Chicago-Kent Law Review

Volume 48 | Issue 1 Article 3

April 1971

Constitutional Conventions and State Legislators

Doyle W. Buckwalter

CONSTITUTIONAL CONVENTIONS AND STATE LEGISLATORS

Doyle W. Buckwalter*

I. Introduction

Recent efforts to amend the United States Constitution, i.e., apportionment, a rewriting of Article V, and legislation to implement the amending clause, have directed considerable public attention to the possibility of a constitutional convention. The recent spate of congressional and academic discussions has revealed several basic issues in this controversy, many of which have surprised public officials. With the death of Senator Everett Dirksen in 1969 and the apparent insufficient number of state petitions for a convention, the impetus for an immediate convention has dramatically diminished. Yet, the fate of congressional bills to operationalize the convention portion of Article V remains indeterminate. Such legislation, in essence, would establish explicit procedures for state and federal government involvement in establishing constitutional conventions.[1] There has been little attempt to ascertain state legislative attitudes and to integrate additional data on state legislative processes on the subject of constitutional conventions. Consequently, this paper shall (1) consider a brief history of the Article, and (2) discuss four basic questions of the convention controversy and how these are perceived by state legislators throughout the United States.

II. Early Precedents and Debates

As the Constitutional Convention of 1787 convened to consider basic plans for revising the Articles of Confederation, there were several alternative approaches to the question of future alteration of the Articles. It became clear that a major focal point of discussion would be the inoperative amending process. Charles Pinckney, in his "Plan for a Federal Constitution," urged on May 29, the following amendment procedure:

> If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the

* B.A., M.A., Brigham Young University; Ph.D., University of Michigan. Associate Professor of Political Science, Brigham Young University.

[1] S. 2307, 90th Cong. and S. 623, 91st Cong. were the principal procedural legislative measures introduced.

> consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.[2]

Pinckney expressed deep concern that unless alteration of the unanimous consent clause of the Articles was imminent, the nation would inevitably continue in its "depressed situation."[3]

The Virginia Plan, suggested by Edmund Randolph, contained in its Resolution XIII the reference to amendments:

> . . . provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.[4]

Charles Pinckney "doubted the propriety or necessity for the last clause," but Elbridge Gerry claimed that "the prospect of such a revision would also give intermediate stability to the Government."[5] It was Madison who strongly advocated not requiring the assent of the national government. He asserted it was:

> . . . better to provide for them in an easy, regular and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.[6]

There was unanimous acceptance of Randolph's proposal with the exception of the last clause.

Subsequently, Alexander Hamilton presented his plan which called for adoption of the following amendment procedure:

> This constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two-thirds of the members of both Houses, and ratified by the Legislature of, or by Conventions of deputies chosen by the people in two-thirds of the States composing the Union.[7]

From July 26 to August 6, the Detail Committee considered the amending provision and subsequently reported the following:

> On the application of the Legislatures of two thirds of the States

2 James Madison, Journal of the Federal Convention 72 (Scott ed. 1898).
3 I. Farrand, The Records of the Federal Convention of 1787 120 (1911).
4 *Supra* n.2 at 63.
5 *Id.* at 110.
6 *Id.* at 149.
7 *Supra* n.3 at 693.

> in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for the purpose.[8]

On September 10, Elbridge Gerry urged reconsideration of the amending provision as he vehemently objected to the two-thirds requirement because it might subvert the Union. The reconsideration motion, though not unanimous, was given support from Madison. He prophetically declared: "there [is] extreme vagueness of the terms, 'calling a convention' . . . ."[9] He further inquired, "How was a convention to be formed, by what rule decided—what is the force of its acts?"[10] Wilson's laborious attempt to retain the provision "of three-fourths of the states" was successful. Madison eventually proposed a slightly modified version which appeared most palatable. It read:

> The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as parts thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification be proposed by the Legislature of the U.S.[11]

Only two short amendments were added to Madison's proposal—no amendments affecting specific items in Article I before 1808, and the right of state suffrage in the Senate.[12]

Randolph and Gerry, among others, refused to sign the Constitution on grounds that the role of the Congress was objectionable and, moreover, that frequent changes were extremely undesirable. Conversely, Patrick Henry accused the framers of the Constitution with attempting to make it virtually impossible for amending because the three-fourths ratification process was inordinately demanding. Madison summarized the thoughts of those supporting the amending procedures:

> That use alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the state

[8] I. Farrand, The Records of the Federal Convention of 1787 159 (1911).
[9] *Supra* n.2 at 693.
[10] *Id.*
[11] *Supra* n.3 at 126-127.
[12] *See* James Madison, The Debates in the Federal Convention of 1787 which Framed The Constitution of The United States 573 (Hunt and Scott ed. 1929).

