate amendments. *See id.*

One of the witnesses at the hearings on the Ervin bill spoke in favor of specific voting requirements. *Id.* at 44, 47, 49 (remarks of Prof. Wallace Mendelson). Professor Mendelson noted that state constitutions generally require extraordinary majorities in the state amendment process. *Id.* at 44. Mendelson argued that the state constitutions reflect the judgment of the people about how amendments ought to be initiated. He concludes that something more than a simple majority ought to be required for a state to apply for a constitutional convention. *Id.* at 47.

127. An argument not addressed in this Note is the view that the determination of voting

means of filling in the details of article V. In providing for state voting procedures, Congress is merely clarifying the conditions that make a congressional call for a constitutional convention necessary. Second, Congress may regulate state convention application voting procedures because, in applying for a constitutional convention, the states are exercising a federal function.[128] Under this theory, congressional regulation of state voting procedures is not an intrusion into state matters. Since the states are involved in a federal matter, where congresionally mandated uniformity is desirable, federal regulation is permissible.

The federal function proposition was addressed by the United States Supreme Court in slightly different circumstances in *Hawke v. Smith No. 1*.[129] In that case, the Supreme Court considered whether the Ohio legislature was required to submit the eighteenth amendment to a state referendum as mandated by the state constitution.[130] The Court held that the Ohio legislature need not submit the amendment to the Ohio voters because the state's power to ratify an amendment derives from the federal constitution and not from the people of the state.[131] Thus, when a state ratifies an amendment to the federal constitution, the state is performing a *federal* function. As a result, there is no constitutional requirement to apply the rule, found in current congressional proposals, in favor of state procedures. Since the process is peculiarly federal, Congress may prescribe procedures that the states must follow in initiating and ratifying amendments to the federal constitution.

Congress should require that each state record the votes at every stage of the state process. Voice votes should be prohibited. The support required to approve a state convention application should not be excessive. A simple majority vote in each house will insure that there is sufficient support within a state legislature to give rise to the congressional duty to call a convention. To require greater than a majority vote would render amendment by convention unreasonably difficult, if not impossible; to require less than a majority vote would render the application suspect.

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procedures is a political question to be determined by Congress. That issue was left open by the Supreme Court in Coleman v. Miller, 307 U.S. 433, 447 (1939). One of the issues raised in *Coleman* concerned the validity of a vote by the Lieutenant Governor to break a tie in the Kansas Senate on a vote to ratify the Child Labor Amendment. *Id.* at 436. Opponents of the amendment argued that the vote was invalid because the Lieutenant Governor was not included within the meaning of the term "legislature" in the article V ratification process. *Id.* An evenly divided Court concluded: "Whether this contention presents a justiciable controversy, or a question which is political in its nature and hence not justiciable, is a question upon which . . . the Court expresses no opinion. . . ." *Id.* at 447.

128. *See* text & notes 61-64 *supra*.

129. 253 U.S. 221 (1920).

130. *Id.* at 225.

131. *Id.* at 230-31.

Gubernatorial Participation

While article V indicates that a constitutional convention shall be called upon the application of two-thirds of the state legislatures, the article is silent on the role of the state govenor in the application process.[132] If applying for a constitutional convention is like any other state legislative act, gubernatorial approval of the application should be required and gubernatorial veto should be permitted.[133] If, however, applying for a constitutional convention is an exercise of a federal function, a state governor might reasonably be excluded from the process.

One argument in favor of gubernatorial participation is that applying for a convention should not be easier than changing a state law.[134] Ordinary state legislation requires the approval of the state governor.[135] An application for a constitutional convention, it is argued, should be considered at least as important as an ordinary state law.[136] Consequently, the same rigorous requirements, including gubernatorial approval, should be applied to both state actions.[137] Second, it is argued that the governor should have a voice in the application process because the governor represents all of the people in the state and is the leading state official.[138]

The practice in the states suggests that there is confusion or uncertainty about the role of the state governor in the convention application process. Several states require gubernatorial participation in the application process.[139] One state attorney general issued an opinion that a convention application not signed by the state governor has no binding effect.[140] Finally, the question of the governor's role in the application process has surfaced in the current drive for a balanced-budget constitutional convention. A Nevada resolution calling for a convention was vetoed by the governor of that state,[141] and the South Carolina convention application specifically required the approval of the state governor in order to take effect.[142]

