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PROPOSING CONSTITUTIONAL AMENDMENTS BY CONVENTION: SOME PROBLEMS

Arthur Earl Bonfield*

All of the existing amendments to the United States Constitution were proposed to the states by a two-thirds vote of both Houses of Congress. Proponents of the three provisions under discussion here seek to avoid this procedure. They are attempting to invoke an alternative means of submitting to the states amendments to our fundamental law. In addition to the direct Congressional initiation of the amending process, Article V¹ provides that "on the Application of the Legislatures of two-thirds of the several states [Congress] shall call a Convention for proposing amendments." The present paper will consider some of the difficult questions raised by the current effort to utilize this particular mode of "proposing" amendments to our Constitution.

At the outset, it should be noted that many of the significant questions that will arise in the present attempt to propose amendments to our fundamental law by convention will not be resolvable in the courts.² Strong dicta even go so far as to insist that *all* questions arising in the amending process are nonjusticiable.³ But there is evidence of a substantial nature to the contrary. It would indicate that some of the questions which may arise in this process can be settled on the merits by the judiciary.⁴ However, those that are beyond the capacity of the courts to decide because they are nonjusticiable

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¹ U.S. Const. art. V.

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 the 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 See *Coleman v. Miller*, 307 U.S. 433, 457 (1939) (concurring opinion). Dowling, *Clarifying The Amending Process*, 1 WASH. & LEE L. REV. 215 (1945). In *Coleman v. Miller*, the Court held that the effectiveness of a state's ratification of a proposed amendment which it had previously rejected, and the period of time within which a state could validly ratify a proposed amendment, were nonjusticiable political questions within the exclusive and irrevocable determination of Congress.

³ See *id.* at 457-59 (concurring opinion).

Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn assurance by the Congress that ratification has taken place as the Constitution commands. Upon this assurance a proclaimed amendment must be accepted as a part of the Constitution, leaving to the judiciary its traditional authority of interpretation. . . . Undivided control of [the amending] process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety . . . and is not subject to judicial guidance, control or interference at any point.

See also text accompanying note 22 *infra*, and Dowling, note 2 *supra*.

⁴ See *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*, No. 1, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

This article will *not* attempt to fully explore the extent to which the Courts can or should take it upon themselves in suits properly before them to independently resolve the vari-

political questions will be resolvable solely by Congress. Its decision in such cases will be final and conclusive on the courts.⁵ Nevertheless, "in the exercise of that power Congress . . . is [still] governed by the Constitution."⁶

I.

The first question raised by the current effort to propose amendments to our National Constitution via a convention concerns the sufficiency of the resolutions sponsored by the Council of State Governments for this purpose.⁷ Are they proper applications for a "Convention" within the meaning of Article V? If they are not, their adoption by the legislatures of two-thirds of the states would neither authorize nor compel Congress to summon a convention empowered to propose amendments to the Constitution. The reasons for this are several.

In the first place, the United States is a government of delegated powers. Consequently, it possesses no authority save that conferred upon it by the Constitution. Article V, the only provision in the Constitution dealing with its amendment, must therefore be deemed exhaustive and not merely illustrative of the Federal Government's powers in this regard. That provision explicitly provides two modes for proposing constitutional amendments. Only one of these contemplates the convening of a convention empowered to propose amendments. Such a "Convention" is authorized by Article V only when two-thirds of the state legislatures have made "Applications" for one. As a result, applications within the meaning of Article V from two-thirds of the state legislatures must fairly be deemed absolute prerequisites to the summoning of such a body.⁸

There is a second reason why valid Article V applications from the requisite number of state legislatures must be deemed prior conditions to the summoning of any convention empowered to propose amendments. If these applications are not prerequisites to such a convention call, on its own say-so, a majority of Congress could validly summon such a body.⁹ By the same simple majority, Congress could determine the convention's make-up and mode of operation. It could therefore provide that the convention could propose amendments to the states by a mere majority of its delegates.

But Article V insists that a two-thirds vote be required by both Houses of Congress, or that two-thirds of the state legislatures make "Application" for a "Convention," before an amendment to the Constitution may be proposed

ous questions that may arise in the amending process. On the justiciability of questions arising in the amending process see ORFIELD, *AMENDING THE FEDERAL CONSTITUTION* 7-36 (1942); Clark, *The Supreme Court and the Amending Process*, 39 VA. L. REV. 621 (1953); Note, 70 HARV. L. REV. 1067 (1957).

⁵ *Coleman v. Miller*, 307 U.S. 433 (1939); *cf.* *United States v. Sprague*, 282 U.S. 716 (1931).

⁶ *Coleman v. Miller*, *supra* note 5, at 457 (1939).

⁷ *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10 (Winter No. 1 1963).

⁸ See ORFIELD, *AMENDING THE FEDERAL CONSTITUTION* 40 (1942); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW, 185, 196 (1951); Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957, 962-64 (1963).

⁹ The terms of Article V in no way suggest that Congress may not convene such a body by the usual vote required for Congressional action. Consequently, no more than a majority vote would seem to be required to "call a Convention."

to the states. This reflects the conviction of the founding fathers that the seriousness of this kind of action demands a national consensus of the sort required to achieve such two-thirds votes. Permitting a majority of Congress, on its own say-so, to call a convention empowered to propose constitutional amendments approved by a simple majority of the latter's delegates would, therefore, frustrate the well-reasoned intentions of the founding fathers in this respect; for the kind of consensus required to secure a two-thirds vote of Congress or applications for a "Convention" from two-thirds of the state legislatures would no longer be required to trigger the amending process.

There is a further reason why Congress may not call a convention empowered to propose amendments to the Constitution until it has received the kinds of applications contemplated by Article V from the requisite number of state legislatures. "A high degree of adherence to exact form . . . is desirable in this ultimate legitimating process."¹⁰ Because of the uniquely fundamental nature of a constitutional amendment, attempts to alter our Constitution should not be filled with highly questionable procedures which could reasonably cast doubt on the ultimate validity of the provision produced. The procedure followed in any effort to amend the Constitution should be so perfect that it renders unequivocal to all reasonable men the binding nature of the product. Consequently, Article V must insist upon a firm and unyielding adherence to the precise procedures it provides. This unusual need for certainty in the process of amending our fundamental law also lends additional force to the assumption that the precise procedures provided in Article V must be deemed exclusive.

