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ARTICLE V AND THE PROPOSED FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES BILLS

REPORT AND RECOMMENDATION TO THE
NEW YORK STATE BAR ASSOCIATION
BY THE COMMITTEE ON
FEDERAL CONSTITUTION

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I. INTRODUCTION

A. History

Article V of the United States Constitution sets forth the respective powers of the states and Congress in the amendment process.¹ At first blush, the amendment process outlined in article V appears uncomplicated and straightforward. Congress can propose amendments and determine whether ratification will be accomplished by state legislatures or state conventions.² Three-fourths of the state legislatures or state conventions must ratify a proposed amendment before it becomes part of the Constitution.³ The history of the amendment process confirms the apparent simplicity of that provision of article V which empowers Congress to propose amendments. To date, all twenty-six amendments have been proposed by Congress and all but one have been ratified by state legislatures.⁴

Article V, however, also provides that Congress "on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments."⁵ This short statement raises important but heretofore unanswered questions about the call-

¹ U.S. CONST. art. V, provides in pertinent part:

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

² *Id.*

³ *Id.*

⁴ The twenty-first amendment, which repealed prohibition, was proposed by Congress and ratified by state conventions. See E.S. BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 3 (1970).

⁵ See *supra* note 1.

ing and conduct of a national convention to propose amendments. For example, what constitutes a valid application by a state legislature for a national convention? What procedures must a state follow in submitting an application? Must the precise language of the proposed amendment be included within the application? How similar must the language be in the applications of various states in order to permit Congress to count them? How long does an application by a state remain valid? May a state rescind its application? If so, under what conditions? What is the extent of Congress' power to review state applications? What institution of government controls the agenda of the convention—the state legislatures, Congress, the convention itself? May Congress refuse to submit the work product of the convention to the states for ratification and, if so, under what circumstances? How will delegates to the convention be selected? How will votes at the convention be counted? How will other procedures for the conduct of the convention be established? How will the convention be financed? If Congress assumes the power to answer some or all of these questions, are its determinations subject to review by any other institution of government, such as the courts?⁶

At present, there are no guidelines in article V or elsewhere defining the procedures that should be followed by the states, Congress and the convention in performing their respective roles in the calling and conduct of a national constitutional convention. The history of this provision of article V is as silent as the text. There has never been a national convention called pursuant to article V. Indeed, there has not been a national convention since the one that drafted the Constitution in Philadelphia in 1787.

Moreover, the revolutionary change in the structure of the national government which resulted from the 1787 Convention haunts current consideration of a constitutional convention. The 1787 Convention was called for the express purpose of amending the Articles of Confederation to eliminate state interference with interstate commerce.⁷ Nevertheless, the Founding Fathers acted beyond this mandate and created an entirely new charter of government. Despite its indisputably magnificent and successful work product, the 1787 Convention has been considered a “runaway” convention.⁸

⁶ See, e.g., 127 CONG. REC. S2790 (daily ed. March 26, 1981) (remarks of Sen. Hatch with respect to S. 817).

⁷ See Mathias, *What's the Constitution among Friends?*, 67 A.B.A. J. 861, 861-62 (1981).

⁸ Gunther, *Constitutional Brinksmanship: Stumbling toward a Convention*, 65 A.B.A. J. 1046, 1047 (1979).

Almost from the beginning of our national government under the Constitution of 1787, state legislatures have submitted applications petitioning Congress to call a convention for the purpose of proposing amendments. The subjects of the proposed amendments have involved both individual rights and institutional power.⁹ Indeed, state legislatures have intentionally used the application for a convention as "a burr under the saddle of Congress, pricking it to use its own amendment-[initiation] process" under article V.¹⁰ The seventeenth amendment, providing for the direct election of Senators, and the twenty-first amendment, repealing prohibition, for example, were proposed by Congress only after a substantial number of state legislatures had applied to Congress for a convention to propose such amendments.¹¹

B. The Present Situation

As of this writing, the legislatures of a number of states have reportedly submitted applications to Congress petitioning it to call a convention for the purpose of proposing a balanced-budget amendment.¹² Accordingly, it is possible that within the very near future thirty-four state legislatures will have reason to believe that the article V duty of Congress to call a national convention has been triggered.

Congressional response to the massing state applications for a convention on the balanced-budget amendment has taken two forms: first, Congress is considering proposing a constitutional amendment which would require a balanced federal budget;¹³ second, Congress is currently considering two bills which establish procedures for the calling and conduct of a convention to propose amendments. S. 817, introduced by Senator Hatch, and S. 600, introduced by Senator Helms, propose similar but not identical solutions to the potential constitutional crisis created by the numerous unanswered questions raised by a national convention.¹⁴

Both bills assume that Congress has the power to define procedures for the calling and conduct of a convention, that a limited

⁹ See A.B.A. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 59 app. B (1974) [hereinafter cited as SPECIAL COMMITTEE REPORT] (appendix B contains a tabulation of article V applications by state and subjects, submitted since 1789).

¹⁰ Mathias, *supra* note 7, at 861.

¹¹ *Id.*

¹² *Id.* As of July 1981, the legislatures of 30 states had passed resolutions petitioning Congress to call for a constitutional convention for the purpose of passing a balanced-budget amendment. In August 1982, the Senate passed, by a vote of 69 to 31, a resolution that seeks to amend the Constitution to require a balanced budget. S.J. Res. 58, 97th Cong., 2d Sess., 128 CONG. REC. S9719-78 (daily ed. Aug. 4, 1982).

¹³ N.Y. Times, Dec. 20, 1979, at A24, col. 3.

¹⁴ 97th Cong., 1st Sess., 127 CONG. REC. S2794-96 (1981); *id.* at S1675-76.

agenda convention can be called by the states, and that the assembled convention cannot exceed the scope of the agenda defined in Congress' call. If the requisite number of states petition Congress to call a general convention for amending the Constitution, Congress presumably would be obligated to do so under the procedures outlined in these bills. In both bills, Congress insures its preeminent role in the amendment-by-convention process by placing the state legislatures and the convention on notice that it will not report to the states for ratification the work product of a "runaway" convention.

The bills differ markedly, however, in providing for judicial review of Congress' determinations. S. 600 provides that the judgment of Congress is final with respect to the procedures to be followed by the convention itself, including its method of voting, and will be binding on the states as well as on state and federal courts. In contrast, S. 817 provides for judicial review of Congress' determinations utilizing the original jurisdiction of the Supreme Court. No standard of judicial review, however, is specified.

This is not the first time that Congress has approached the subject of procedures for a constitutional convention. Recognizing that the nation was then venturing into the uncharted waters of a national convention in the wake of the Supreme Court's reapportionment decisions, Senator Sam Ervin introduced a procedures bill in 1967 for the convention method of amending the Constitution. Senator Ervin's bill finally passed the Senate in October, 1971, but died in the House Judiciary Committee.¹⁵

Bills similar to the Ervin proposal were introduced in later Congresses but failed to attract any interest in the House. Now, however, because of the number of state applications to Congress to convene a convention to consider a balanced-budget amendment, interest in defining procedures for the calling and conduct of a national convention by scholars, legislatures, the organized bar and the public has increased dramatically.

C. The Special Committee Report

There has been substantial scholarly commentary with respect to the constitutional issues raised by the article V convention.¹⁶ In 1974,

¹⁵ S. 2307, 90th Cong., 1st Sess., 113 CONG. REC. 23,006-07 (1967).