In opposition to gubernatorial participation is the theory that gov-

132. *See* U.S. CONST. art. V. See note 3 *supra*.
133. All of the states except North Carolina empower a governor to veto acts of the state legislature. *Hearings on S. 2307*, *supra* note 5, at 63 (remarks of Sen. Ervin).
134. Black, *supra* note 94, at 210.
135. *Id.* North Carolina is an exception. *See* note 133 *supra*.
136. Black, *supra* note 94, at 210.
137. *See id.*
138. *Hearings on S. 2307*, *supra* note 5, at 24 (remarks of Sen. Proxmire).
139. Buckwalter, *supra* note 9, at 551. Buckwalter's survey indicated that a governor's approval is required in at least fourteen states. *Id.*
140. *Id.* at 552 (Oklahoma).
141. Huckabee, *supra* note 9, at 8 n.d.
142. 125 CONG. REC. S1311 (daily ed. Feb. 8, 1979).

ernors are not a part of the amendment process because article V does not specifically include the governor.[143] Article V requires application by state legislatures and makes no mention of the governors.[144] Consequently, the authority for initiating a convention is believed to be vested in the state legislatures alone.[145] The Supreme Court's decision in *Hawke v. Smith No. 1*[146] supports this position. In *Hawke*, the Court was required to decide whether the word "legislatures" in the ratification section of article V meant the "legislative process," which would include the governor, or was limited to the "representative body" of a state.[147] The *Hawke* Court held that "legislatures" means the "representative body."[148] Thus, the power to ratify constitutional amendments was found to reside solely in the state legislature.[149]

Logically, if the word "legislatures" means legislative body in the ratification section of article V, the same meaning should be given to "legislatures" in the convention application section of the same article.[150] By analogy, the power to propose the initiation of an amendment must also rest solely with the state legislature.[151] The inevitable conclusion is that the governor has no role to play in the amendment process.

Another analogy supports gubernatorial exclusion. In *Hollingsworth v. Virginia*,[152] the United States Supreme Court considered a challenge to the validity of the eleventh amendment.[153] The challenge was based upon article I, section 7 of the Constitution, requiring every action needing concurrence of the House of Representatives and the Senate to be approved by the President in order to become effective.[154] The eleventh amendment was said to be invalid because it had not been submitted to the President for approval before being sent to the states for ratification.[155] The *Hollingsworth* Court unanimously held that the eleventh amendment had been constitutionally adopted.[156] Justice Chase stated that the presidential veto power applies only to ordinary legislation and not to proposing or adopting constitutional

143. U.S. CONST. art. V. See note 3 *supra*.
144. *Id.*
145. *See* Ervin, *supra* note 2, at 63; Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1075 (1957).
146. 253 U.S. 221 (1920).
147. *Id.* at 227.
148. *Id.*
149. *Id.* at 230.
150. Ervin, *supra* note 2, at 53.
151. *See id.* at 52.
152. 3 U.S. (3 Dall.) 378 (1798).
153. *Id.* at 378.
154. *Id.* at 379.
155. *Id.*
156. *Id.* at 382.

amendments.[157]

The *Hollingsworth* Court described the congressional amendment process as outside the ordinary legislative process.[158] Likewise, the state amendment initiation process should be considered outside the ordinary state legislative process.[159] Since the President is excluded at the national level, the reasonable conclusion is that state governors should also be excluded.[160]

The weight of the evidence suggests that the governor should be excluded from the amendment process. A convention application procedures bill should provide specifically that applications are to be forwarded to Congress without being submitted to the state governor. The current convention procedure bills require the secretary of state or a similar state official to transmit the convention application to Congress after adoption by the state legislature.[161] The bills also provide that state convention applications are "effective" without the approval of the state governor.[162] These proposals do not go far enough because they do not specify that applications are to be sent to Congress without being submitted to the governor. It is possible that an application might be passed by a state legislature and thus be "effective" within the meaning of the current proposals but still not be sent to Congress. This could happen if there is a controversy within the state over the participation of the state governor.[163] State governors should be explicitly denied the right to veto state constitutional convention applications.

Transmission to Congress

The transmission and receipt of state applications is the source of considerable confusion in the states and Congress.[164] Until this confusion is resolved Congress will be unable to determine whether the required number of applications has been received. The confusion centers upon how the applications should be addressed, how receipt is

157. *Id.* at 381.

158. *See id.*

159. *See* Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161, 163 (1959).

160. ABA REPORT, *supra* note 7, at 30.

161. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

162. *See* note 161 *supra*.