Prior discussion demonstrates that in the process of "proposing Amendments" to the Constitution by "Convention," Congress resembles those state legislatures that are empowered to create such a body only after a demand for such action by the people at the polls.¹¹ That is, Congress may not call a convention empowered to "propose" amendments to the Constitution unless it receives from two-thirds of the state legislatures the kinds of applications for such action that are contemplated by Article V. As a consequence, the resolutions sponsored by the Council of State Governments and adopted by the legislatures of several states must be carefully scrutinized in order to determine their adequacy in this respect. If these resolutions are not applications for a convention within the meaning of Article V in no case would Congress be authorized or obligated to call a "Convention" pursuant thereto.

The resolutions sponsored by the Council of State Governments provide as follows:

Resolved by the House of Representatives, the Senate concurring that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States. [The text of one of the three desired constitutional amendments is then inserted.]¹²

¹⁰ Black, *supra* note 8, at 963.

¹¹ See Iowa Const. art. X, § 3; Nev. Const. art. XVI, § 2; N.Y. Const. art. XIX, § 1; S.D. Const. art. XXIII, § 2; Tenn. Const. art. XI, § 3.

¹² *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11-14 (Winter No. 1 1963).

It can be argued with substantial persuasiveness that these resolutions are not applications for an Article V "Convention."

Article V clearly specifies that Congress "shall call a Convention for *proposing* Amendments." The process of *proposing* amendments contemplates a conscious weighing and evaluation of various alternative solutions to the problems perceived. As Professor Charles Black has noted:

The process of "proposal" by Congress, contained in the *first* alternative of Article V, obviously [and necessarily] includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the second alternative, ought to be taken to denote a mechanical take-it or leave-it process.¹³

Common sense alone suggests that Article V contemplates a deliberative convention that would itself undertake fully to evaluate a problem, and propose those particular solutions that it deems desirable. The reason for this is that amendments to our National Constitution are chiefly matters of national concern. Consequently, all the alternatives should be carefully explored and debated on a national level, and the details of any proposed amendments fully worked out on a national level, before they are sent to the states for their more locally oriented action of ratification.

With this in mind, it can reasonably be assumed that the two modes provided for "proposing" amendments found in Article V were to be symmetrical. Whether "proposed" by Congress or a "Convention," the problem at which any amendment is directed is to be "considered as a *problem*, with [an evaluation] of a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power."¹⁴ Consequently, the "Convention" contemplated by Article V was to be a fully deliberative body — with power to propose to the states as amendments any solutions to the problem submitted to the "Convention" that it deemed best.

If Article V contemplates this kind of a "Convention . . . for proposing Amendments," the resolutions sponsored by the Council of State Governments should be deemed insufficient applications within the meaning of that provision. Instead of requesting a deliberative convention with full power to propose to the states any amendments dealing with the subject in question that it thinks proper, these resolutions demand "a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States."¹⁵ As a result, the resolutions in issue really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part

¹³ Black, *supra* note 8, at 962.

¹⁴ *Id.* at 963 (emphasis added).

¹⁵ See text accompanying note 12, *supra*.

of the *ratifying* process, rather than part of the deliberative process for "proposing" constitutional amendments.¹⁶ Consequently, the resolutions in question should not empower Congress to call a convention authorized to submit amendments to the states for ratification. They are not "Application[s for a] Convention . . . for *proposing* amendments" as Article V demands; rather, they are applications for a convention empowered solely to approve or disapprove the submission to the states of particular amendments "proposed" elsewhere.

Furthermore, Congress has no authority to treat the resolutions sponsored by the Council of State Governments as applications for the kind of convention Article V does contemplate. It cannot be inferred from these resolutions requesting a convention empowered solely to approve or disapprove particular amendments for submission to the states, that the state legislatures tendering them would be satisfied or willing to have a plenary convention consider the problems at which these amendments were directed, and submit to the states the solutions to those problems that *the convention* deems best. "It is not for Congress to guess whether a state which asks for one kind of a 'convention' wants the other as a second choice. Altogether different political considerations might govern."¹⁷

A further defect in the resolutions may preclude their characterization as valid Article V applications. The text of each of the amendments contained in the propositions sponsored by the Council of State Governments specifies that it is to be ratified by "the state legislatures."¹⁸ Article V clearly indicates that regardless of the mode of an amendment's proposal, *Congress* is to decide whether it shall be ratified by three-fourths of the state legislatures or three-fourths of special ratifying conventions held in each state.¹⁹ As a result, the resolutions in question may also be deemed insufficient as Article V applications because they are attempting to achieve an illegitimate end. They seek to deny Congress the discretion to choose the mode whereby the states might ratify any product of the convention they seek.

Prior discussion should demonstrate that Congress could not legitimately treat the resolutions in question as valid applications for an Article V convention. Consequently, it should have no authority to call such a "Convention for proposing Amendments" to the Constitution pursuant thereto. Since precedent does exist for the proposition that courts will review the validity of a constitutional amendment on the merits in light of *some* procedural defects that may have vitiated its proper proposal or adoption,²⁰ there is a possibility that amendments proposed by any convention called pursuant to *these* resolutions

16 Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, 49 A.B.A.J. 631, 633 (1963). He specifically notes that the purpose of including the actual text amendments was to insure that the "applicants" for a convention retained control over the amendments ultimately proposed.

17 Black, *supra* note 8, at 964.

18 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11-14 (Winter No. 1 1963).

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

20 The courts will adjudicate on the merits the validity of a constitutional amendment in light of any alleged procedural defects that may have vitiated its proper proposal or adoption. See *Dillon v. Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

would be held invalid in an appropriate judicial proceeding. Indeed, at the behest of a proper litigant a court might even enjoin the election of delegates to any convention called on the basis of such inadequate Article V applications.

However, it can be argued with great force that the sufficiency for Article V purposes of the resolutions sponsored by the Council of State Governments is a nonjusticiable political question,²¹ whose resolution is committed exclusively and finally to Congress. While there is no case directly on point, the dicta of four Justices of the United States Supreme Court in the case of *Coleman v. Miller*²² should be recalled. "Undivided control of [the amending] process has been given by . . . Article [V] exclusively and completely to Congress. 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."²³

Furthermore, there may be a "textually demonstrable constitutional commitment of the [particular] issue to a coordinate political department."²⁴ That is, since Congress is to call the Article V convention on receipt of applications from the proper number of states requesting such a body, Congress alone may be empowered to decide whether those applications tendered are sufficient. By the same token it can be argued that the validity of these resolutions as applications for an Article V convention is nonjusticiable because of "the impossibility of a court's undertaking independent resolution [of the question] without expressing lack of respect due coordinate branches of government."²⁵ If this is true, and the validity of these resolutions as applications for an Article V convention is "not meet for judicial determination," the decision of Congress on this question, whatever it is, will be conclusive on the courts for all purposes.