¹⁶ An extensive collection of materials on the subject of an article V constitutional convention is contained in *Constitutional Convention Procedures, 1979: Hearings on S. 3, S. 520, and S. 1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Constitutional Convention Procedures Hearings*]. See generally AMERICAN ENTERPRISE INSTITUTE, PROPOSALS FOR A CONSTITUTIONAL CONVENTION TO

after more than two years of extensive research, a special committee of the American Bar Association prepared a thorough analysis of the problems raised by article V. In its report, entitled *Amendment of the Constitution By the Convention Method Under Article V (Special Committee Report)*, the ABA Committee concluded that "Congress has the power to establish procedures governing the calling of a national constitutional convention" and that it would be highly desirable for Congress to enact such legislation in advance of any "'contemporaneously felt need' by the required two-thirds of the state legislatures."¹⁷

The *Special Committee Report* also determined that procedures legislation could limit the agenda of a national convention to a particular subject matter, reasoning that if two-thirds of the states petition Congress to call a limited purpose convention, article V requires Congress to call such a convention.¹⁸ A corollary of the *Special Committee Report's* conclusion was that if Congress had the power to call a limited purpose convention, it also had the power to limit the work product of the convention to the subject matter of its call and to enforce that limitation by refusing to submit to the states for ratification any proposed amendment beyond the scope of its call.¹⁹

Congress, according to the *Special Committee Report*, is empowered under the Constitution to determine whether a proper application for a national convention was submitted, whether it was timely, and whether and under what conditions a state legislature could withdraw such an application. The *Special Committee Report* concluded that the national convention rather than Congress should decide the question of voting at the convention for purposes of proposing an amendment.²⁰ The final recommendation of the *Special Committee Report* was that any congressional legislation on the subject of an article V convention should provide for limited judicial review of determinations made by Congress.²¹ The scope of the recommended judicial review, however, was not discussed.

D. The Committee's Work

After studying recent scholarship examining the original intent of the Founding Fathers in drafting article V, reviewing post-*Special*

REQUIRE A BALANCED FEDERAL BUDGET (1970); The Committee on Federal Legislation, *Proposed Procedures for Federal Constitutional Conventions* (S. 215), 27 REC. A.B. CITY N.Y. 327 (1972).

¹⁷ SPECIAL COMMITTEE REPORT, *supra* note 9, at 8-9.

¹⁸ *Id.* at 9, 18, 19, 30, 31.

¹⁹ *Id.* at 17-20, 31-33.

²⁰ *Id.* at 10, 19-20.

²¹ *Id.* at 9-10, 20-25.

Committee Report decisions with respect to the availability of judicial review of questions likely to be raised by the convention process, and considering new legislative proposals defining convention procedures, we concluded that another report on the subject of article V and proposed procedures bills was warranted. Rather than cover well-examined areas of the article V problems, however, our Committee chose to limit its investigation to an examination of two important areas of concern raised by these bills: 1) the power of the states to apply to Congress for the calling of a limited agenda constitutional convention; and 2) the possibility of judicial review of congressional decisions regarding the calling and conduct of a convention.

After an in-depth study of these questions, we agree with the *Special Committee Report* that a procedures bill precisely outlining the responsibilities of the states and Congress in the calling and conduct of a national convention is desirable. While we recognize that promulgating such procedures may encourage a spate of single-issue applications, we believe that it is more desirable to set forth the procedures in advance of the requisite thirty-four applications than to suffer the risks of a potential constitutional crisis.

The Committee also believes that some form of judicial review within the context of article V is desirable, but we do not think it can be approached in any monolithic fashion. In the years following the *Special Committee Report's* assessment of the likelihood of judicial review in the context of article V, the Court has demonstrated an increased reluctance to define the constitutional limitations of judicial power so as to permit judicial monitoring of the institutional responsibilities of the coordinate branches. At the very least, there is increased doubt that the reasoning of *Baker v. Carr*²² and *Powell v. McCormack*²³ affords a realistic basis upon which to premise judicial review of all congressional determinations pursuant to its responsibilities under article V. In our judgment, the likelihood of judicial review, even if expressly provided for in the procedures legislation, will depend on the precise article V question raised.

II. THE POWER OF STATES TO APPLY FOR A LIMITED AGENDA CONVENTION

The procedures bills pending in Congress provide that state legislatures can petition Congress to call a national convention to propose an amendment on a specific subject. If the state legislatures desire a general convention, the procedures bills permit them to include that

²² 369 U.S. 186 (1962).

²³ 395 U.S. 486 (1972).

purpose in their applications. The pending procedures bills also attempt to reduce the likelihood of a "runaway" convention by their provision that Congress will not refer to the states for ratification amendments of a convention that exceeds the scope of its call.

There is a deceptively simple but attractive logic to the theory of the proposed procedures legislation: article V permits Congress to convene either a general or a limited purpose convention depending on what the state legislatures specify in their applications. With some reservations, we endorse the approach of the proposed legislation, believing that it is adequately supported by traditional constitutional doctrine and contemporary practice.

A. The Scholarly Debate in Historical Context

If contemporary practice alone were the guarantee of constitutional legitimacy, there would be no difficulty in approving the proposition that states may limit the agenda of a national convention. Since the Nebraska petition of 1893, states have repeatedly submitted applications to Congress on the assumption that they could limit the agenda of an article V convention to proposing amendments about a single subject.²⁴

Our research discloses that before 1893, with one possible exception,²⁵ states submitted applications only for general agenda conventions.²⁶ No one appears to know with certainty why the practice suddenly changed. Yet the apparent assumption that limited agenda conventions are appropriate under article V became so widely accepted that from 1929 to 1957 not a single state submitted an application for a general convention,²⁷ and from 1958 to the present only one state appears to have submitted such an application.²⁸ Moreover, the convention procedures bills placed before Congress in the last fifteen years treat limited agenda conventions as the norm.²⁹

²⁴ SPECIAL COMMITTEE REPORT, *supra* note 9, at 20-25.

²⁵ *Id.*

²⁶ See C. BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION, 85TH CONG., 1ST SESS. 89-91 (Comm. Print 1957).

²⁷ *Id.*

²⁸ The description of the application reads:

[M]emorial of the Legislature of the State of Virginia memorializing the President and the Congress of the United States relative to calling a convention to propose amendments to the Constitution of the United States; to the Committee on the Judiciary.

111 CONG. REC. 94 (1965).

²⁹ E.g., S. 600, 97th Cong., 1st Sess. § 2, 127 CONG. REC. S1675-76 (1981) (Senator Helms); S. 817, 97th Cong., 1st Sess. § 2(a), 127 CONG. REC. S2794-96 (1981) (Senator Hatch); S. 3, 96th Cong., 1st Sess. § 2 (1979) (Senator Helms); S. 520, 96th Cong., 1st Sess. § 2 (1979) (Senator

Unlike the key governmental institutions in our national life which have accepted without any dissent the practice of limited agenda conventions, scholarly commentary has failed to reach a consensus. In *A Treatise on Constitutional Conventions*,³⁰ probably the first extensive treatment of the subject, Judge John Jameson undertook to discredit the notion that every assembly of the people for amending their basic law is necessarily beyond the law, or revolutionary in character. He argued that conventions are ordinary mechanisms of government to be limited, like other mechanisms of government, in the carefully wrought constitutional balance of power.³¹ According to Judge Jameson, the legislature, in particular, "has a clear constitutional right, in its discretion, to prescribe the scope of the duties of the Convention it calls"³² In his view, constitutional conventions did not, as some had claimed before and during the Civil War, possess illimitable sovereignty.³³ Jameson's argument, novel as it was, apparently bore fruit in the 105 state applications for conventions on particular subjects between 1893 and 1916.³⁴

Despite its practical success, Jameson's approach met with intense academic criticism. Walter Dodd, in *The Revision and Amendment of State Constitutions* (1910), and Roger Hoar, in *Constitutional Conventions: Their Nature, Powers and Limitations* (1917), challenged Jameson's attempt to tame or "constitutionalize" conventions, specifically state conventions for the amendment of state constitutions. In their view, conflict between the legislature and the convention could be avoided only, in Dodd's words, "if the convention as an organ for constitutional revision is entirely freed from the control of the regular legislature."³⁵ Legislative restrictions on the powers of a convention, Dodd argued, diminish its usefulness.³⁶

Helms); S. 1710, 96th Cong., 1st Sess. § 2(a), 125 CONG. REC. S11,871-72 (1979) (Senator Hatch); S. 1272, 93rd Cong., 1st Sess. § 2 (1973) (Senator Ervin).

³⁰ J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (4th ed. 1887).

³¹ *Id.* §§ 320-321, at 315-17.

³² *Id.* § 379, at 364.

³³ *Id.* §§ 311-313, 377-378.

³⁴ See C. BRICKFIELD, *supra* note 26, at 89-91.

³⁵ See W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 92 (1910).

³⁶ *Id.* at 79. Nowhere do Dodd or Hoar discuss limiting the power of a federal constitutional convention. Certainly a state constitutional convention, whose call traditionally proceeds directly from a single legislature, can be distinguished from a national convention under article V, whose call proceeds indirectly from two-thirds of the state legislatures by petitions to Congress. Nevertheless, nothing in either Dodd's or Hoar's treatise suggests such a distinction. Thus, it is reasonable to assume that both would extend their argument to encompass state legislatures acting together under article V to limit a national convention.