163. This would be especially important if Congress were to pass a convention bill requiring applications to be sent to Congress within a specified period after their passage by the state legislatures. *See Hearings on S. 2307*, *supra* note 5, at 2. It would also be important if Congress were to require that the states apply for a convention within some time span designed to insure that there is contemporaneous support for a convention. *See id.* at 3.

164. *See* Ervin, *supra* note 2, at 52. Senator Ervin noted that many of the states "do not even know where to send their applications." *Id.*

to be recorded, and what form the applications must take to be considered valid.

Currently, state applications for a convention are delivered to a variety of congressional officers. The state legislatures usually address their applications to the Speaker of the House, the President of the Senate, or the President pro tempore of the Senate.[165] The clerks of the House and Senate, however, have also received applications.[166]

Ideally, the applications are printed in the *Congressional Record* after receipt and forwarded to the Judiciary Committee of each house.[167] Publication in the *Congressional Record* serves as a form of official notice that Congress has received the application.[168] Publication and delivery to the Judiciary Committees also facilitates keeping track of the number of applications for a convention and the interest of the states in particular constitutional changes. Unfortunately, the system does not work well.[169] The states are not certain whether or where to send their applications.[170] As a result of such confusion, applications may be lost.[171]

The actions of the states calling for a balanced-budget convention are illustrative.[172] Applications have been addressed to the President, Vice President, President of the Senate, Secretary of the Senate, Speaker of the House, and House Clerk. In addition, some resolutions have been addressed to "the presiding officers of the Senate and House of Representatives,"[173] to the Senate and House of Representatives,[174] or simply to Congress.[175] One application made no reference to a con-

165. Huckabee, *supra* note 9, at 3.

166. *Id.*

167. *See Hearings on S. 2307*, *supra* note 5, at 118. Four of the applications for a convention to overturn the Supreme Court's reapportionment decisions were either not received or not officially recorded by Congress. Opponents of the convention argued that "a petition must be transmitted to and received by both houses of the Congress in order to constitute an 'application' to the Congress." *Id.*

168. *See* Huckabee, *supra* note 9, at 4.

169. *Id.*

170. Ervin, *supra* note 2, at 52.

171. *See* discussion at note 167 *supra*. Since the *Congressional Record Index* lists the petitions under "Speaker of the House" and "Vice President," if these officers do not receive the petitions they may not be officially noted in the *Congressional Record*. *See* Huckabee, *supra* note 9, at 4.

172. *See, e.g.*, 125 CONG. REC. S8182 (daily ed. June 21, 1979) (Iowa); *id.* at S6085 (daily ed. May 16, 1979) (New Hampshire); *id.* at S5017 (daily ed. May 1, 1979) (Indiana). Citations for the remainder of the states that have submitted applications for a constitutional convention are set forth at note 108 *supra*.

The analysis in this section is based upon the addresses contained in the convention application resolutions passed by the states. It is possible that the state officials with the responsibility for forwarding the applications to Congress may have transmitted them to addressees different from or in addition to those listed in the applications.

173. 125 CONG. REC. S1310 (daily ed. Feb. 8, 1979) (Oregon); *id.* at S1307 (daily ed. Feb. 8, 1979) (Florida).

174. *Id.* at S1312 (daily ed. Feb. 8, 1979) (Tennessee).

175. *Id.* at S1310 (daily ed. Feb. 8, 1979) (Oklahoma); *id.* at S1307 (daily ed. Feb. 8, 1979) (Kansas).

gressional addressee.[176]

Thirty states claim to have requested a balanced-budget convention but only twenty-six applications could be located by the Congressional Research Service in the *Congressional Record* or records of the Judiciary Committees of both houses.[177] Some applications could be found in the records of one house of Congress but not the other.[178] An unofficial telephone survey of the states revealed that five states believed that their applications had been sent, yet those applications could not be located in Congress.[179] One state legislature had approved an application but had not sent the application.[180]

A final problem in the transmission of convention applications is the form in which the application is sent. The American Enterprise Institute, a nonpartisan public policy research organization, has suggested that a valid state application should include a verified copy of the state's resolution calling for a convention.[181] Some sort of certification that the resolution received by Congress is the same resolution that was passed by both houses of a state legislature is essential. Whether Congress has received verified copies of the state resolutions in the current balanced-budget convention applications is uncertain. Some applications purport to include certified copies,[182] duly attested copies,[183] copies under seal,[184] and official copies.[185]

The constitutional convention procedure bills currently being considered by Congress require a state to address copies of its application to the President of the Senate and the Speaker of the House of Representatives. These copies must be sent by the secretary of state or a similar official to Congress within thirty days of the resolution's adoption. The copies must bear the date the resolution was passed and must be certified by the state official as accurately presenting the text of the state resolution.[186]

176. *Id.* at S1310 (daily ed. Feb. 8, 1979) (North Dakota). The North Dakota resolution read in part: "We respectfully propose an amendment to the Constitution of the United States and call upon the people of the several states for a convention for such purpose as provided by Article V on the Constitution. . . ." *Id.*

177. Huckabee, *supra* note 9, at 7-8.

178. *Id.*

179. *Id.* at 6.