> governments to originate the amendment of errors, and they may be pointed out by the experience on one side, or on the other.[13]

Ratification by the states did involve numerous deliberate discussions of the amending clause, yet the arguments were repetitious of those at the Convention. Since that time, states have utilized Article V many times in requesting a congressional call for a constitutional convention.

Between 1789 and 1889, only ten petitions for a constitutional convention were registered with Congress. New York and Virginia submitted petitions, simultaneously with their constitutional ratifications.[14] Congress rendered the convention process unnecessary, in these particular cases, by opting for the first amendment procedure. In 1833, South Carolina, Alabama and Georgia *memorialized* Congress to call a convention. South Carolina petitioned to secure a clarification of federal and state powers, while Georgia desired a thorough consideration of the personal freedoms of Indians. Alabama sought a convention to summarily consider all amendment proposals presently before Congress.[15] Prior to the outbreak of the Civil War, Kentucky, Indiana, Virginia, Illinois, and Ohio petitioned for a constitutional convention in a desperate attempt to prevent the dissolution of the nation. The convention, in the latter case, would have been officially assigned the responsibility of preparing an authoritative interpretation of the constitution.

Subsequent to 1893, the utilization of the application process was much more prevalent. Commencing with Nebraska, some thirty-one states petitioned Congress concerning the direct election of Senators. Since the beginning of the twentieth century, Americans have witnessed a significant variety of suggested convention topics (See Table I).

III. Current Action and Attitudes on Constitutional Conventions

As of January, 1970, 32 states had petitioned Congress to summon a constitutional convention to consider the subject of state legislative apportionment.[16] Though this amount was two less than the requisite

[13] The Federalist, No. 43 286-87 (Mod. Lib. ed. 1937).

[14] H.R. Jour., 1st Cong., 1st Sess. 32, 34 (1789).

[15] S. Jour., 22d Cong., 2d Sess., 65-66, 83 (1833).

[16] On July 8, 1969, the lower House in the Illinois State Legislature withdrew its support of its original 1965 Joint Resolution. On August 13, 1969, the Oklahoma State Attorney ruled its concurrent resolution petition as not binding, as the Governor's approval was refused. The Utah resolution as declared null and void by U.S. Federal Court because of the malapportionment issue. Consequently, the action in these three states leaves only 29 state petitions on file with Congress.

TABLE I

State applications to Congress for constitutional conventions, listed by subject matter.*

1. Direct election of senators

Ark. (1901, 1903, 1911); Calif. (1903, 1911); Colo. (1901); Ida. (1901, 1903); Ill. (1903, 1907, 1909); Ind. (1907); Iowa (1904, 1907, 1909); Kans. (1901, 1905, 1907, 1909); Ky. (1902); La. (1907); Me. (1911); Mich. (1901); Minn. (1901, 1911); Mo. (1901, 1903, 1905); Mont. (1901, 1903, 1905, 1907, 1908, 1911); Neb. (1893, 1901, 1903, 1907); Nev. (1901, 1903, 1905, 1907, 1907); N.J. (1907); N.C. (1901, 1907); N.D. (1903); Ohio (1908, 1911); Okla. (1908); Ore. (1901, 1901, 1903, 1903, 1907, 1909); Penn. (1901); S.D. (1901, 1907, 1909); Tenn. (1901, 1901, 1903, 1905); Tex. (1901, 1911); Utah (1903); Wash. (1903); Wisc. (1903, 1907, 1908); Wyo. (1895)

2. Limitation of federal taxing power

Ala. (1943); Ark. (1943); Del. (1943); Fla. (1951); Ga. (1952); Ill. (1943); Ind. (1943), 1957); Iowa (1941, 1951); Kans. (1951); Ky. (1944); La. (1950); Me. (1941, 1951); Mass. (1941); Mich. (1941, 1949); Miss. (1940); Neb. (1949); N.H. (1943, 1951); N.J. (1944); N.M. (1951); Okla. (1955); Penn. (1943); R.I. (1940); Utah (1951); Va. (1952); Wisc. (1943); Wyo. (1939)