Dodd's and Hoar's argument was one of utility, not constitutional power. The constitutional dimension was added by Lester Orfield in *The Amending of the Federal Constitution*. State legislatures, Orfield asserted, have no authority to limit a national convention called pursuant to the Constitution. "[T]he right of the legislatures," he wrote, "is confined to applying for a convention, and any statement of purposes in their petitions would be irrelevant as to the scope of powers of the convention."³⁷

The difficulty with the constitutional argument as explained by Professor Orfield is that it is predicated on the supremacy clause, not the text and function of article V. The proposition that state legislatures cannot limit a federal instrumentality, stated abstractly, may be correct.³⁸ However, if the Constitution, and in particular article V of the Constitution, provides or should be interpreted to provide for limiting the convention instrumentality, then Orfield's proposition would appear to fail.

Commencing with a *Yale Law Journal* article in 1963³⁹ and continuing in two well-publicized letters to distinguished members of Congress,⁴⁰ Professor Black has reconstructed Professor Orfield's argument. He has also influenced and encouraged a generation of scholars to reject the limited convention idea based on the text and function of article V.⁴¹ The key idea underlying recent scholarship opposing limited conventions is that amendments to the federal Constitution ought to originate only from a fully deliberative body of national scope.⁴² This assumption stems, in part, from an examination of

³⁷ See L. ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 45 (1942).

³⁸ See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426-27 (1819).

³⁹ Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 *YALE L.J.* 957, 962-64 (1963).

⁴⁰ See Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, 32 *OKLA. L. REV.* 626 *passim* (1979); Black, *Amending the Constitution: A Letter to a Congressman*, 82 *YALE L.J.* 189, 196-204 (1972).

⁴¹ *Procedures for Calling Constitutional Conventions: Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 60, 61-63 (1967) (statement of Alexander M. Bickel); *id.* at 230-31 (letter from Alexander M. Bickel to Phillip B. Kurland (Oct. 2, 1967) (discussing S. 2307)) [hereinafter cited as Bickel Letter]; see Ackerman, *Unconstitutional Convention*, *NEW REPUBLIC*, Mar. 3, 1979, at 8; Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 *YALE L.J.* 1623, 1630-36 (1979); Gunther, *The Convention Method of Amending the United States Constitution*, 14 *GA. L. REV.* 1, 12-13 (1979); Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 *PAC. L.J.* 627 n.* (1979); Voegler, *Amending the Constitution by the Article V Convention Method*, 55 *N.D.L. REV.* 355 (1979). But see Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 *DUKE L.J.* 985; Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 *DUKE L.J.* 1295.

⁴² The pedigree of this important idea, for recent scholarship at least, seems to derive from Professor Black's article, *The Proposed Amendment of Article V: A Threatened Disaster*, *supra*

basic constitutional materials, and, in part, from a judgment regarding what is practical and desirable in our modern system of government.

1. *Basic Constitutional Materials*

The anti-limited agenda convention argument relies on an examination of the language of article V, the debates of the framers of article V, and state practices under article V from 1789 to 1893.⁴³

a. *The Language of Article V*

Article V refers to "a Convention for proposing Amendments." Does this phrase mean "a Convention for proposing Amendments the Convention decides to propose," or "a Convention for proposing such Amendments as the States applying for a Convention authorize it to propose?" The language can be construed as supporting either a broad or narrow grant of power to the convention.

Anti-limitation scholars advance at least two arguments in favor of a broad grant of power. First, applications under a statute typically track the language of the statute in order to ensure the validity of the application. Following this principle, a state legislature must apply to Congress for "a Convention for proposing Amendments." It cannot apply for a convention limited by subject matter or a convention for proposing specific amendments. Since a state cannot simultaneously limit its application and track the language of article V, anti-limitation scholars conclude that states cannot limit the agenda of a national convention.⁴⁴

note 39, at 963. Professor Black does not, however, cite any sources. Nonetheless, the idea continues to convince scholars examining the issues raised by an article V convention. See, e.g., Dellinger, *supra* note 41, at 1625-26; Gunther, *supra* note 41, at 17-18; Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1630 (1972); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1071-72 (1957); Bickel Letter, *supra* note 41, at 231.

⁴³ State courts have decided many cases where a state legislature attempted to limit the agenda of a state constitutional convention. See Annot., 158 A.L.R. 512 (1945) (powers of state legislatures to limit the powers of a state constitutional convention). The availability of limited calls has commonly depended on several factors, including the language of the state constitution. However, no court has had to confront the question whether a state legislature can effectively limit the agenda of a national convention called pursuant to article V. A note in the *Harvard Journal on Legislation*, however, takes the position that the state experience illuminates the federal question. See Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. ON LEGIS. 127 (1973).

⁴⁴ See Black, *Amendment by National Constitutional Convention: A Letter to a Senator*, *supra* note 40, at 628-29.

Second, the term "Convention" in article V occupies the same grammatical position as the term "Congress." The drafter of a statute, the anti-limitation scholars assert, uses two terms in the same grammatical position only if he intends that they should perform an identical statutory function. Since article V empowers Congress to originate amendments without limitation, it follows, according to the suggested rule of interpretation, that a convention should have the same power. Moreover, the argument continues, neither collateral language in the Constitution nor direct, unambiguous historical evidence vitiates the presumption of functional identity derived from this construction of article V. The function to be performed by an article V convention cannot in any historically defensible way be distinguished from that performed by Congress: they are the sole and apposite sources of constitutional amendments.⁴⁵

Yet even according to its own terms, this suggested construction of article V is not convincing. Placing the convention by itself in apposition to Congress is both grammatically and functionally inapt. The convention does not stand alone in its branch of the amending process. It is one of three stages—state application, congressional call, and the convention itself—that Congress, when it is the source of amendments, compresses into one. The grammatical and functional comparison of the convention method with Congress, we believe, neither determines the distribution of the agenda-setting activity among the constituent stages of the convention method nor supports the proposition that agenda-setting is a monopoly of the convention.

b. *Debates of the Framers on Article V*

Recent scholarship suggests certain key themes in the debates of the framers concerning article V. In 1979, Professor Walter Dellinger published a review of the framers' debates, in which he concluded:

The accounts of the Philadelphia Convention do not expressly answer the question of whether a convention can be limited by either the states or by Congress. Two themes, however, do emerge from the debates: Congress should not have exclusive power to propose amendments; and state legislatures should not be able to propose

⁴⁵ Professor Van Alstyne attributes this argument to Professor Black. See Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1297. If one scrupulously examines the passage cited by Professor Van Alstyne, however, one does not find support for the argument he asserts. See Black, *Amending the Constitution: A Letter to a Congressman*, *supra* note 40, at 198. The argument is nonetheless a good one, applying Professor Black's principles of structure and relationship in an apt and elegant fashion. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

and ratify amendments that enhance their power at the expense of the national government. States were empowered under Article V to *ratify* amendments; the power to *propose* amendments was lodged in two national bodies, Congress and a convention. The proceedings suggest that the framers did not want to permit enactment of amendments by a process of state proposal followed by state ratification without the substantive involvement of a national forum. *Permitting the states to limit the subject matter of a constitutional convention would be inconsistent with this aim.*⁴⁶

It is possible to accept Professor Dellinger's reading of the framers' debates without reaching his conclusion. Limiting the subject matter of a constitutional convention can be quite consistent with using it as a neutral national forum. Far from laying siege to the convention from two sides, the power of states to limit the agenda of a convention may be balanced, in part, by the counter power of Congress to judge the extent of the limit. Limited applications do not clearly tilt the convention in the direction of either Congress or the states (assuming states have one direction). Furthermore, Congress supplies the "substantive involvement of a national forum," at least with respect to agenda-setting. Finally, the convention, even one whose agenda has been limited, provides a forum for debate.

One ought not to confuse setting the agenda of a convention with the freedom of delegates to the convention to deliberate with respect to the set agenda. States submitting applications for a convention whose agenda is limited to voting up or down a single amendment take the risk, after all, that the convention, after plenary, deliberate debate, will vote down the amendment. The wider the agenda, the greater the probability of a result that is at least partially satisfactory to those state legislatures which applied for the convention.