180. *Id.*

181. *Hearings on S. 2307*, *supra* note 5, at 118.

182. 125 CONG. REC. S5017 (daily ed. May, 1, 1979) (Indiana); *id.* at S1312 (daily ed. Feb. 8, 1979) (Tennessee); *id.* at S1306 (daily ed. Feb. 8, 1979) (Arizona).

183. *Id.* at S1312 (daily ed. Feb. 8, 1979) (Virginia); *id.* at S1308 (daily ed. Feb. 8, 1979) (Mississippi); *id.* at S1307 (daily ed. Feb. 8, 1979) (Delaware, Georgia & Louisiana).

184. *Id.* at S1308 (daily ed. Feb. 8, 1979) (Maryland).

185. *Id.* at S1312 (daily ed. Feb. 8, 1979) (Texas).

186. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

The provisions of the current bills provide an excellent procedure for transmission of state convention applications to Congress. The proposed procedure insures that the applications will be sent to Congress and that they reach the appropriate congressional officers. This procedure also defines what an application must include to be treated as a valid version of the state request. The bills should be modified however, to require the appropriate state official to verify that proper voting procedures were used by the state legislature in approving the resolution.[187]

Rescission

Whether a state may rescind an application that has passed its legislature and been forwarded to Congress is another disputed issue in the amendment-by-convention procedure. One commentator asserts that since the exercise of the amendment initiation power is an irreversible step, a state may not rescind an application once it has been received by Congress.[188] This viewpoint draws support from the fact that Congress may not withdraw an amendment that it submits to the states for ratification.[189] By analogy, it is argued that a state should not be allowed to withdraw its application after the power to initiate amendments by the convention method has been exercised.[190]

A congressionally proposed amendment submitted to the state for ratification, however, is not analogous to a state application for a constitutional convention. The congressionally proposed amendment has already completed its first stage once it has been approved by two-thirds of the members of both houses of Congress.[191] The state application for a convention, however, still needs support from thirty-three other states before a convention must be called.[192] Furthermore, the participants in the convention, once called, must agree to the amendment before it stands in the same position as the congressionally proposed amendment.[193] The proper analogy to the congressionally proposed amendment is the convention-proposed amendment. Both are ready for ratification or rejection by the states. Neither should be rescinded at this point.

187. *See* text & notes 181-82 *supra*.
188. *See* Note, *Rescinding Memorialization Resolutions*, 30 CHI.-KENT L. REV. 339, 339-40 (1952).
189. *Id.*
190. *Id.*
191. *See* U.S. CONST. art. V. Article V requires two-thirds of both houses of Congress to agree to an amendment before it can be sent to the states for ratification. *See* L. ORFIELD, *supra* note 1, at 48-49.
192. U.S. CONST. art. V. Congress is not required to call a convention until two-thirds of the state legislatures have submitted applications. *Id.*
193. *See* L. ORFIELD, *supra* note 1, at 42-43.

The proper analogy to a state's convention application is the introduction of a proposed amendment by a member of Congress. In this latter context, the proposed amendment must still gather approval from two-thirds of the members of both houses.[194] Only then will the amendment be submitted to the states for ratification.[195] The proposed amendment can be withdrawn in either house of Congress prior to passage by a two-thirds vote. Consequently, analogy to the congressionally proposed amendment does not forbid a state's rescission of a convention petition.

Furthermore, some commentators assert that conventions are required only when there is considerable contemporaneous support for them.[196] This contemporaneous-support argument is drawn by analogy from language in *Dillon v. Gloss*.[197] In considering whether the eighteenth amendment was invalid because Congress set a ratification time limit, the *Dillon* Court was required to examine the amendment process.[198] The Court stated that amendments are proposed only when there is a necessity for them.[199] The Court also stated that since ratification is an expression of the will of the people, it must be sufficiently contemporaneous to reflect the will of the people "at relatively the same period. . . ."[200] Thus, state rescission of a convention application indicates a lack of support for a convention, and the rescinding state should not be counted in the contemporaneous support for such a convention.[201]

While the effect of a state's rescission of its convention application is of no immediate concern, the issue will become critical when thirty-four states have requested a constitutional convention and one or more of the states have rescinded an application.[202] In this context, the valid-

194. U.S. CONST. art. V.

195. *Id.*

196. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659, 670-71 (1964); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendments*, 26 NOTRE DAME LAW. 185, 195-96 (1951); Ervin, *supra* note 2, at 53-54.