3. Prohibition of polygamy

Calif. (1909); Conn. (1915); Del. (1907); Ill. (1913); Iowa (1906); La. (1916); Me. (1907); Md. (1908, 1914); Mich. (1913); Minn. (1909); Mont. (1911); Neb. (1911); N.H. (1911); N.Y. (1906); N.D. (1907); Ohio (1911); Okla. (1911); Ore. (1913); Penn. (1907, 1913); S.C. (1915); S.D. (1909); Tenn. (1911); Tex. (1911); Vt. (1912); Wash. (1909, 1910); W. Va. (1907); Wis. (1913)

4. General revision of the Constitution

Colo. (1901); Ga. (1832); Ill. (1861, 1903); Ind. (1861); La. (1907); Mo. (1907); Mont. (1911); Neb. (1907); Nev. (1907); N.Y. (1789); N.C. (1907); Ohio (1861); Okla. (1908); Ore. (1901); Tex. (1889); Va. (1788, 1861); Wash. (1901, 1903); Wis. (1911, 1929); Iowa (1907, 1909); Kans. (1901, 1905, 1907); Ky. (1861)

5. World federal government

Calif. (1949); Conn. (1949); Fla. (1943, 1945 ,1949); Me. (1949); N.J. (1949); N.C. (1949)

6. Repeal of 18th amendment

Mass. (1931); Nev. (1925); N.J. (1932); N.Y. (1931); Wis. (1931)

7. Limitation of presidential tenure

Ill. (1943); Iowa (1943); Mich. (1943); Mont. (1947); Wis. (1943).

8. Treaty making of president

Fla. (1945); Ga. (1952); Ind. (1957)

9. Taxation of federal and state securities

Calif. (1935); Ida. (1927)

10. Against protective tariff

Ala. (1833)

11. Federal regulation of wages and hours of labor

Calif. (1952)

12. Federal tax on gasoline

Calif. (1952)

13. Tidelands control

Tex. (1949)

14. Control of trusts

Ill. (1911)

15. Prohibition of grants-in aid

Penn. (1943)

* This is an updated version of Cyril F. Brickfield, *Problems Relating to A Federal Constitutional Convention*, House Committee on the Judiciary, 85th CONG., 1st SESS., (1957), 89-91.

TABLE I (*Continued*)

16. Popular ratification of amendments
La. (1920)

17. Constitutionality of state enactments
Mo. (1913)

18. Townsend Plan
Ore. (1939)

19. Revision of Article V
Ark. (1963); Fla. (1963); Ida. (1957, 1963); Ill. (1953, 1963); Ind. (1957); Kans. (1963**); Mich. (1956); Mo. (1963); Okla. (1963); S.C. (1963); S.D. (1953, 1963, 1955); Tex. (1955, 1963); Wyo. (1963); Va. (1965)

20. Reapportionment
Ark. (1963); Ind. (1957); Ida. (1963); Kans. (1963); Mo. (1963); Mont. (1963); Nev. (1963); S.C. (1963); Tex. (1963); Wash. (1963); Wyo. (1963); Va. (1964); Ala. (1965); Ariz. (1965); Ark. (1965); Colo. (1965); Fla. (1965); Ga. (1965); Ida. (1965); Ill. (1965***); Kans. (1965****); Ky. (1965); La. (1965); Md. (1965); Minn. (1965); Miss. (1965); Mo. (1965); Mont. (1965); Neb. (1965); N.H. (1965); N.C. (1965); N.D. (1965); Okla. (1965*****); S.C. (1965), S.D. (1965); Tex. (1965); Va. (1965); Utah (1965******); Ala. (1966); N.M. (1966); Tenn. (1966); Colo. (1967); Ill. (1967); Ind. (1967); Nev. (1967); N.D. (1967); Iowa (1969)

21. Balancing the budget
Ind. (1957; Wyo. (1961)

22. State control of schools
Ga. (1955, 1959, 1965); La. (1965); Miss. (1965)

23. Examination of the 4th amendment ratification
Ark. (1959)

24. Repeal of 16th amendment
Nev. (1960); S.C. (1962)

25. Establish a Court of the Union
Ala. (1963); Ark. (1963); Fla. (1963); S.C. (1963); Wyo. (1963)

26. Presidential elections
Ark. (1963); Colo. (1963); Mont. (1963); S.D. (1963); Tex. (1963); Utah (1963); Wis. (1963); Kans. (1963*******); Okla. (1965); Ill. (1967); Neb. (1965)