A limited convention "cannot," in some complex and possibly sanctionless sense, originate amendments outside its agenda.⁴⁷ It is not clear, however, that the power to originate amendments outside an agenda two-thirds of the states would suggest is a practically important power, since three-quarters of them must ratify whatever amendments the convention originates. Of course, the political argu-

⁴⁶ Dellinger, *supra* note 41, at 1630 (emphasis added). Professor Gunther makes the further point that the limitation of an agenda may, for all practical purposes, be only apparent. See Gunther, *supra* note 41, at 8-10. In a complex, interdependent society, any call, unless very strictly and definitively defined (which is politically unlikely) to exclude all but certain subjects, could be construed to include amendments whose subjects are superficially alien.

⁴⁷ But recall Professor Gunther's insight that even a limited agenda may be honest, sincere construction be legitimately expanded to include superficially far-ranging amendments. See *supra* note 41.

ment could be made that three-quarters of the states could be "steam-rolled" into ratifying what two-thirds of them would not have proposed. Nevertheless, such a judgment is filled with hypothesis and uncertainty. Moreover, "steamrolling" may not always be less democratic or desirable than other forms of expression of the popular will that lead to adoption of amendments.⁴⁸

It may be correct that the convention whose agenda is limited by the cooperation of Congress and the states loses a measure of independence and authority. Yet this is also a judgment filled with hypothesis and uncertainty. Arguably, the Philadelphia Convention of 1787, for example, was a limited convention which exceeded its agenda. Authority proceeds from necessity, as Judge Jameson observed, where a grave national crisis demands extensive constitutional alteration. Accordingly, we believe it is erroneous to equate the effect of claims by the states and Congress to control a convention, taken separately, with the effect of such claims as they balance each other in the political process of article V.

c. *State Practice Under Article V*

Brickfield's tabulation of state applications for national conventions through 1958 shows that before 1893 only a single application

⁴⁸ In testimony before Senator Bayh's subcommittee on the Constitution, Professor Black asked Senators to reject the limited convention idea on the ground, amongst others, that it is potentially inconsistent with the form of democracy that extends legitimacy only to actions that meet with the approval of a vast majority of the national electorate. A popular mandate, he argued, at once accords with the spirit of democracy and provides the overwhelming consensus that ought to accompany amendment of our basic law. Ratification of amendments by three-quarters of the states is no guarantee of national consensus since it is possible to assemble 38 states containing only 40% of the population.

In Professor Black's view, the only guarantee of national consensus is that the forum originating amendments be a national forum representing the electorate on the basis of population. Congress, more precisely the House, is such a forum. A convention whose delegates are selected by population is such a forum. If two-thirds of the states could use their applications to constrain the convention to originate amendments reflecting the sectarian interest of the applying states, which amendments three-quarters of the states could ratify, then 40% of the electorate, theoretically, could overcome the wishes of 60%. See *Constitutional Convention Procedures Hearings*, *supra* note 16, at 177, 181-82 (testimony of Prof. Charles L. Black, Jr.). Far from proving the case against the limited convention, however, Professor Black's argument demonstrates that limited conventions fit the broad intentions of the framers. First, Professor Black does not convince us that delegates elected to a convention on the basis of population would choose to be bypassed and originate an unpopular amendment. Second, even if delegates choose to originate an unpopular amendment, which states representing 40% of the population then ratified, it is not clear that the result fails to accord with fundamental constitutional premises. After all, a dominant theme of the framers was that populous states ought not be automatically able to defeat the interests of unpopulous states. Democracy by sheer numbers was not and has never been the essence of our constitutionalism.

purported in any way to limit the convention.⁴⁹ Since 1893, however, the limited convention application has become the norm. Nevertheless, it is argued by the anti-limitation scholarship that early state practice reveals the intent of the framers⁵⁰ and that the change in practice is "a child of the *twentieth century*"⁵¹ and an egregious departure from the constitutional command of the framers.

The practice argument is superficially plausible. One is permitted in our legal tradition to look to practice in order to construe ambiguous terms of a constitution or statute. Yet the practice referred to in the anti-limitation scholarship does not clearly or convincingly support their construction of article V.

First, between 1789 and the Nebraska petition of 1893 on direct election of Senators, only nine applications for an article V convention were submitted by state legislatures to Congress. The following chart describes these petitions:⁵²

<i>State</i>	<i>Year</i>	<i>Subject Matter of Petition</i>
Virginia	1788	general revision of Constitution
New York	1789	general revision of Constitution
Georgia	1832	general revision of Constitution
Alabama	1833	against protective tariff or general revision of Constitution
Illinois	1861	general revision of Constitution
Indiana	1861	general revision of Constitution
Kentucky	1861	general revision of Constitution
Ohio	1861	general revision of Constitution
Virginia	1861	general revision of Constitution

The Alabama application appears ambiguously as an application for either a convention limited to originating an amendment to forbid a protective tariff or a general convention.⁵³ Only eight applications in a period stretching from 1788 to 1893 appear to call for a general convention.

From 1893 to the present, however, more than two hundred applications for a national convention to propose amendments on limited subjects have been filed with Congress. Which represents the

⁴⁹ See *supra* note 26.

⁵⁰ See, e.g., Black, *Amending the Constitution: A Letter to a Congressman*, *supra* note 40, at 202-03.

⁵¹ *Id.* at 203 (emphasis in original).

⁵² See C. BRICKFIELD, *supra* note 26, at 89-91.

⁵³ See Black, *Amending the Constitution: A Letter to a Congressman*, *supra* note 40, at 189.

dominant practice, two hundred applications or eight? Do eight applications over one hundred years constitute a practice of any sort? And which is the relevant period in which to measure the relevant practice, one hundred years from the founding or two hundred years? Neither is sufficiently contemporaneous with the founding of the Constitution to make any compelling claim of authority.

Consider the general applications that were sufficiently contemporaneous: Virginia (1788) and New York (1789). Do we know the circumstances under which these applications were forwarded to Congress? The legislatures of Virginia and New York appear to have been responding to the crisis of ratification of the Constitution from the 1787 Convention, where an application for a general convention was reasonable even if the common understanding was that a limited convention was possible. The same argument holds for the secession crisis of 1861, which produced five applications. The only application that remains unclear is the Georgia application of 1832. Upon close examination, therefore, the practice argument is not at all convincing.

Finally, even if the original practice was to call for general conventions and this original practice comported with the intent of the framers, it may still not be binding precedent. Not every change in constitutional practice is properly characterized as an usurpation. The original intent of the framers, assuming they had an intent in a given case or that we can discover what it was, can be used to determine subordinate norms in one age that may not be valid in another, all the while maintaining the authority of the original intent.

"[W]e must never forget that it is a *constitution* we are expounding."⁵⁴ Unlike an ordinary statute, the Constitution tolerates, even welcomes, deliberate and organic change in the set of subordinate norms which give content to its fundamental purposes and intentions.⁵⁵ Due process, for example, or equal protection, have very different operative meanings today than they did when their drafters used them to specify not this or that particularly articulate intention but a legitimate role for the development of intentions as the necessities of government and society may demand. Thus, the fundamental question is not whether state practice regarding convention applica-

⁵⁴ *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

⁵⁵ See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 (1980). Even ordinary statutes commonly contain language that the drafter of the statute fully expects to be suffused with a purpose or intention either that the drafter has not sufficiently articulated or that he expects to be changed as the subject matter of the statute requires. Statutes enabling the operations of administrative agencies are especially clear examples of such "constitutional statutes."

tions in the 1890's departed from the original intention of the framers, but whether the change in practice is legitimate and comprehensible within the framework of article V.