II.

The next question presented by the current effort to propose amendments to the Constitution by convention concerns the role of state governors in the application process. Must applications for an Article V convention be approved by the legislatures *and* the governors of two-thirds of the states to be effective? Or, is legislative approval of these applications by the required number of states alone sufficient to empower Congress to call a convention for proposing amendments?

It should be noted that the Council of State Governments specifies that the resolution it sponsors "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto."²⁶ The correctness of the approach taken by the Council of State Governments in this respect depends on whether the term "legislature" in the application provision of Article V means the

21 See Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 791-92 (1927); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1071 (1957).

22 *Coleman v. Miller*, 307 U.S. 433 (1939).

23 *Id.* at 459 (1939) (concurring opinion).

24 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

25 *Id.* at 217.

26 *Amending the Constitution to Strengthen the States in the Federal System*, 19 State Government 10, 11 (Winter No. 1 1963).

whole legislative process of the state — as defined in the state constitution — or only its representative lawmaking body. As we will see, close analogies suggest that this is a justiciable question.

The 1920 case of *Hawke v. Smith, No. 1*²⁷ interpreted “legislatures” in the ratification clauses of Article V to mean the representative lawmaking body only, since “ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word.”²⁸ If the term “legislature” is interpreted to mean only the state’s representative lawmaking body in the ratification clauses of Article V, it should bear the same meaning in the application clauses of that provision. There would seem to be no valid reason for according a different meaning to the one term in these two different clauses of the same constitutional provision.

Further support for the view that the governor of a state need not sign its application for an Article V convention can be gleaned from the case of *Hollingsworth v. Virginia*.²⁹ In that suit counsel argued that the Eleventh Amendment was invalid because after it had been approved for proposal to the states by a two-thirds vote of Congress, it had not been tendered to the President for his signature. On this basis it was asserted that the Amendment had never been properly submitted to the states for their ratification. Mr. Justice Chase answered this contention by asserting that “the negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition, or adoption, of amendments to the Constitution.”³⁰

It is easy to apply this reasoning to the powers of state governors and conclude similarly that the executive of the state has no function to perform in the application process under Article V. The governor’s approval of such an application for a convention is unnecessary; and an executive veto may be disregarded. Consequently, effective applications for an Article V convention need only be approved by a state’s legislature³¹ — and in this respect, the theory upon which the resolutions sponsored by the Council of State Governments is predicated is correct.

III.

The current effort to seek a constitutional convention through the application process also raises a question of timing. That is, in order to be effective,

27 253 U.S. 221 (1920). That case held that a state could not restrict the ratifying power of its legislature by providing for a binding popular referendum on the question.

28 *Id.* at 229. As a result, the Court held that a state constitutional provision that provided for a referendum on the action of the General Assembly in ratifying any proposed amendment to the United States Constitution was in conflict with Article V. *Contra, State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 Pac. 920 (1919). An approach similar to that of *Hawke v. Smith, No. 1* has been taken by state courts with regard to state constitutional amendments. See *Mitchell v. Hopper*, 153 Ark. 515, 241 S.W. 10 (1922); *Larkin v. Gronna*, 69 N.D. 234, 285 N.W. 59 (1939).

29 3 U.S. (3 Dall.) 378 (1798).

30 *Id.* at 381. “The most reasonable view would seem to be that the signature of the chief executive of a state is no more essential to complete the action of the legislature upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment.” Ames, *The Proposed Amendments to the Constitution of the U.S. During the First Century of Its History*, H.R. Doc. No. 353, pt. 2, 54th Cong., 2d Sess., 298 (1897).

31 See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS ON FEDERAL TAX RATES 7-8 (Comm. Print 1952); Note, 70 HARV. L. REV. 1075 (1957).

within what period must the resolutions be adopted by two-thirds of the state legislatures? There would seem little doubt that Congress would neither be empowered nor under a duty to call an Article V convention unless it receives "relatively contemporaneously," proper applications from the required number of state legislatures.³² The reason for this is that each step in the amending process is meant to demonstrate significant agreement among the people of this country — *at one time* — that changes in some particular part or the whole of our fundamental law are desirable. Nothing less would seem acceptable in a process of such significance and lasting impact.

The case of *Dillon v. Gloss*³³ lends support to the assumption that a convention can properly be called pursuant to applications for an Article V convention only if they are made relatively contemporaneously by the legislatures of two-thirds of the states. In that suit the United States Supreme Court sustained the power of Congress to fix the time period during which ratification of a pending amendment could be effective. After noting that Article V was silent on this question, the Court commented as follows:

What then is the reasonable inference or implication? Is it that ratification may be had at any time as within a few years, a century or even a longer period; or that it must be had within some reasonable period which Congress is left free to define?³⁴

After admitting that neither the debates in the Federal Convention nor those in the state conventions ratifying the Constitution shed any light on this question, the Court concluded that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix."³⁵ The Court's rationale was:

As ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people

³² Additionally, Congress may not properly call an Article V Convention unless a sufficient number of timely applications also agree on the problem or *general subject matter* that such a body should consider. But they need not be otherwise identical. That is, it is sufficient if the specific constitutional changes suggested by each application concern the same general subject matter; it is not necessary that each application propose the same changes in that subject matter. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG. 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME LAW. 185, 195-96 (1951); Note, 70 HARV. L. REV. 1067 (1957). *But see* ORFIELD, *op. cit. supra* note 8, at 42; Wheeler, *Is a Constitutional Convention Impending?*, 21 ILL. L. REV. 782, 795 (1927).

The prior position seems correct for many of the same reasons that such applications must be reasonably contemporaneous to be effective. Sufficient national agreement to warrant the calling of an Article V Convention is evidenced only if the legislatures of two-thirds of the states agree that a convention is needed to deal with the *same* general problem or subject matter. Consequently, applications for a convention dealing with divergent subjects such as some dealing with the treaty power, some dealing with the taxing power, and some desiring a general constitutional revision, should not be counted together. The problem of whether heterogeneous applications should be considered together does not really arise in the present case since the Council of State Governments proposes that two-thirds of the states adopt identical resolutions. Twelve states have already adopted one of these resolutions. Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175, 1182-83 (1963).