27. Limiting and retiring the national debt
Ida. (1963)

28. Pay pensions to certain people
Mass. (1964)

29. Reading the Bible in schools
Mass. (1964)

30. Prayer in schools
Mass. (1964)

31. Sharing income tax (revenue sharing)
Illinois (1965); Ohio (1965); Ala. (1967); Tex. (1967); Fla. (1969); N.H. (1969)

32. Control of the Communist Party in the United States
Miss. (1965)

33. Taxation
Colo. (1963)

34. Prohibit race segregation in public schools
Miss. (1970)

** Rescinded in 1970.
*** House rescinded in 1969.
**** Rescinded in 1970.
***** Declared null and void by state attorney general because no executive signature.
****** Declared null and void by federal district court, 1969.
******* Rescinded in 1970.

number, the possibility of such an occurrence presented, for some people, an unpredictable and tremendous onslaught on the constitutional foundation of this nation. Because Article V stipulates state petitions and involvement, it would seem desirable to have a survey of the state legislators' views surrounding the possibility of a constitutional convention. A survey of the 1969-70 state legislatures and processes revealed some interesting information on four basic questions regarding the constitutional convention.* A brief examination of each question will be followed by survey results.

Must the Language of Amendments Proposed in State Petitions be Identical?

Readily noticeable in the apportionment case are three major categories of apportionment petitions—(1) abolishing of federal judicial review of state legislative apportionment, (2) requesting a convention to reverse the decision of *Reynolds* v. *Sims*,[16a] and (3) establishing criteria other than mere population for apportionment determination. Constitutional writers would fundamentally disagree whether the amount of similarity is sufficient. Lester B. Orfield claimed that the "ground of the application would be immaterial, and that a demand by two-thirds of the states would conclusively show a widespread desire for constitutional changes."[17] The House Committee on the Judiciary of 1952 questioned the wisdom and practicality of identicalness:

> Conversely, there appears no valid reason to suppose that the language of the amendments requested in State applications must be identical with one another in wording. It should be enough that the suggested amendments be of the same general subject matter in order to be included in a congressional count of applications for a constitutional convention, bearing in mind, of course, that any or all of the states may at any time request a general convention should strong sentiment for such proceedings prevail.[18]

Contrariwise, Charles L. Black urged the necessity for exact form because it "is illegitimate to infer, from a state's having asked for a

* Twenty-one percent (1589) of the 7,568 legislators responded to the questionnaire. Consequently, the reported results are not technically randomized nor conclusive and should only be considered reflective in nature.

[16a] 377 U.S. 533 (1964).

[17] L. Orfield, The Amending of the Federal Constitution 42 (1942).

[18] House Committee on the Judiciary, Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates, 82nd Cong., 2d Sess., 11-12 (1952).

'convention' to vote a textually-given amendment up or down, that it desires some other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of 'convention' wants the other as a second choice. Altogether different political considerations might govern."[19]

The state legislative survey revealed that slightly over *57 percent* of the 1,589 respondents considered identical language as not requisite for calling a constitutional convention. Justifications for this position included "political considerations," "substantive natures of topics rather than procedural," "experience," and "state individuality." Many legislators maintained that a clearinghouse operation might insure similarity in state petitions, but unforeseen problems could result from the uniformity in legislative devices utilized for petitioning Congress. The legislative measures utilized by the states differ widely and lead to considerable difficulty in determining the exact intent and legality of the legislative action. Three principal methods are generally employed in the states: joint resolution, concurrent resolution, and memorials. Norman J. Small, Legislative Attorney, American Law Division of the Congressional Legislative Reference Service, indicated the difference between memorials and petitions:

> The former are merely exhortations to the Congress to exercise its power to originate, approve, and submit for ratification a specific proposal as an amendment to the Constitution. As an exhortation, such memorials are deemed to give rise to no more than a moral obligation on the part of Congress to respond affirmatively thereto when tendered by a substantial number or even by as many as two-thirds, of the States.[20]

Small equates "petitions" with "applications," but does admit that even the "petitions" (resolutions, etc.) may be legally questionable because they have not been tested in the courts. Some of the states require 51 percent majority, while others demand no less than 65 percent approval. Table II indicates the various devices utilized by the state legislatures as determined by our survey. There is state consensus that combined action of both legislature houses is necessarily required. This assumption is substantiated by a staff Study of the House Committee on

[19] C. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 963-964 (1963).