We do not believe that the arguments about the original intent of the framers, the structure of the amending process, and the first century of apparent constitutional practices are sufficiently important or persuasive to overturn the second century of practice, in which limited agenda conventions have come to be the norm, or to disrupt the institutional consensus in favor of limited agenda conventions. Furthermore, the political effects of the contemporary practice are not clearly deleterious in strictly political terms, as opponents of the practice have charged. A change in practice gives rise to delicate issues of constitutional interpretation.⁵⁶ In our opinion, arguments about

⁵⁶ One member of our Committee advances the following observations:

After the Civil War amendments, the states had responsibilities toward the federal government they did not have in 1789. For example, the states had to conform their laws to the mandates of due process and equal protection. They also had to administer federal programs. The host of particular burdens imposed on the states after the Civil War gave them a privilege, it could be argued, to urge particular constitutional change in response to the imposition of the burdens. The argument against legitimizing change in practice under article V focuses on the difficulty or undesirability of implying change in those portions of the Constitution which deal with the structure of government. It is easy to accept, as a general proposition, the principle that the Constitution is not a static instrument. It is, however, quite difficult to describe precisely how it can change. Clearly, not all parts of the Constitution are equally changeable. For instance, it is now well established that the due process and equal protection guarantees were designed to reflect contemporary notions of equality and "fundamental fairness" and not simply to embody the value structure of an earlier age. The same is true of other civil liberties which are meant to reflect our contemporary value system, particularly our conception of the proper relationship of the individual to the state. *See* *Elrod v. Burns*, 427 U.S. 347 (1976).

While the structural relationships between the institutions of government created by the Constitution have not generally been considered overtly mutable, the force of the argument against implying change in the structure of government is diminished by the many instances in which profound change has been accomplished. The independent administrative agencies, for instance, have introduced a "fourth branch" of government that the framers certainly did not intend. The development of administrative agencies from the delegation of far-reaching legislative and judicial powers appears all the more remarkable when one considers that it was accomplished in the face of clear judicial precedent against such delegations. Surely, it is easier to tolerate a change in constitutional practice respecting conventions, where it is not opposed by judicial precedent. The evolution of doctrine expanding the operation of the commerce clause is another change in structure, accomplished with the cooperation of the Court. The cases in the first half of the nineteenth century, where the Court narrowed the power of states to tax, or control a federal instrumentality (the *Bank of the United States*), present a third instance of government structure evolving without amendment. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Change in a field in which the Court is constrained, as it may be in article V, not to participate in the creation of constitutional norms on the ground that they are largely political questions arguably is less troublesome than change in fields, such as the delegation doctrine, the commerce clause and the taxing power, where the Court claims to make authoritative statements. Even the restraint with which the Court treats coordinate branches has changed—as, for example, the increasing respect the Court has afforded to the military and foreign affairs powers

practice are sufficiently complex and indeterminate to justify withholding the approving certainty that ought to accompany a severe restriction on the power of the states that the anti-limitation scholarship endorses.

2. *What Is Practical and Desirable in Our Modern Government?*

A number of scholars envision the convention as a serious national occasion, a response of the popular will in state legislatures to an unyielding, tyrannical Congress over fundamental issues of national political structure. They regard amendments on issues such as school prayer, busing, and abortion as improper subjects of amendments which a convention ought to be called to originate even though these are the subjects which have prompted the current applications for a limited convention. They feel that confining a convention to single issues invites control by elements of our political life willing to sacrifice the general well-being and political cohesion of the nation to one or a series of private visions. In their judgment, the only way to ensure that a convention behaves in the manner of a politically responsible national organization is to require it to have a diverse representation of open ended interests, each competing in the convention just as they do in Congress. To be politically responsible to a national constituency, according to these scholars, delegates ought to be forced to take a position on a variety of issues, each of which could easily

of the President. Finally, the growth of judicial power itself presents the most significant change in government structure we have witnessed in two centuries of constitutional practice. Perhaps the narrowest holding of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)—that the Court is the final arbiter of the constitutional validity of statutes giving it jurisdiction pursuant to article III of the Constitution—could be justified as fulfilling the intent of the framers. But the broader claim the Court developed out of *Marbury*—that the Court is the final arbiter of the constitutional validity of all actions taken by the coordinate branches—is a change in the structure of government which is not clearly rooted in the intent of the framers. Perhaps the best statement of the possibility of structural change in the Constitution is that of Justice Frankfurter in his concurrence in the *Steel Seizure Case* (where, however, he agreed with the opinion of the Court that practice did not sanction the effort by President Truman to take over the nation's steel mills without an authorizing act of Congress):

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive [p]ower" vested in the President by § 1 of Art. II.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952).

arise at a convention. They must be free to trade on the issues during sessions of the convention, which they could not do in a limited convention. Single-issue conventions, it is asserted, breed political irresponsibility at every level: in the state legislatures submitting applications, in the election of delegates, and on the floor of the convention.⁵⁷

In these two respects—fear of the political irresponsibility a single-issue convention breeds and the reluctance to concede control of the convention to an overweening Congress—the adherents of the general agenda convention position have perhaps their most powerful argument. On the other hand, congressional control of the convention might be just what is needed to bring political responsibility to its debates. Moreover, the pressure of single-issue politics might reduce the political ambitions of a centralizing, tyrannical Congress. The political calculus is not sufficiently exact to predict the result of these contrary tendencies. Yet surely the concerns of the consensus ought to be alleviated by the knowledge that, under certain political conditions, they offset each other.

One commentator who has recognized the inherently political nature of the process of constitution-making is Professor Gerald Gunther of Stanford. In a recent article he took the position

that states may legitimately articulate the specific grievances prompting their applications for a convention; that Congress may heed those complaints by specifying the subject matter of the state grievances in its call for a convention; but that the congressional specification of the subject is not ultimately binding on the convention. Rather, the congressional specification serves the purpose of informing the convention delegates of the subject matter that prompted the applications and operates as a moral exhortation to the convention. I insist, however, that the convention is a separate, independent body ultimately not controllable by the applying states or by the Congress issuing the call. . . . I believe that the final authority to determine the convention's agenda rests with the convention itself⁵⁸

The limiting application, in Professor Gunther's view, is not legally binding in a court of law, as it would be for many today who support the idea of a limited convention. To Professor Gunther it is a "moral exhortation," a gesture in the struggle over the content of fundamen-

⁵⁷ See, e.g., *Constitutional Convention Procedures Hearings*, *supra* note 16, at 254, 257, 259 (testimony of Walter E. Dellinger).

⁵⁸ Gunther, *supra* note 41, at 12-13.

tal law. Only if one accepts an especially intrusive judicial review of the convention process—so that a court could be expected, for example, to second-guess Congress on its assessment of the subject matter expressed in applications, or order Congress to send the work product of a convention to the states for ratification—would the strictly legal treatment of the effects of limited agenda applications be feasible. Otherwise, we are forced to rely on the political interaction of units of government. Even the legal treatment, as we know, depends on the willingness of Congress and the executive to obey a court's order.

Professor Gunther sees no middle ground between law and moral exhortation. In our view, it is neither accurate nor desirable to propose that short of judicial enforcement of limited agenda applications, the convention is free to do as it pleases. Certainly, the limited agenda application has some political force. Yet it also allows Congress, should it choose, to refuse to send proposed amendments of the convention to the states for ratification. If a court were not available to aid the convention in any struggle with Congress (and even if it were available), how could the convention oppose the will of Congress? Surely the answer is what it is at every stage of the amendment process: a political controversy lying somewhere between law and moral exhortation.

We believe that states and the Congress possess the power—both political and constitutional—to limit the agenda of a convention. Moreover, we recognize that there are judicially nonenforceable yet compelling provisions of the Constitution.⁵⁹ We are also concerned that, as Jameson pointed out over one hundred years ago, the convention always has the potential to exceed the institutional limits placed on it. Nevertheless, the pending procedures legislation as well as the article V requirement of ratification of amendments by the states substantially diminish the risks of a “runaway” constitutional convention.

III. JUDICIAL REVIEW AND THE ARTICLE V CONVENTION

Many disputes of constitutional, legal and political dimension are bound to occur during the calling and conduct of an article V convention. Issues of individual rights and institutional power among the delegates, Congress, the states and the convention itself will have to be resolved quickly to protect the integrity of the amendment process. Though the Supreme Court has considered and decided several issues

⁵⁹ See Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 U. PA. L. REV. 54 (1931).

respecting the article V amending process,⁶⁰ it declined in *Coleman v. Miller*⁶¹ to decide two issues, on the ground that they presented non-justiciable political questions.

However desirable it may be to assign courts the responsibility of deciding the numerous and complex issues likely to arise in the context of an article V convention, the Committee is persuaded that Supreme Court pronouncements since *Coleman v. Miller* dealing with the "case or controversy" limitation of article III will not guarantee judicial review of all such issues. In each case, the availability of judicial review will depend upon the nature of the issue presented. While modern case law does not suggest a single, clear answer to the problem of judicial review of issues arising from the convention method of originating amendments, *Baker v. Carr*⁶² provides a consensus of criteria that will be used by the Supreme Court in deciding whether a particular issue is justiciable. Though Congress cannot confer justiciability by statute on an issue that offends the "case or controversy" limitation,⁶³ provision of judicial review in the proposed convention procedures legislation would serve to strengthen the case for justiciability under the criteria of *Baker v. Carr*.