³³ 256 U.S. 368 (1921).

³⁴ *Id.* at 371.

³⁵ *Id.* at 375.

in all sections at relatively the same period which of course ratification scattered through a long series of years would not do.³⁶

This logic would seem equally compelling in regard to the process of proposing amendments to the Constitution. Article V is silent as to how long applications for a convention are to retain their vitality. But to exhibit any significant or meaningful agreement as to the desirability of such a convention, applications from two-thirds of the states must be "sufficiently contemporaneous . . . to reflect the will of the people in . . . [different] sections at relatively the same period." That is, "to be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then, would they be persuasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought also to be expressive of similar views respecting the . . . [subject matter] of the amendment sought."³⁷

While *Dillon v. Gloss*³⁸ seems to establish the authority of Congress to fix reasonable time limitations for the application as well as the amending process, it does not solve the problem as to what would be considered sufficient contemporaneity in absence of such a stipulation. The case of *Coleman v. Miller*³⁹ is relevant to this inquiry, since it held that the period of time within which the states could validly ratify a proposed amendment was a nonjusticiable political question. That is, in the absence of any edification from Congress as to what constitutes a reasonable time in the ratification process, the Court refused to make such a determination. Its rationale was that

. . . the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.⁴⁰

While the previous discussion only directly considers the role of the judiciary in defining time limits in the ratification process, it probably also means that the courts will not independently determine whether applications from two-thirds of the states for an Article V convention have been tendered to Congress

36 *Id.* at 375. The Court quotes JAMESON, *CONSTITUTIONAL CONVENTIONS* § 585 (4th ed. 1887) at this point to the effect that: "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress."

37 Corwin & Ramsey, *The Constitutional Law of a Constitutional Amendment*, 26 *NOTRE DAME LAW.* 185, 195-98 (1951).

38 256 U.S. 368 (1921).

39 307 U.S. 433 (1939).

40 *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

with sufficient contemporaneity. *Coleman v. Miller* would seem to indicate that this question is solely for Congress, and its decision on the matter will be binding on the judiciary for all purposes.

How, then, should Congress determine whether tendered applications are sufficiently contemporaneous to be counted together? It has been suggested that the current Congress might only consider those applications submitted during its tenure.⁴¹ That is, in order to ascertain whether it is empowered or under an obligation to call an Article V convention, each Congress need only look to those applications tendered during its life. The 88th Congress need not consider any applications tendered during the 87th Congress, since the life of an application is only as long as the particular Congress to which it is tendered.

This standard of contemporaneity seems unacceptable for a variety of reasons. In the first place, ten applications tendered the last day of one Congress, and thirty submitted the first day of the following one would be insufficient even though they may have been submitted only three months apart. Additionally, it should be recalled that the state legislatures do not address their applications to any specific Congress.

It has also been suggested that at maximum only those applications tendered within the last generation be counted with each other; that is, that the effective life of an application not exceed a generation.⁴² However, no measure of the precise length of a generation is provided; nor is any satisfactory rationale offered to justify Congress' counting applications together that have been tendered over such an appreciable time period.

Congress might determine the effective life of an application, and therefore whether it can properly be counted with later applications on the same subject, by engaging in a full analysis of the application itself and all surrounding circumstances. This was at least suggested in *Coleman v. Miller*.⁴³ Among the factors that could be considered in determining the continuing vitality of an application might be the political tenor of the times, then and now; intervening or changing circumstances relevant to the subject matter of the application since its filing; the transitory or long-term nature of the problem to which the application for a convention addresses itself; whether the problem is still considered grave by most Americans; and so on. The difficulty with this approach is that it requires Congress to make a determination with regard to many variables that are unusually difficult if not impossible for even that politically oriented body properly to evaluate or handle.

A more persuasive and perhaps more sensible approach to the question of reasonable contemporaneity can be devised than any of the prior possibilities. In counting applications for an Article V convention, Congress should properly consider only those tendered in that period, prior to the most recent applica-

⁴¹ Sprague, *Shall We Have a Federal Constitutional Convention, and What Shall It Do?*, 3 MAINE L. REV. 115, 123 (1910). The author admits that as a practical matter, such a requirement of contemporaneity would render the application process incapable of fulfillment.

⁴² ORFIELD, *op. cit. supra* note 8, at 42.

⁴³ 307 U.S. 433 (1939).

tion, during which all of the state legislatures have had an opportunity to consider the question at a full regular session. That is, the maximum time between those applications that can be counted together should not exceed that period during which all state legislatures have met once for a full regular session. In no case could the time period involved exceed about two and a half years.⁴⁴

The advantage of this approach seems evident. The burden should always be on those who invoke this process to demonstrate clearly by sufficient contemporaneity of their applications that there is a present agreement among two-thirds of the states as to the desirability of a constitutional convention. Such a present consensus can only be realistically demonstrated by limiting the count of such applications to those made during the most recent period during which all state legislatures have had a reasonable opportunity to consider the question. Only applications filed during this period would accurately represent the results of the most recent poll that could reasonably be taken on the subject.

There are other advantages to limiting the life of an application to that period during which all other state legislatures have had a subsequent opportunity to consider similar action during a full regular session. Once applications for a convention are filed, attempts to withdraw them are not likely to be strenuously pressed. This is true even though the legislature may have changed its mind — or would no longer make such an application as a *de novo* proposition.⁴⁵ The requirement suggested here would cure this by forcing a reasonably frequent reconsideration of the desirability of such a convention in each state that had previously applied for one. Some assurance is thereby provided that such an extraordinary body will be convened only if applications from two-thirds of the states clearly demonstrate by the most recent, hence most reliable poll practicable, a present agreement on the subject.

The suggested requirement is neither unduly onerous, nor necessarily destructive of the "Application" process. States generally will not act alone in such matters. Indeed, the founding fathers probably contemplated some concert of action in such attempts to obtain a convention. The present effort is an excellent example. Furthermore, once a state legislature tenders such an application it can continually renew that application in its subsequent sessions. If there really is substantial agreement on the desirability of such a convention, debate on subsequent renewals of such applications should be relatively perfunctory, and the renewals easy to obtain.