[20] N. Small, *Procedures for Amending the United States Constitution*, Library of Congress Legislative Reference Service 1965.

the Judiciary in 1952, which contended that identical but separate resolutions would not constitute a legislative measure.[21]

As Table II indicates, the governor's approval of petitions is required in at least fourteen states, depending on whether the states utilize Joint or Concurrent Resolutions. Article V indicates that the "legislature" constitutes the petitioning body, yet this fails to delineate whether this has reference to the legislative process, or the specific representative lawmaking body. According to the U.S. Supreme Court, the connotation of the "legislature" depends upon the particular function engaged in.[22] For example, we note that in Article I, Section IV of the Constitution, the state electoral process has explicit reference to the total lawmaking process, i.e., legislative and executive. In 1920, the Supreme Court ruled in *Hawke* v. *Smith*[23] that because "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word," the Governor would not be directly involved. With regards to convention petitions, the state legislature would not be functioning in a routine legislative capacity, but as an agent in the national government responsibility. However, in 1969, the Oklahoma Attorney General explicitly contradicted this view:

> . . . the resolution . . . was not signed by the Governor, it did not become the law of this state. . . . It is the opinion of the Attorney General that a concurrent resolution passed by a session of the Oklahoma Legislature which does not meet the criteria of becoming law, is merely an expression of opinion of that particular body and has no binding effect on a subsequent session of the Legislature.[24]

How Long Should a State Petition Requesting a Constitutional Convention Remain Valid?

Article V is silent on this perplexing subject, though many would agree with the Supreme Court on the constitutional ratification procedures and attempt to utilize this as an analogy comparable to the state legislative petition process.

> [A]s 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

[21] Staff of House Comm. on the Judiciary, 82d Cong., 2d Sess., Problems Relating to State Applications for a Convention to Propose Constitutional Limitations of Federal Tax Rates (Comm. Print 1950).

[22] Smiley v. Holm, 285 U.S. 355 (1932).

[23] 253 U.S. 221, 229 (1920).

[24] 115 Cong. Rec. 9992-93 (daily ed. Aug. 13, 1969).

TABLE II
Device for Constitutional Conventions

State	Bill	J. Resol.	Con. Resol.	Memorial	Governor's Approval
Alabama		X			yes
Alaska		X			yes, not to veto
Arizona			X		yes
Arkansas		X	X		no, yes
California		X			no
Colorado				X Joint	yes, not adhered
Connecticut		X			no
Delaware		X			yes
Florida				X may rescind	no
Georgia		X			no
Hawaii		X			no
Idaho		X			no
Illinois		X			no
Indiana			X		no
Iowa			X		no
Kansas			X		no
Kentucky			X		no
Louisiana			X		no
Maine		X			no
Maryland		X			yes
Massachusetts		X			no
Michigan			X		no
Minnesota		X			yes
Mississippi			X		no
Missouri			X		no
Montana		X			no
Nebraska				X	no
Nevada		X			no
New Hampshire		X			no
New Jersey		X	X		yes, no
New Mexico		X		X Joint	no
New York			X		no
North Carolina		X			X
North Dakota			X		X
Ohio		X			no
Oklahoma			X		no
Oregon				X Joint	no
Pennsylvania		X can rescind	X		no, no
Rhode Island	X	X			yes, yes
South Carolina			X		no
South Dakota			X		X
Tennessee		X can rescind			yes
Texas			X		yes
Utah		X	X		no, yes
Vermont				X	no
Virginia		X			no
Washington		X		X Joint	no
West Virginia			X		no
Wisconsin		X			no
Wyoming				X	yes

> that number of States to reflect the will of the people in all sections at relatively the same period which of course ratification scattered through a long series of years would not do. . . . the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal.[25]