A. Background

Prior to 1939 when it decided *Coleman v. Miller*,⁶⁴ the Supreme Court, without providing a universal answer to the question of justiciability, addressed and resolved several specific issues raised by the amendment process of article V: 1) whether Congress may choose the "state legislature" method of ratification for proposed amendments which expand federal power;⁶⁵ 2) whether a proposed amendment requires the approval of the President;⁶⁶ 3) whether Congress may fix a reasonable time for ratification of a proposed amendment by state legislatures;⁶⁷ 4) whether the states may restrict the power of the legislatures to ratify amendments or to submit the decision to a popular referendum;⁶⁸ and 5) the meaning of the requirement of a two-

⁶⁰ See *United States v. Sprague*, 282 U.S. 716 (1931); *Leser v. Garnett*, 258 U.S. 130 (1922); *Dillon v. Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith*, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

⁶¹ 307 U.S. 433, 453-56 (1939).

⁶² 369 U.S. 186, 210-11, 214-15 (1962).

⁶³ U.S. CONST. art. III, § 2.

⁶⁴ 307 U.S. 433 (1939).

⁶⁵ *United States v. Sprague*, 282 U.S. 716, 730 (1931).

⁶⁶ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 379 (1798).

⁶⁷ *Dillon v. Gloss*, 256 U.S. 368, 375-76 (1921).

⁶⁸ *Hawke v. Smith*, 253 U.S. 221, 229-31 (1920).

thirds vote of each House.⁶⁹ In none of these cases, however, was the Court actually asked to inject itself into the actual amending process. In each case, litigation was a post facto challenge to already promulgated amendments.

The subsequent case of *Coleman v. Miller* helped to define further the parameters of justiciability in the article V context by finding that two issues raised nonjusticiable political questions, while not rejecting the earlier decision in favor of justiciability. However, the Court's decision in *Coleman* created some uncertainty whether the Court would ultimately find that most article V issues are nonjusticiable. As the *Special Committee Report* noted:

In *Coleman*, the Court held that a group of state legislators who had voted not to ratify the child labor amendment had standing to question the validity of their state's ratification. Four Justices dissented on this point. The Court held two questions non-justiciable: the issue of undue time lapse for ratification and the power of a state legislature to ratify after having first rejected ratification. In reaching these conclusions, the Court pointed to the absence of criteria either in the Constitution or a statute relating to the ratification process. The four Justices who dissented on standing concurred on non-justiciability. They felt, however, that the Court should have disapproved *Dillon v. Gloss* insofar as it decided judicially that seven years is a reasonable period of time for ratification, stating that Article V gave control of the amending process to Congress and that the process was " 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Even though the calling of a convention is not precisely within these time limits and the holding in *Coleman* is not broad, it is not at all surprising that commentators read that case as bringing Article V issues generally within the rubric of "political questions."⁷⁰

In the more recent decisions of *Baker v. Carr*⁷¹ and *Powell v. McCormack*⁷² the Supreme Court laid to rest the notion that *Coleman* signaled the Court's complete withdrawal from its previously active role in this area of potential political questions. For example, in the view of the *Special Committee Report*, *Coleman*, in turn, may have

⁶⁹ National Prohibition Cases, 253 U.S. 350, 386 (1920).

⁷⁰ SPECIAL COMMITTEE REPORT, *supra* note 9, at 21-22 (quoting *Coleman v. Miller*, 307 U.S. 433, 459 (1939)).

⁷¹ 369 U.S. 186 (1962).

⁷² 395 U.S. 486 (1969).

been significantly restricted by *Baker* and *Powell*. Arguably, for instance, the rationale of *Powell*, with its strong emphasis on the interest of voters in having the person they elect take a seat in Congress, could also control a situation where Congress refused to call a convention despite the requisite number of petitions. Clearly, the convention method was meant to permit the states, expressing the will of the people, to bring about change despite congressional opposition.⁷³ *Baker*, moreover, may suggest that, despite dicta to the contrary in *Powell*,⁷⁴ the Court need not restrict itself to declaratory relief but might fashion a more extensive remedy in vindicating such a frustration of the popular will.⁷⁵

In *Baker v. Carr* the Court set forth the fundamental principles to be applied to political question problems. These principles constitute a modern consensus of analysis.⁷⁶ First, the Court will not intervene where the issue involves resolution of questions committed by the text of the Constitution to a coordinate branch of the government. Accordingly, the provisions in the Constitution governing the exercise of the power in question must be carefully examined.⁷⁷ Second, resolution of the question must not demand that a court move beyond areas of judicial expertise. There must be no "lack of judicially discoverable and manageable standards for resolving" the issue, and the decision must not call for "an initial policy determination of a kind clearly for nonjudicial discretion."⁷⁸ Third, the Court will abstain when prudential considerations counsel against judicial intervention. Mutual respect among the three branches of government must be encouraged by avoiding "the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question."⁷⁹ The prudential consideration discourages judicial action where there is an "unusual need for unquestioning adherence to a political decision already made."⁸⁰

B. Recent Developments

In assessing whether the Supreme Court would consider possible article V convention issues justiciable, we must give due regard not

⁷³ SPECIAL COMMITTEE REPORT, *supra* note 9, at 23-24.

⁷⁴ 395 U.S. at 517-18.

⁷⁵ SPECIAL COMMITTEE REPORT, *supra* note 9, at 24.

⁷⁶ 369 U.S. at 297. *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996 (1979).

⁷⁷ *Powell v. McCormack*, 395 U.S. at 519.

⁷⁸ *Baker v. Carr*, 369 U.S. at 217.

⁷⁹ *Id.*

⁸⁰ *Id.*

only to *Baker* and to *Powell*, but also to the decisions of the Court in more recent years. In the intervening years since those decisions and the *Special Committee Report*, while adhering to the *Baker v. Carr* criteria, the Court has taken advantage of available opportunities to refine the concept of justiciability. Significantly, some of these cases involved constitutional provisions which, like article V, concerned institutional responsibilities rather than individual rights. These cases manifest, at least at the hands of the present Court, a distinct propensity to acknowledge the right and responsibility of the other branches to interpret definitively such clauses.

For instance, in *United States v. Richardson*,⁸¹ the Court held that a private citizen did not have standing to maintain an action for the enforcement of the accounts clause⁸² since he could show no "particular concrete injury"⁸³ from Congress' refusal to enforce the clause against the Central Intelligence Agency. Relying on *Ex parte Levitt*⁸⁴ the Court readily acknowledged that

[i]t can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.⁸⁵

Mr. Justice Powell's concurring opinion manifested an even greater reluctance to involve the Court in such matters. Speaking of the power of judicial review, he wrote:

The irreplaceable value of the power . . . [of judicial review] . . . lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.⁸⁶

Significantly, on the same day, the Court addressed the question whether a citizen could judicially challenge Congress' nonenforce-

⁸¹ 418 U.S. 166 (1974).

⁸² U.S. CONST. art. I, § 9, cl. 7.

⁸³ *United States v. Richardson*, 418 U.S. at 177.

⁸⁴ 302 U.S. 633 (1937).

⁸⁵ *Richardson*, 418 U.S. at 179.