197. 256 U.S. 368 (1921).

198. *Id.* at 370-71.

199. *Id.* at 375.

200. *Id.*

201. Bonfield, *supra* note 196, at 671. From 1944 to 1946, four states rescinded their applications for a constitutional convention to propose an amendment limiting federal taxes. 1945 Ala. Acts No. 138, at 155; 1945 Ill. Laws, Joint Resolution No. 7, at 1797; 1946 Ky. Acts ch. 309, at 720; 1944-45 Wis. Laws, Joint Resolution No. 21, at 1126-27. One of the rescissions demonstrates that a better understanding of the subject matter of the proposed amendment and of the nature of a convention might make a state decide to withdraw its application. In its rescission resolution the Kentucky legislature indicated that it had approved a convention application "under a misapprehension as to its true meaning, intent and purpose, and without a full consideration of the results that might obtain from such action. . . ." 1946 Ky. Acts ch. 309, at 720.

One proponent of rescission argues that a state legislature has the power and the duty to repudiate its action when it learns that it has made a mistake. Grinnel, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 A.B.A.J. 1164, 1166 (1959).

202. Although four states rescinded their applications for a convention to propose amend-

ity of a rescission will determine whether the constitutional imperative to call a convention has been triggered.

States should be permitted to rescind their convention applications. The state's rescission action should be required to follow the same procedures as to scope, recordation of votes, and transmission as used in approving the application.[203]

With one exception, the present constitutional convention procedure bills uniformly permit rescission of a state application prior to the receipt by Congress of applications from two-thirds of the states.[204] Rescission is expressly made subject to the procedures required to approve a resolution calling for a convention.[205]

CONCLUSION

A constitutional convention is a serious undertaking. A bill to regulate the state procedures used in applying for constitutional conventions should be adopted. The bill should deal with the extent to which a state may limit the scope of the convention requested, the voting procedures to be followed by a state in order to submit an application for a convention, the role of the state governor in the application process, the transmission of a convention application to Congress, and the rescission of a state application once it has been received by Congress.

States should be permitted to apply for a limited or a general convention. States that apply for a limited convention should be allowed to designate whether their applications should be counted toward the number needed for other limited conventions or for a general convention.

States should be required to ensure that both houses of their state legislatures approve by majority vote the same resolution calling for application to Congress for a constitutional convention. All votes in the state process leading to the application for a convention should be recorded; voice votes should not be permitted.

The governor of a state should not be allowed to participate in the state initiated amendment process. A convention procedures bill

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ments limiting federal taxation, there was no occasion to test the validity of the rescissions because fewer than two-thirds of the states petitioned for a convention. *See* note 201 *supra*.

203. Thus, voice votes would not be permitted. The current congressional proposals would permit a voice vote. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

204. H.R. 2587, 96th Cong., 1st Sess., 125 CONG. REC. H1055 (daily ed. Mar. 1, 1979) makes no mention of rescission.

205. *E.g.*, S. 520, 96th Cong., 1st Sess., 125 CONG. REC. S1935 (daily ed. Mar. 1, 1979); H.R. 2274, 96th Cong., 1st Sess., 125 CONG. REC. H814 (daily ed. Feb. 21, 1979); S. 3, 96th Cong., 1st Sess., 125 CONG. REC. S33 (daily ed. Jan. 15, 1979).

should require specifically that an appropriate state official forward an otherwise perfected convention application within a specified period of time and without being first submitted to the state governor.

States should be required to transmit verified copies of their petitions calling for a constitutional convention to the President of the Senate and the Speaker of the House of Representatives. An appropriate state official should be required to verify that the application is an accurate copy of the resolution passed by the state legislature. The official should also be required to verify that the state followed the procedures set out in the convention procedures bills.

Finally, states should be permitted to rescind their constitutional convention applications at any time prior to the receipt by Congress of applications from two-thirds of the states for a similarly described convention. The rescission of a state application should be required to follow the same procedural rules as the application itself.