The precise formulation that is offered for measuring the required contemporaneity of the applications may be fruitfully tested against the treatment

44 If legislature A made such an application at the very start of its session, say in February 1962, its application would retain its validity until the end of the next full regular session of all the state legislatures. Since many states meet only every other year, and one of those might make such an application at the end of its session, for example, as late as June or July 1964, a period of two and a half years may elapse between the first and last applications that may be counted together.

45 But note that in a good number of cases, states have attempted to rescind applications for an Article V Convention that they had previously tendered. 49 A.B.A.J. 1181-82 (1963).

of the same problem in the ratification process. The two situations seem closely analogous and probably would be treated similarly by Congress.⁴⁶

In four of the last seven amendments that Congress proposed to the states it specified that the latter were to have up to seven years to effectively ratify them.⁴⁷ Congress has also deemed all of the twenty-four amendments to the Constitution properly ratified within a time period sufficiently short to demonstrate a contemporaneous agreement among the people in three-fourths of the states, despite the fact that one took as long as four years from the date of its submission and another three and a half years.⁴⁸

So far, Congress has therefore rejected any test of contemporaneity as stringent as that suggested here. However, on the basis of its express action in four of the last seven amendments it submitted to the states, Congress may be inclined to consider seven years the absolute maximum period allowable to demonstrate a "current" agreement among the people in all sections of the country in respect to any question dealing with amendments to the Constitution. If this is so, proponents of the three "states' rights" amendments will have to secure the endorsement of their resolutions by the legislatures of two-thirds of the states within that period of time.

Congress could, of course, greatly reduce this period and quite reasonably choose to ignore any applications submitted prior to that most recent period during which all state legislatures had an opportunity to consider the question during a full regular session. But it seems rather unlikely that Congress would adopt a standard of contemporaneity in the "Application" process so much stricter than that which it has recently used in the ratification process.

IV.

The next major issue likely to arise in the current effort to convene a constitutional convention is the right of states tendering such applications to withdraw them. *Coleman v. Miller*⁴⁹ held that "the efficacy of ratifications by state legislatures, in light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in Congress."⁵⁰ It is likely that the courts would treat the closely analogous question of the effect of a state's "withdrawal" of its application for an Article V convention in a similar way. If this is true, the judiciary will refuse independently to resolve the question, feeling itself conclusively bound by Congress' decision in the matter.

How should Congress handle this problem? It has been argued that under

46 It might be contended that applications for a convention need not be made contemporaneously to be effective because the calling of a convention empowered only to *propose* amendments is far less significant than ratification. But this notion should be rejected. All parts of the amending process are too important to demand anything less than the kind of contemporaneous agreement suggested here.

47 U.S. CONST. amend. XXII; U.S. CONST. amend. XXI; U.S. CONST. amend. XX; U.S. CONST. amend. XVIII; see also *Dillon v. Gloss*, 256 U.S. 368 (1921).

48 The Constitution of the United States of America 47-48, 54 (Corwin ed. 1952). The 16th Amendment was proposed July 12, 1909, and ratification was completed on February 3, 1913, while the 22d Amendment was proposed on March 24, 1947, and ratification was completed on February 27, 1951.

49 307 U.S. 433 (1939).

50 *Id.* at 450 (1939).

Article V only forward steps can be taken and therefore a state cannot effectively withdraw an application for a convention.⁵¹ This view seems entirely erroneous and untenable. It would base the presence of a sufficient number of applications solely upon a mechanical process of addition and ignore the extent to which each application reflects the existence of the required contemporaneous agreement that an Article V convention is desired. Consequently, in determining whether two-thirds of the states have applied for a convention, applications which have been rescinded should be disregarded;⁵² for they no longer evidence any present agreement that a convention should be called.

Any precedent that may exist for denying states the right to rescind their ratifications of interstate compacts⁵³ or constitutional amendments⁵⁴ is not apposite here. Ratification is the "final act by which sovereign bodies confirm a legal or political agreement arrived at by their agents."⁵⁵ Applications for a constitutional convention, however, are merely "formal requests" by state legislatures to Congress, requesting the latter to "call a Convention for proposing Amendments" because there is a present consensus that such action is desirable. Consequently, they do not share the same dignity or finality as ratifications which might justify the latter's irrevocable nature.⁵⁶

V.

Assuming that the resolutions in question are deemed to be valid Article V applications and are tendered to Congress by two-thirds of the states within a "reasonable" time of each other, is Congress under a duty to call a constitutional convention? Or, does it have discretion to use its judgment as to whether such a convention is really desirable or necessary? The former conclusion seems most plausible.

Article V states: "On the Application of the Legislatures of two thirds of the several States [Congress] *shall* call a Convention for proposing Amendments." From this language alone it would seem clear that Congress was to be under a firm and nondiscretionary obligation to call a Convention when sufficient applications from two-thirds of the states are tendered. The word "shall" as used in Article V is clearly mandatory.

More, however, is available than the bare language itself to support this conclusion. The debates of the Constitutional Convention indicate that in pro-

51 See Note, *Rescinding Memorialization Resolutions*, 30 *CHI.-KENT. L. REV.* 339 (1952).

52 Fensterwald, *Constitutional Law: The States and the Amending Process — A Reply*, 46 *A.B.A.J.* 717, 719 (1960); Grinnel, *Petitioning Congress for a Convention: Cannot a State Change Its Mind?*, 45 *A.B.A.J.* 1165 (1959); Note, *Proposing Amendments to the United States Constitution by Amendment*, 70 *HARV. L. REV.* 1067, 1071 (1957). *Contra*, Packard, *Constitutional Law: The States and the Amending Process*, 45 *A.B.A.J.* 161 (1959).

53 See *West Virginia v. Sims*, 341 *U.S.* 22 (1950).

54 There is precedent for Congressional refusal to permit a state to withdraw its ratification. Congress did so during Reconstruction when several states attempted to withdraw their ratification of the post-Civil War amendments. The decision of Congress in that case seems clearly wrong. Its action may be attributed to the unusual temper of the times. See Clark, *The Supreme Court and the Amending Process*, 39 *VA. L. REV.* 621, 624-26 (1953); Grinnel, *supra* note 52, at 1165.