⁸⁶ *Id.* at 192.

ment of the provisions of the incompatibility clause⁸⁷ against its own members.⁸⁸ Again, the Court declined to entertain the issue, noting that to allow such a suit would “distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’ ”⁸⁹

It may be argued that, since the foregoing cases concern primarily the question of standing, they are inapposite to a determination of whether a particular issue raises a “political question.” However, as Chief Justice Warren pointed out in *Flast v. Cohen*,⁹⁰ the standing and political question inquiries have common constitutional roots in the “case or controversy” requirement of article III.⁹¹ In both situations, the Court must ultimately determine whether the dispute presents a matter capable of judicial resolution. The common root of these concepts is perhaps best illustrated by one of the cases which reached the Court in the aftermath of the tragedy at Kent State.⁹² In *Gilligan v. Morgan*, the Court held that a request to submit the training and operations of the Ohio National Guard to continuing federal judicial scrutiny was nonjusticiable. That conclusion could be articulated either as a lack of standing or as a political question requiring judicial scrutiny of a subject committed expressly by the Constitution “to a coordinate political department”⁹³ because of the mandate of the militia clause.⁹⁴

Moreover, in *Goldwater v. Carter*,⁹⁵ a case which presented the question whether the President had the authority to terminate unilaterally the United States Mutual Defense Treaty with Taiwan, Justice Rehnquist (writing for himself and for three other Justices) took the position that the case presented a political question. Significantly, Justice Rehnquist argued that this conclusion followed a fortiori from the Court’s holding in *Coleman v. Miller*.⁹⁶ Central to his analysis was Chief Justice Hughes’ observation in *Coleman* that article V contains the explicit provision concerning ratification of an amendment by a state legislature and that Congress therefore retained final

⁸⁷ U.S. CONST. art. I, § 6, cl. 2.

⁸⁸ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

⁸⁹ *Id.* at 222.

⁹⁰ 392 U.S. 83 (1968).

⁹¹ *Id.* at 95.

⁹² *Gilligan v. Morgan*, 413 U.S. 1 (1973).

⁹³ *Baker v. Carr*, 369 U.S. at 217.

⁹⁴ U.S. CONST. art. I, § 8, cl. 16.

⁹⁵ 444 U.S. 996 (1979).

⁹⁶ 307 U.S. 433 (1939).

authority to decide "whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."⁹⁷ The Constitution is similarly silent on the manner in which a treaty is to be terminated, Justice Rehnquist noted, and, since "different termination procedures may be appropriate for different treaties," the matter " 'must surely be controlled by political standards.' "⁹⁸

This recent statement by a plurality of the Court can be construed as indicating willingness to accept the broad proposition that certain governmental functions, including the termination of treaties and the convention method of amending the Constitution, are committed entirely to the control of the political branches.⁹⁹

On the other hand, *Goldwater* may be read as holding nonjusticiable only those issues where the Court would have to second-guess a determination committed in the first instance to a coordinate branch of the federal government and where, consequently, there is the distinct possibility of "multifarious pronouncements by various departments on one question."¹⁰⁰ Such a view of *Goldwater* is consistent with Justice Powell's concurring opinion in which he asserts that "[p]rudential considerations" rendered the question nonjusticiable because the dispute between the legislative and executive branches was not

ready for judicial review unless and until each branch ha[d] taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.¹⁰¹

However, according to the view of Justice Powell, the fact that a case or controversy "touches" a matter normally related to a nonjudicial branch does not render it nonjusticiable. Rather, the Court has the duty "to say what the law is,"¹⁰² and the Court must necessarily

⁹⁷ *Id.* at 456.

⁹⁸ *Goldwater v. Carter*, 444 U.S. at 1003 (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

⁹⁹ If so, these Justices, like Justice Black and those who joined his separate opinion in *Coleman*, would presumably hold that: "The process itself is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." *Coleman v. Miller*, 307 U.S. at 459.

¹⁰⁰ *Baker v. Carr*, 369 U.S. at 217.

¹⁰¹ *Goldwater v. Carter*, 444 U.S. at 997 (Powell J., concurring).

¹⁰² *Id.* at 1001 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

decide issues of textual construction, including whether "one branch of our Government has impinged upon the power of another."¹⁰³

C. Prognosis

These recent developments culminating in *Goldwater* raise substantial doubt, in the Committee's view, regarding the availability of judicial review to resolve all of the questions which may arise if the convention method of amending the Constitution is ever implemented. With respect to matters of textual interpretation of article V, the fact that a majority of the Court has never accepted the position of Justice Black in *Coleman* and the continued vitality of the Court's holding in *Powell* leave open the possibility that the Court will "say what the law is"¹⁰⁴ by interpreting the text of article V. With respect to the review of questions of fact which Congress has already determined, the possibility of judicial review seems significantly less certain. As then Judge Stevens noted in *Dyer v. Blair*,¹⁰⁵ "A question that might be answered in different ways for different amendments must surely be controlled by political standards rather than standards easily characterized as judicially manageable."¹⁰⁶

The Committee is aware that, while all of the recent cases involve the allocation of power between branches of the federal government, many of the issues involved in the convention method of amendment implicate the allocation of power between the Congress and the states. However, the two issues found nonjusticiable in *Coleman*—undue time-lapse for ratification and the power of a state legislature to ratify after having first rejected ratification—clearly implicated federalism concerns. Yet, they were found to be nonjusticiable.

In sum, therefore, the Committee believes that *Goldwater* does not suggest that all questions involving a subject matter committed by the text to another branch are nonjusticiable. Accordingly, the remaining precedent need not be read as entirely precluding all judicial review of questions arising under a convention method of proposing constitutional amendments.

D. Potential Applications of the *Baker v. Carr* Criteria

The case law on the political question doctrine teaches us that there is no single, definitive answer to the question whether issues

¹⁰³ *Goldwater*, 444 U.S. at 1001.

¹⁰⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177.

¹⁰⁵ 390 F. Supp. 1291 (N.D. Ill. 1975).

¹⁰⁶ *Id.* at 1302.

arising from the convention method are justiciable. What emerges from the cases is a consensus, clearly expressed in *Baker v. Carr*,¹⁰⁷ on criteria that will be used to answer the question of justiciability, issue-by-issue. To predict how the Supreme Court would apply these criteria in a particular case is simply not possible, even if it is worthwhile. The Committee can, however, show how the *Baker v. Carr* criteria might apply in three important issues that would undoubtedly arise were two-thirds of the states to submit applications to Congress for a limited agenda convention.

1. *Whether the State May Apply for, and Congress
Call, a Limited Agenda Convention?
A General Agenda Convention?*

The Supreme Court might easily justify reviewing the limited/general agenda issue under the criteria of *Baker v. Carr*. The language of article V does not clearly commit resolution of this issue either to Congress or the convention. Moreover, the potential for Congress and the convention coming to loggerheads on the issue is considerable. The judicial power exists, in part, to resolve "irreconcilable positions" taken by separate departments of the political branches of government.

Congress, it is true, has the role in article V of judging whether the states have made the requisite number of applications for a convention, and the role of judging the number of applications necessarily includes judging their validity, including a determination whether an application seeking a limited/general agenda convention is valid. Yet article V does not clearly assign the task of judging validity exclusively to Congress, free from supervision by the Supreme Court. The "commitment" of the limited/general agenda issue to a "coordinate political department" is not "textually demonstrable."

Nor would resolution of the issue be hampered by a "lack of judicially manageable standards." Once the Supreme Court decides whether the agenda of a convention must be general or may be limited, implementation of the decision would not be difficult. The states and Congress would know their respective rights and duties as a result of the decision and future conflicts touching on the issue would be easy to settle. The limited/general agenda issue reasonably falls within the Court's duty to "say what the law is."¹⁰⁸

¹⁰⁷ 369 U.S. 186 (1962).

¹⁰⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177.

The last criterion of *Baker v. Carr*, involving prudential considerations, is the most difficult to discuss prospectively. Were Congress and the convention to override a pronouncement by the Supreme Court that limited agenda conventions are unconstitutional, and were the states to ratify an amendment produced by such a convention, the Supreme Court would nonetheless be capable of declaring the amendment invalid in any subsequent proceeding requiring application of the amendment. Furthermore, Congress has no distinctive political contribution to make to the process of construing the words of article V with respect to the issue of general/limited agenda conventions. By taking the matter of construction into its own hands, the Supreme Court would be ruling on Congress' construction of the Constitution, rather than legislating in its own right.

*2. Assuming States May Apply for a Convention
Limited to a Single Subject, Whether Congress
Has Properly Determined that the Requisite
Number of States Have Submitted
Applications on the Same Subject?*

Whether the Supreme Court may review a congressional determination that a requisite number of states have submitted applications on the same subject is a considerably more difficult issue to resolve. The language of article V clearly assigns to Congress the task of determining whether it has received a sufficient number of applications. Assuming that Congress permits limited agenda applications and the Supreme Court acquiesces, Congress must also determine whether all the applications call for a convention on the same subject. The extent to which the Supreme Court can review Congress' determination, however, remains unclear.