The term "sufficiently contemporaneous" becomes the pivotal criterion on which the controversy rests. Arthur Bonfield indicates that rather than relying on such criteria as changing social, economic, and political events, the fundamental criterion should the legislative period in which all states have had the opportunity to meet in one full regular session.[26] This approach appears to have a distinct advantage because it challenges those recommending a convention on a particular subject to provide convincing evidence from other current legislatures on the consensus of calling a convention. In theory, then, the duration factor of two years would represent a current poll of legislators' attitudes. The data from our legislative survey, particularly of the 32 states which urged a constitutional convention on reapportionment, gives some insight on the problems of "sufficiently contemporaneous." In 1963, petitions from the following states were received: Arkansas, Idaho, Kansas, Missouri, Montana, Nevada, South Carolina, South Dakota, Texas, Washington, and Wyoming. The following year, Virginia requested the Congress to call a convention. The 1965-66 legislative period witnessed a flurry of petitions: Alabama, Arizona, Florida, Georgia, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Tennessee, and Utah.[27] The 90th Congress in 1967 received similar petitions from Illinois, Indiana, North Dakota, and Colorado.[28] Senate Bill 2307 of the 90th Congress called for a six-year petition duration, though some congressmen and committee witnesses urged periods from two to seven years. It became conspicuously clear that unless the six-year prerequisite was adopted, the eleven petitions of 1963 would be declared void by the end of 1969. Senator Dirksen's determined efforts to gather sufficient consensus on initiating floor consideration were cut short by his illness and eventual death in September, 1969. Had Dirksen been successful in securing

[25] Dillon v. Gloss, 256 U.S. 368, 375 (1921).

[26] A. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 Notre Dame L. 659 (1964).

[27] The Legislative Reference Service reported that there is no record of the petition S.R. 14 submitted by Georgia. The petitions from New Hampshire and Utah, though appearing in the Congressional Record, were not forwarded to the Judiciary Committees in the House or Senate.

[28] Colorado maintains that S.J. Memorial No. 5 was forwarded to Congress, though no record can be found.

favorable Congressional action, the implications may have been rather astounding. For example, our survey found the total number of legislators voting on the petitions, in states where it was accepted, amounted to 5,259. Nevertheless, in 1969 when Congress may have rendered a decision allowing a constitutional convention, 57 percent of those original legislators voting on the petitions were no longer in the state legislatures. This significant change in personnel makes the issue of "sufficiently contemporaneous" even more poignant. A discussion of the partisanship of the state legislatures makes the change of personnel more complicated. Assuming that an issue might be purely partisan, would the petition remain consistently representative of the current legislative attitude? Between 1963 and 1969, we observed that subsequent to the petition acceptance, there were 13 party control turnovers, 2 ties, and 8 nonpartisan elections. There is substantial evidence that petitions, purely partisan in nature, might be rejected and not reflect the contemporary attitude.

The legislative survey disclosed conflicting data as well as constructive suggestions for alleviating the entire question of petition duration. Nearly 80 percent of the respondents recommend a four-year duration period or the completion of the second session. This procedure would allow a double check on whether the legislature, in the first instance, acted presumptuously. Congress would be responsible for transmitting copies of the petition to all states and requesting immediate consideration. Simultaneously, as state legislators supported this conclusion, 85 percent favored retaining state control of the petition by power of recission. There was substantial fear that a specific legislative body might act contrary to the public good, necessitating a reconsideration of the petition. Yet, if the four-year duration factor existed, then the recission power would be valid for only one attempt.

May Congress Refuse to Call a Constitutional Convention?

Edmund Randolph introduced the original resolution providing for constitutional revision:

> [Resolved] that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[29]

[29] I. Farrand, The Records of the Federal Convention 11 (1911).

Colonel Mason contended that "it would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their consent on that very account."[30] Up until the last two weeks of the convention, the primary discussion concerned the sole responsibility of the state legislatures to propose amendments. Governor Morris and Mr. Gerry moved to amend the article to have a mandatory convention when the requisite number of states had requested. Madison strongly supported the view of mandatory congressional action.[31] One week before the convention concluded, Hamilton and Gerry successfully urged reconsideration of the amendment article because of the failure to include congressional prerogative to propose amendments. Consequently, Madison's proposal to allow both Congress and the state legislatures to make proposals was adopted. Yet, on the last day of the convention, a compromise was enacted which allowed for both congressional and state proposals, but stipulated a convention process for the latter.

Undoubtedly the most compelling evidence of congressional obligation to summon a convention came to light immediately after the constitutional convention. In the *Federalist Papers*, No. 85, Hamilton claimed that:

> 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 preemptory. The Congress shall call a Convention. Nothing in this particular is left to the discretion of that body.[32]

At the initial Congress, Madison implored his colleagues to consider the subject of amendments, specifically, the amendments which would contain the Bill of Rights.[33] The following day, May 5, 1789, a member of Congress displayed a state legislative petition for a convention. Madison claimed that thorough discussion of the petition would be inappropriate until the requisite number of petitions had been received and ". . . then it is out of the power of Congress to decline complying, the words of the Constitution being express and positive relative to the agency Congress may have in case of applications of this nature . . . ."[34]

[30] *Id.* at 203.
[31] *Id.* at 629-30.
[32] The Federalist, No. 85 586 (Wright ed. 1961).
[33] I. Annals 247. *See also* an excellent discussion of this amendment process, Forkosch, *Who are the People in the Preamble to the Constitution?* 6 W. Res. L. Rev. (1967).
[34] I. Annals 249. Five months earlier, a letter from Madison indicated that 'if two-thirds

Consequently, the petition was placed in the archives until others would arrive.