55 Fensterwald, *supra* note 52, at 719.

56 The common sense of Article V, however, would seem to be that ratifications can also be effectively rescinded anytime before three-fourths of the states lend their assent to the proposed amendment. *But see* note 54 *supra*.

viding for the proposal of amendments by convention the founding fathers intended to furnish a method by which the Constitution could be altered even though Congress was opposed.⁵⁷ Further support for the mandatory and non-discretionary nature of Congress' duty to call a convention when the prerequisites are met can be found in the *Federalist Papers*. In paper No. 85 Hamilton insisted:

By the fifth article of the plan, the Congress will be obligated "on application of the legislatures of two thirds of the states . . . to call a Convention for proposing amendments . . ." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body.⁵⁸

It therefore seems clear that if Congress receives applications for an Article V convention from two-thirds of the state legislatures within a "reasonable time period," it is absolutely bound to convene such a body.⁵⁹

However, it should be relatively clear that the courts would never attempt to force Congress to call such a convention⁶⁰ since the latter's decision as to whether many of the prerequisites to such a call have been met will probably be conclusively binding on the former. For example, prior discussion demonstrates that the intrinsic adequacy as applications for an Article V convention of any resolutions tendered to Congress, their timeliness, and their continuing validity in light of attempts to withdraw them, are all likely to be considered by the judiciary as nonjusticiable political questions. If this is so, Congress' decision on these matters will conclusively bind the courts, and necessarily disable the latter from playing any positive role in forcing a convention call.

It should also be noted that the courts have never issued an injunction or writ of mandamus directly against the President or Congress because of the doctrine of separation of powers embodied in our National Constitution, and the consequent obligation of respect owed co-equal branches of the National Government by the federal judiciary.⁶¹ To do so here would reflect a "lack of

57 When final debate on Article V began in the Constitutional Convention the draft being considered provided that "the Congress, whenever two-thirds of both Houses shall deem necessary, or on the applications of two-thirds of the Legislatures of the several States shall propose amendments to this Constitution . . ." 2 FARRAND, *THE RECORDS OF THE FEDERAL CONSTITUTION* 629 (1911).

"Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the national government should become oppressive . . ." 2 FARRAND, *op. cit. supra*, at 629. As a result, Mr. Gouverneur Morris and Mr. Gerry moved to amend the article to require a convention or application of two-thirds of the states. 2 FARRAND, *op. cit. supra*, at 629. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a call (sic) a convention on the like application." 2 FARRAND, *op. cit. supra*, at 629-30.

58 *THE FEDERALIST* No. 85, at 546 (Wright ed. 1961) (Hamilton).

59 See 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 331 (2d ed. 1929); Packard, *Legal Facets of the Income Tax Rate Limitation Program*, 30 *CHI-KENT L. REV.* 128, 133-34 (1952); Note, 70 *HARV. L. REV.* 1067 (1957). *Contra*, Platz, *Article V of the Federal Constitution*, 3 *GEO. WASH. L. REV.* 17, 44 (1934).

60 See 1 WILLOUGHBY, *op. cit. supra* note 59, § 331; Fensterwald, *supra* note 52, at 720. *Contra*, Packard, *supra* note 52, at 196.

61 In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), the Supreme Court unani- mously held that the President himself is not accountable to any court save that of impeach-

respect” for the actions of a coordinate branch of the Federal Government in regard to a subject that may even textually be exclusively committed to its judgment by the Constitution.⁶² Therefore, aside from the very practical inability of the courts adequately to enforce any decree directing Congress to call such a convention,⁶³ sound reasons and well-established precedent dictate the correctness of the assumption that it lacks the authority to do so.

Recent cases holding that the courts can force the states to reapportion their legislatures conformably to equal protection,⁶⁴ or that the courts can force state legislatures to draw congressional districts so that they are as nearly equal in population as practicable⁶⁵ are inapposite here. The reason for this is that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and *not* the federal judiciary’s relationship to the States which gives rise to the ‘political question’.”⁶⁶ That is, “the nonjusticiability of a political question is primarily a function of the separation of powers.”⁶⁷ Judicial review on the merits of state legislative apportionment or the drawing of congressional districts by the states only involves federal judicial superintendence of *state* action or inaction; but judicial review of Congress’ failure to call an Article V convention directly involves the federal courts in an effort to force its co-equal branch of government to perform a duty exclusively entrusted to it by the Constitution.

VI.

What is the President’s role in the calling of an Article V convention? Does the call for a convention, like any ordinary piece of legislation, require his signature or a two-thirds vote of Congress for it to be valid?

The previously discussed case of *Hollingsworth v. Virginia*⁶⁸ would seem to indicate that the need for Presidential concurrence in any convention call is justiciable, but that his signature is never required for the valid issuance of such a call. Consequently, the President’s failure to join in the Congressional summons of such a convention would in no way impair the validity of any amendment the latter body proposed. The language of Article V directly supports this conclusion since it asserts that “*the Congress*” is to call a “Convention for proposing Amendments” on “the Application of the legislatures of two-thirds of the several states.”

However, a contrary argument of substantial weight has been made.⁶⁹ Article I, Section 7 of the Constitution provides that

ment either for the nonperformance of his constitutional duties or for the exceeding of his constitutional powers.

“The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.” *Mississippi v. Johnson, supra* at 500.

62 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

63 How could the courts force Congress to call a convention when all the details of such a body seem to be left to the unreviewable discretion of Congress? Would a court call one itself if Congress failed to follow a court decree directing it to do so?

64 *Baker v. Carr*, 369 U.S. 186 (1962).

65 *Westberry v. Sanders*, 84 S. Ct. 526 (1964).

66 *Baker v. Carr, supra* note 64, at 210. (Emphasis added.)

67 *Id.* at 210.

68 3 U.S. (3 Dall.) 378 (1798).

69 See *Black, supra* note 8, at 965.

. . . every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the case of a Bill.

Hollingsworth v. Virginia carved an exception to this rule as far as Congress' proposal of Constitutional Amendments was concerned. But it can be argued that this mode of proposing constitutional amendments was taken out of the veto process by the Supreme Court in that case solely because "the congressional proposal must be by two-thirds in each house [and] it [therefore] may have been thought that the requirement for overriding the veto was already met."⁷⁰ This ground would not exist if Congress called a constitutional convention to propose amendments by a simple majority vote.

As a result, it can be argued that the commands of Article I, Section 7, apply to the convention call since it is an "Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives [are] . . . necessary." If this is true, the President must sign any call by Congress for a constitutional convention and if he vetoes it, Congress can override him only by a two-thirds vote of both Houses.