Assume, for example, that Congress receives thirty applications calling for a convention limited to the subject of a balanced budget, and four applications limited to the subject of abortion. Were Congress to declare that it received thirty-four applications on the same subject, the requisite number today for calling a convention, the issue would be squarely presented whether the Supreme Court could review Congress' declaration. Easy as it might be in this instance to resolve the issue in the affirmative, we must also consider whether the Supreme Court may review a determination in which the erroneous judgment of Congress is less apparent. Accompanying any assertion of justiciability, in other words, is the need to determine the intensity with which the Court will scrutinize the decision it reviews.

As a theoretical matter, the Supreme Court could perform the task of determining whether the states' petitions involve the same

subject matter. State courts have traditionally found it possible to adjudicate the "same subject matter" issue when required to do so by a state constitution.¹⁰⁹ However, the doctrine of separation of powers has a distinctly different history in the federal sphere than it has had in the state context. Moreover, issues of federalism arise since the states, authors of the petitions, are represented in Congress which has already made a "same subject matter" determination. Consequently, the constitutional consequences of intervention by the United States Supreme Court in the article V amendment process would be far more serious than similar involvement by state courts in the state constitutional amendment process. The Supreme Court might be expected to intervene only in egregious cases; in all others, it likely would accord a high degree of deference to the previous determination of Congress.

3. *Whether the Amendments a Convention
Proposes Conform to the Subject
of the States' Applications?*

The difference between this issue and the second is that it arises after Congress has fashioned a rule for the agenda of the convention, and the Court in this instance is called upon to determine whether Congress is living up to the rule it has fashioned in reporting amendments of the convention out to the states for ratification. Hence, the Court is less involved in the creation of a standard than in its traditional function of ensuring that a standard created has been properly applied. Nevertheless, congressional determination that a proposed amendment falls within or without the ambit of the limited agenda Congress has defined is a classic application of law to fact which the Court might wish to leave to Congress, reviewable if at all, only under a "clearly erroneous" or perhaps an "arbitrary and capricious" standard.

E. To What Extent Can Congress Make
Article V Issues Justiciable?

The Supreme Court has clearly stated that Congress cannot make justiciable issues that fail to satisfy the "case or controversy" requirement of article III.¹¹⁰ There is, therefore, no assurance that the Court would accept a congressional invitation to share the political heat of the amending process. However, if the Court were to determine that the issue was justiciable in the constitutional sense, the Court might well determine that the existence of a statute counseled against the

¹⁰⁹ See, e.g., *Carter v. Burson*, 230 Ca. 511, 518-20, 198 S.E.2d 151, 156 (1973).

¹¹⁰ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972).

invocation of the prudential criteria of *Baker v. Carr*. A statement by Congress that it wishes the Courts to review issues arising from the convention method of originating amendments would minimize the danger of multifarious pronouncements by separate branches of government. It would reduce the chance that judicial action would be considered disrespectful to Congress. Furthermore, by providing a mechanism for review, Congress does not default on its obligation to deliberate and otherwise perform its guiding legislative role. Inasmuch as the prudential criterion of *Baker v. Carr* is the stumbling block to justiciability of the three issues discussed above, a statute conferring justiciability on the Court could go a long way towards satisfying the Court that its intervention is appropriate.

F. The Implications of Uncertain Judicial Review of Article V Questions

No process of government poses more hazards for our constitutional system than the convention method of originating amendments. The potential for political conflict and collision between branches of government is severe. Inasmuch as the Supreme Court is able to facilitate the convention method by serving as ultimate arbiter, its most divisive political consequences may be avoided. The Supreme Court has performed the desirable function of acting as the guarantor of political unity in many other areas of United States political history. Consistent with article III requirements, we believe that the Supreme Court ought to perform this function as much as it is able in the amendment process of article V.

Nevertheless, discussion of the possibility of a federal convention by lawyers has generally included undisguised apprehension about what such a convention might do to the structure of government and the protection of individual liberties believed to be imbedded in the Constitution we know today. The apprehension appears to be attributable not only to the fact that the nation has never had a constitutional convention since the "runaway" and revolutionary gathering in Philadelphia in 1787, but also because judicial review may be limited. Cut loose from the traditional moorings of judicial review in an emotionally and politically charged environment of a federal convention, most commentators would prefer that Congress propose the amendment for which the convention has been petitioned so as to avoid the unknown risks of an assembled convention exceeding its "call."

The Committee is persuaded that the proposed federal constitutional convention procedures bills are necessary and desirable in part because issues raised in the context of an article V convention may be

immune from judicial review. In the absence of judicial review, the checks and balances in the nation's system of separation of powers will consist of those within the constitutional arsenal of Congress and the states. The Committee further believes that it is most desirable that the procedures by which these checks and balances will operate be thought out well in advance, freed from any concern for a particular amendment, and clearly incorporated in legislation.

Such steps, in our judgment, can eliminate some of the unwarranted fears currently informing the federal convention controversy. The procedures outlined in the current federal convention procedures bills not only give direction to the states with respect to the convention mode of amendment but also emphasize the gravity of a decision by a state legislature to petition Congress for a convention.

Some commentators, most notably Professor Black, have criticized the idea of a federal convention procedures bill, arguing that one Congress cannot bind another.¹¹¹ This criticism is unfounded. Congress has often acted by statute in defining separation of powers issues. Many examples of such legislation can be given,¹¹² but the best illustration is the War Powers Resolution passed in 1973.¹¹³ That legislation defined the respective roles for Congress and the President in the introduction of armed forces into areas of imminent hostilities. Passed by the 93d Congress, the War Powers Resolution remains in effect until repealed or modified by subsequent congressional action.

Congress passed the War Powers Resolution—just as it would enact a federal convention procedures bill—pursuant to its powers under article I, section 8, clause 18: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In defining convention procedures, Congress must be viewed as exercising its traditional constitutional power. The possibility that the exercise of such power will not be reviewed in every instance by the judiciary is neither surprising nor alarming. Congress has had substantial experience in making unreviewable constitutional

¹¹¹ See, e.g., Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191-94 (1972).

¹¹² See, e.g., 3 U.S.C. § 19 (1976 & Supp. IV 1980) (succession to the presidency); 28 U.S.C. §§ 1738-1739 (1976 & Supp. IV 1980) (full faith and credit obligations of the states); 31 U.S.C. §§ 65-67 (1976 & Supp. IV 1980).

¹¹³ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1976)).

determinations.¹¹⁴ Constitutional determinations made by Congress, like those rendered by a court, involve issues of fairness and common sense. Congress' duty to function as a constitutional arbiter in matters affecting separation of powers and federalism is no less compelling than that of the federal courts when individual liberties are at stake.¹¹⁵

Those commentators who criticize congressional performance in this context as policymaking in the guise of constitutional adjudication conveniently forget the recognized legislative function performed by federal courts in giving content to the meaning of the equal protection clause. Contrary to the fears expressed by such commentators, Congress and the courts share many of the techniques of arriving at constitutional determinations. Like courts, Congress acts on a policy level in rendering constitutional decisions. Where a court can overrule itself, Congress can amend or repeal its constitutional determinations. Recognition of some of the similarities in decisionmaking processes may help to alleviate some—but by no means all—of the legitimate anxiety created by the prospect of a “runaway” convention subject only to apparent political checks of Congress.

CONCLUSION

The Committee favors passage of a constitutional convention procedures bill. We are persuaded by current scholarship on the subject that Congress can call a limited agenda as well as a general constitutional convention. While we cannot predict the likelihood of judicial review of every issue that arises in the article V context, we favor a procedures bill which provides for judicial review.

¹¹⁴ See Ripple, *Judicial Review of Congressional Determinations Pursuant to the Convention Method of Amending the Constitution*, in *Constitutional Convention Procedures Hearings*, *supra* note 16, at 431.

¹¹⁵ See, e.g., Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

Dated: New York, N.Y.
September 30, 1982

RESPECTFULLY SUBMITTED,
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* Mr. Feerick did not take part in the Committee's consideration of this report.

** The Committee expresses its deep appreciation to these members for their extraordinary work over a two-year period in the writing and preparation of this report. The Committee is also indebted to Mr. Stephen Breitstone, a 1982 graduate of the Benjamin N. Cardozo School of Law, for his generous assistance, and to Ms. Nancy Sikorski who kindly typed the many drafts of the manuscript.