Regardless of whether one concurs with the foregoing, a fundamental question remains: What recourse do the states have in the event Congress fails to act? Some argue that Congress performs in a ministerial role in calling for a convention; thus the Supreme Court would have authority to issue some form of mandamus requiring the legislative body to act.[35] Unless Congress could be forced to comply, the intent of the framers would be thwarted. Cyril F. Brickfield and Arthur E. Bonfield claim, on the contrary, that the courts would not enter the controversy because of the "doctrine of the separation of powers" which prohibits injurious intrusion of one branch on another.[36] The concept of "coordinate branch respect" was not violated by the *Baker* v. *Carr*[36a] nor the *Westberry* v. *Sanders*[36b] cases. For example, Bonfield asserts that,

> [J]udicial review on the merits of 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 the Government to perform a duty exclusively entrusted to it by the Constitution."[37]

How do current legislators react to the power of Congress to call a national constitutional convention? Seventy-four percent of the 1589 respondents favored the mandatory clause requiring Congress to initiate a convention call. The basic rationale suggested was the prohibiting of Congress from becoming completely dominant in the amending process. Allowing Congress to debate the need as indicated by the petitions would unnecessarily complicate the task of retaining the sufficient number of petitions. The "contemporaneousness" of the petitions would be brought into question. A typical legislator response was, "the 'shall' in Article

---

of the States apply for one, Congress cannot refuse to call it . . . ." V Documentary History of the Constitution 141.

[35] W. K. Tuller, *A Convention to Amend the Constitution*, 193 N. Am. Rev. 379-81 (1911); E. Cuvillier, *Shall We Revise the Constitution?* 77 Forum 323-25 (1927); F. E. Packard, *Legal Facets of the Income Tax Rate Limitation Program.* 30 Chi.-Kent L. Rev. 128 (1952); F. E. Packard, *Constitutional Law: The States and the Amending Process* 45 A.B.A.J. 161 (1959).

[36] Cyril F. Brickfield, House Comm. on the Judiciary, 85th Cong., 1st Sess., Problems Relating to A Federal Constitutional Convention 27 (1957); *supra* n.26 at 672-73.

[36a] 369 U.S. 186 (1962).

[36b] 376 U.S. 1 (1964).

[37] *Supra* n.26 at 673.

V stipulates precisely that—Congress must act, and unless it does, the states are relegated to complete subservience in the amending process."

Can State Legislative Petitions Control the Subject Matter Considered by the Constitutional Convention?

Basically, the question is whether the convention ought to be viewed as a premier assembly of the people possessing "conventional Sovereignty," or whether the states can stipulate the subject area or areas of discussion. Article V permits the following: "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. . . ."[38] Professor Charles Black maintains that:

> The process of 'proposal' by Congress contained in the first alternative of Article Five, 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.[39]

Arthur E. Bonfield supports this position by claiming that the constitutional convention would necessarily have the ability to propose amendments as solutions to the basic subject area. He categorically rejects the recent resolutions suggested by the Council of State Governments and adopted by several states because:

> . . . the resolutions in issue [resolutions calling Congress to establish a convention for specific reasons] 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 of the ratifying process, rather than part of the deliberative process for "proposing" constitutional amendment.[40]

Allowing the convention to select the most acceptable format of amendment to be voted on by the legislatures or conventions in the various states would give the constitutional convention a propitious opportunity to conduct deliberations on the proposal.

[38] U.S. Const. art. V.
[39] *Supra* n.19 at 962.
[40] *Supra* n.26 at 662-63.

Our survey data appeared to support contrary positions. A substantial 77 percent claimed the state applications would control the particular subjects discussed at the convention. Congress would only summon the convention for a particular time and location and would make but one limitation on the convention—a perfunctory statement of what subject the state legislators wanted considered. A total of 1,334 legislators (84 percent) supported the single amendment convention, which suggests they view the *convention as a ratifying rather than a deliberative body*. There was a general fear expressed (83 percent) that a premier assembly, possessing inherent power to determine subjects of discussion and the power to recommend amendments, would prove detrimental to the constitutional framework. One might assume, as a result of the variety of convention subjects recommended in the survey, that the legislators would prefer having issue clarification before submitting them to a constitutional convention.