Further support for this point of view can be gleaned from the fact — to be shortly noted — that Congress can specify how the convention is to be chosen, its organization, rules, etc. This being so, Congress must necessarily make more than a mere call for a convention. Such a call would be meaningless without the inclusion of the specific terms upon which such a body is to be constituted, organized, and conducted. These terms to be spelled out by Congress would appear similar to the general kinds of legislation with which Congress normally deals. Consequently, no reason of logic dictates its different treatment in respect to the need for Presidential approval.

This conclusion is bolstered by the desirability of such a requirement. The President is the only official who is elected by and responsible to the American people as a whole. His concurrence in the summoning of such a convention that would intimately affect the concerns of all individual Americans, and our Nation as a whole, therefore seems most logical and desirable.

The President's duty in such a case would be the same as that of Congress; to participate in such a call only if, in good conscience, he deems the requisites for such a convention to have been properly met. If Article V demands Presidential concurrence in such a call, the refusal of the chief executive to act, like that of Congress, would probably be conclusive on the courts,⁷¹ subject however to the right of Congress to override his judgment by a two-thirds vote. However, it should be reiterated that the need for Presidential concurrence in any congressional convention call might well be decided otherwise on the basis of

⁷⁰ *Id.* at 965.

⁷¹ See note 61 *supra* and the text accompanying that note.

Article V's specific language directing "*The Congress*" to call a convention, and the analogous case of *Hollingsworth v. Virginia*.⁷²

VII.

If Congress does call an Article V convention pursuant to the resolutions in question here, on what terms may it do so? How would such a convention be constituted, how would it operate, and what would be the scope of its authority? The terms of Article V give us little help. Indeed, Madison worried about these questions at the Convention of 1789. "He saw no objection . . . against providing for a convention for the purpose of proposing amendments, except only that difficulties might arise as to the form, the quorum, etc."⁷³

Since Article V empowers "*Congress*" to call the "Convention" when the requisites for the summoning of such a body are met, and Article V does not indicate the terms upon which such a convention is to be constituted, organized, or operated, Congress must be authorized to decide such questions. Under its power to call a convention, Congress therefore has implied authority to fix the time and place of meeting, the number of delegates, the manner and date of their election, whether representation shall be by states or by population, whether voting shall be by number of delegates or by states, and the vote in convention required to validly propose an amendment to the states.⁷⁴

If the broad dictum of *Coleman v. Miller*⁷⁵ is any guide to present judicial conviction Congress' determination in the above matters may be conclusive on the courts for all purposes. Such a refusal by the courts to review on the merits the propriety of the organizational ground rules imposed by Congress on an Article V convention might be defensible on the assumption that in Article V there is a "textually demonstrable constitutional commitment of th[is] issue to a coordinate political department."⁷⁶ Even if the courts are conclusively bound for all purposes by the congressional specifications regarding the terms upon which such a convention must be constituted, organized and operated, Congress will still be bound in its action on these questions by the Constitution and its judgment of the popular will. However, here as in most places in the amending process, the only available remedy for Congressional abuse may be political — resting with the electorate at the polls.

In calling an Article V convention Congress would not be justified in following by analogy the Constitutional Convention of 1787 where representation and voting were by states.⁷⁷ Nothing in the terms of Article V requires representation or voting in such a body to be on that basis. Furthermore, at the time of the 1787 Constitutional Convention the states

. . . were in a position of at least nominal sovereignty, and were

72 3 U.S. (3 Dall.) 378 (1798).

73 2 FARRAND, *supra* note 57, at 630.

74 See ORFIELD, *op. cit. supra* note 8, at 43-44; Black, *supra* note 8, at 959; Note, 70 HARV. L. REV. 1067, 1075-76 (1957). This continuing hand of Congress in the convention process need not appear unduly strange since Article V explicitly gives it the power to decide between modes of ratification regardless of the mode of proposing the amendment to the states.

75 307 U.S. 433 (1939).

76 *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, a good argument can be made to the contrary.

77 FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 57 (1962).

considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of a new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble union; there is a whole American people. The question in an amending convention now would [only] be whether innovations, binding on dissenters, were to be offered for ratification.⁷⁸

As a result, the propriety of a vote or representation by states in the 1787 Convention cannot settle the propriety of similar action in a convention today.

More appropriate than representation or voting by states in any Article V convention would be an apportionment of the delegates and voting power in such a body on the basis of population alone. Such an approach makes good sense not only because it would conduce to the most accurate expression of the national will, but also because regional interests are more than adequately weighted at the ratification stage where each state is given an equal voice. Congress should therefore provide that delegates to any Article V convention be elected from districts of equal population, and that each delegate have one vote.

Congress should also provide that an affirmative vote of two-thirds of the delegates would be required to propose any given amendment to the states. In this way it would assure a symmetry of concurrence in the bodies empowered to propose constitutional amendments — whether the body was Congress or a convention. Such symmetry is desirable because it would assure the same kind of overwhelming consensus in one route to proposal as the other, thereby avoiding possible forum shopping. A two-thirds requirement in such a convention would also guarantee that no amendment, regardless of its means of proposal, is ever submitted to the states before an overwhelming consensus as to its desirability is evidenced in a nationally oriented body.

From all of the above, it would seem clear that “no Senator or Representative [or the President if his concurrence is required] is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national interests.”⁷⁹ And as noted previously, their decision in this regard would seem to be unreviewable in the courts. That is, the sole remedy available to check an abuse of Congress’ judgment in this matter may be at the polls.

A further question is raised by the current effort to propose amendments to the Constitution by convention. Can either the states or Congress limit the scope of such a convention’s authority in any way? It should be recalled that the resolutions sponsored by the Council of State Governments avowedly attempt to restrict the convention to the approval or rejection of the precise amendments contained in those resolutions. Prior discussion has already demonstrated that an Article V convention is to be a fully deliberative body empowered to propose those solutions to a problem that *it* deems best. Consequently, such a convention cannot be limited by the state applications upon which it is predicated to the approval or rejection of the text of any particular amendments

⁷⁸ Black, *supra* note 8, at 964-65.

⁷⁹ *Id.* at 964.

contained therein. By the same token, Congress may not limit such a convention to the approval or rejection of any particular amendments.⁸⁰

While neither the states nor Congress may limit an Article V convention to the consideration of the terms of any particular provision, they should be able to restrict such a body to the proposal of amendments dealing with the same general subject matter as that contained in the applications upon which the convention is predicated. Indeed, of their own force, the state applications should limit any convention called by Congress to the proposal of amendments dealing with the same general subject matter as that requested in those applications. The reason for this is as follows.

An agreement is required among two-thirds of the state legislatures that a Convention ought to be held before Congress is empowered to convene such a body. No Article V convention may be called in absence of such a consensus. If the agreement is that a convention is desired only to deal with a certain subject matter, as opposed to constitutional revision generally, then the convention must logically be limited to that subject matter. To permit such a body to propose amendments on any other subject would be to recognize the convention's right to go beyond that consensus which is an absolute prerequisite for its creation and legitimate action.

If the prior conclusion is correct, and the state applications of their own force can bind any convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter requested in those applications, then Congress should disregard any amendment proposed by such a body which is outside of that subject matter. Here, as elsewhere, the courts will be bound by Congress' decision on the question if the issue is nonjusticiable. This, regardless of whether Congress deems a proposed amendment ineffective because it is beyond the scope of the convention's authority, or effective because it is within the scope of the convention's authority. On the other hand, if this question is justiciable, the courts may independently determine whether an amendment proposed by such a convention is beyond the general subject matter requested by the state applications. If such an amendment is outside that subject matter the courts might enjoin its ratification, or set the amendment aside afterwards because it was never properly proposed.

The notion that state applications can limit a convention called pursuant thereto solely to a consideration of amendments dealing with the same general subject matter as that contained in those applications is not widely accepted. It has been insisted that "the nature of the right conferred upon the state legislatures in requesting Congress to call a constitutional convention is nothing more or less than the right of petition."⁸¹ The Convention itself is a Federal instrumentality set up by Congress under powers granted to it by the Constitution. Since Article V directs *Congress* to call the convention, and is silent as to the details of such a body, Congress is the only authority entitled to specify

80 There is another reason why *Congress* cannot properly limit a convention to the approval or rejection of the text of any particular amendment. The framers of the Constitution probably intended the convention method of proposing amendments to be as free as possible from Congressional interference so that the "Convention" could propose any amendments it deemed desirable in spite of any Congressional objections to the provision. See note 57 *supra*.

81 Wheeler, *supra* note 21, at 795.

those details. Consequently, if any power can limit such a convention to the proposal of amendments dealing with the same subject matter as that contained in the state applications, it can only be Congress.⁸² "State legislatures . . . have no authority to limit an instrumentality set up under the federal Constitution. . . . The right of the legislatures is confined to applying for a convention, and any statement of purposes in their petition would be irrelevant as to the scope of powers of the convention."⁸³

If this is true, and the state applications cannot themselves bind a convention to a consideration of only the same subject matter requested in those applications, then Congress should be able to do so pursuant to its implied power to fix the terms upon which such a body shall operate.⁸⁴ A convention called pursuant to the resolutions in question here, for example, should not be permitted to propose amendments concerning the treaty power.⁸⁵ The reason for this is that the applications specifically request a convention for another purpose. A constitutional change should never be proposed by a convention unless two-thirds of the states have previously agreed that an amendment dealing with the particular subject matter involved is desirable, or that a convention was needed to consider a general constitutional revision. For this reason, it would seem anomalous were Congress powerless to limit the scope of a convention's authority to the general subject matter requested in the text of the applications upon which it is predicated. Certainly it would be under a duty to call a general convention if two-thirds of the state legislatures properly ask for one. Equally obvious should be its right and obligation to limit the scope of a convention to the same subject matter requested by the state applications.

Some authority for Congressional power in this respect can be gleaned from those state cases insisting that state constitutional conventions are subject to the restrictions contained in the call for the convention. The theory is that the legislatures call is a law and the delegates are elected under the terms of that law.⁸⁶ Consequently, they can exercise no powers beyond that conferred by such a statute or the Constitution itself.

Prior discussion should demonstrate that at least Congress can limit the scope of any Article V convention to the "subject matter" or "problem" at which the state applications were directed. Clearly, Congress is at least morally bound to do so. And in any subsequent litigation, the courts should respect

82 STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952).

83 ORFIELD, *op. cit. supra* note 8, at 45.

84 *Contra*, 46 Cong. Rec. 2769 (1911) (remarks of Senator Heyburn). ORFIELD, *op. cit. supra* note 8, at 45; Wheeler, *supra* note 21, at 796; Note, 70 HARV. L. REV. 1067, 1076 (1957).

85 See STAFF OF HOUSE COMM. ON THE JUDICIARY, 82ND CONG., 2d Sess., PROBLEMS RELATING TO STATE APPLICATIONS FOR A CONVENTION TO PROPOSE CONSTITUTIONAL LIMITATIONS OF FEDERAL TAX RATES 15 (Comm. Print 1952); JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS AND MODES OF PROCEEDING 10, 11, 493 (4th ed. 1887).

86 See *Wells v. Bain*, 75 Pa. 39, 51 (1874). *But see* *Goodrich v. Moore*, 2 Minn. 49, 53 (1858) (dictum). For debate on both sides of this question, see 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 1872-73, 52-61 (1873).

such a limitation imposed by Congress and disregard any provisions proposed by a convention that were beyond the latter's authority as so limited. Of course, the notion that the state applications can themselves limit the scope of a convention's authority solely to a consideration of the same subject matter as that contained in those applications should not be ignored. However, if that theory is rejected, the people of the United States will have to rely on Congress to expressly limit any Article V convention it calls to the proposal of amendments dealing with the same general subject matter as that contained in the state applications.

VIII.

If the amendments sponsored by the Council of State Governments were proposed by a validly convened and constituted convention, the states would still need to ratify them. As previously noted, the terms of the three "states rights" amendments specify that they are to be ratified by the *legislatures* of three-fourths of the states. Even if these precise amendments could be validly proposed by a convention called pursuant to the resolutions in question here, Congress would not be bound in this respect. Article V clearly empowers *Congress* to determine in its sole discretion which of the two modes of ratification specified in that provision shall be utilized;⁸⁷ this regardless of the method of the particular amendment's proposal. Consequently, that decision would still rest with Congress in the case at hand, and the courts would be bound in all respects by its choice in the matter. Congress could, therefore, choose to have any amendment proposed by such a convention "ratified by the Legislatures of three-fourths of the several states, or by Conventions in three-fourths thereof"

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