IV. Present Demands for a Constitutional Convention

Legislators in the 1969-70 survey had neither reached a general consensus on the need for a convention, nor the topics which might be considered. In addition to the 557 requests for an immediate constitutional convention on apportionment, there were additional 499 requests for other issue considerations. The following limited list gives some indication of subjects which were *specifically recommended* by our respondents.

TABLE III
Subjects for State Petitions

1. State rights	14. 5th amendment
2. Changing electoral college	15. Voting age
3. Busing students	16. Curbing the Supreme Court powers
4. National debt	17. Military spending
5. Eavesdropping	18. Welfare
6. Income tax limit	19. Law and order
7. Outlawing communists	20. Educational and local control
8. Judicial reform	21. Presidential powers
9. Bill of Rights	22. Item veto for president
10. Judges retirement	23. Rights of white race
11. Prayer in school	24. Federal grants
12. Right to bear arms	25. Executive department power
13. Apportionment	26. General constitutional review

Though the foregoing list is inconclusive and represents a minute proportion of potential state legislative respondents, the data does render an indication of potential convention subjects.

It is not inconceivable that such topics as "electoral college revision" might evoke sufficient support that the nation would be confronted with chaotic imbroglio. One state legislator, with 15 years experience, expressed the following sentiment regarding the ease with which the requisite number of petitions might be secured:

> It is possible that with pressure from such groups as the Council of State Governments, plus a well planned drive to have each state introduce and consider a particular petition, that within four years there would be more than ample requests for a convention.

Though there may be sufficient number of legislators who advocate numerous changes, the intensity and intention of those supporters may be questioned. One legislator, reflecting the apparent fear of an open constitutional convention, made this statement:

> I have talked with many of my colleagues who were also frightened that a convention may completely undo the fundamental principles of our constitution. Many of them voted to have Congress call a convention, not because they wanted one necessarily, but because they wanted Congress to know how the legislators felt. From now on we will not petition for a convention, but simply urge the Congress to propose an amendment about a specific subject. This way, we know that there will be only one amendment, which we here in the states can accept or reject.

This statement does have some empirical support. Nearly three fourths of all petitions seek constitutional revision, but not for the convention process.

Our survey responses reveal a wide range of attitudes, many of them expressing distrust of the convention, while others anticipate some significant results from the convening of a national constitutional convention:

> I think that each state should take two consecutive sessions and consider major areas and then transmit their actions to the Congress.
>
> I believe that we need to have a public referendum, requiring at least ⅔ of those voting in the last election, before the state legislature considers the possibility of adopting a constitutional petition.
>
> I see no real threat in conducting a constitutional convention, because all of its proposals have to be accepted by the States.
>
> My colleagues, representing one of the largest states, feel that there ought to be a continuous constitutional convention. Each section of the constitution would receive a thorough hearing throughout the country during one year's time, after which any new amendment proposals would be voted on in convention and dispatched to the State legislatures for their consideration.

It would be possible for the Congress to actually solve many of the problem areas which are bothering the state legislatures. A convention might open Pandora's box.

Many people have argued that the convention process of amending the constitution is an anomaly in the law. Nevertheless, state legislatures continue to petition Congress for the establishment of conventions. Pertinent legislation has been explored in the Senate, yet no decision has been concluded. The Ninety-Second Congress recently adopted its latest proposed amendment: the 18 year old vote. Fifteen state legislatures had resolutions pending which would call for a constitutional convention on that subject. With the pre-emptive action by Congress, the unused originating source of the state legislature remains to be tested. Our data appears to support the retention of the convention process, and yet a clarification of the convention procedure is imperative.

CHICAGO-KENT LAW REVIEW

PUBLISHED SPRING AND FALL BY THE STUDENTS OF
CHICAGO-KENT COLLEGE OF LAW OF ILLINOIS INSTITUTE OF TECHNOLOGY
10 N. FRANKLIN STREET, CHICAGO, ILLINOIS 60606
Subscription Price, $4.00 per year
Single Copies, $2.50
Foreign Subscription, $4.50

VOLUME 48 SPRING, 1971 NUMBER 1