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A LIMITED FEDERAL CONSTITUTIONAL CONVENTION

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Article V of the United States Constitution provides that constitutional amendments may be initated in two ways — by two-thirds of both houses of Congress or by a convention called by Congress at the request of two-thirds of the state legislatures.[1] The second initiation option was provided to afford states an opportunity to bypass congressional refusal to originate amendments of significant state and national concern.[2] Although the architects of the Constitution evidently viewed the two methods as equivalent alternatives, initiation through state legislative application has never been accomplished; each of the twenty-six ratified amendments has been proposed by Congress.[3] As a result of this historical preference, little precedent exists relating to state initiation of amendments.[4]

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1. The full text of article V reads: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

2. "The founders included the convention alternative in the amending article to enable the states to initiate constitutional reform in the event the national legislature refused to do so." Ervin, *Proposed Legislation To Implement the Convention Method of Amending the Constitution,* 66 MICH. L. REV. 875, 885 (1968).

3. Between 1788 and October 1971 the states submitted a total of 304 applications for a constitutional convention. The following subjects have received the support of at least ten states: reapportionment (33), 1957-1969; direct election of Senators (31), 1893-1911; limitation of federal taking power (28), 1939-1960; prohibition of polygamy (27), 1906-1916; general constitutional revision (22), 1788-1929; and return portion of federal taxes to states (15), 1965-1971. 117 CONG. REC. 16,519 (1971). Subsequent to this report by Senator Ervin, four additional states submitted revenue sharing applications. *See* note 6 *infra.*

4. Responding to the lack of clarity concerning article V convention procedures, Senator Ervin introduced S. 2307 in the 90th Cong., 1st Sess. Ervin, *supra* note 2, at 875. *See Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary,* 90th Cong., 1st Sess. (1967) [hereinafter cited as *1967 Hearings*]. The bill was revised and reintroduced in the 91st Cong., 1st Sess. as S. 623. The Subcommittee reported

The paucity of understanding concerning the unused article V convention procedure became apparent when national organizations representing state legislators joined forces in 1970 to prod congressional action on federal revenue sharing.[5] Pursuant to article V, a united effort was commenced to secure applications from thirty-four states requesting Congress to convene a constitutional convention dealing solely with revenue sharing. Thirteen states had enacted a model application,[6] or a similar version, by the time revenue sharing was passed into law.[7]

The most perplexing of the several questions raised by the revenue sharing convention campaign was whether a convention created by state application may be limited to a single subject or whether such a convention must open the entire Constitution to revision. The authority of the states and Congress to impose limitations on an article V convention is not evident through a literal construction of the article's language.[8] Moreover, the Supreme Court has been noticeably silent regarding questions raised by the amendment process.[9] The convention route has been useful in the past,[10] however, and it is

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S. 623 to the full Committee on June 19, 1960, but no action was taken by the Judiciary Committee. The legislation was reintroduced in the 92d Congress on Jan. 26, 1971, as S. 215 [hereinafter cited as *Ervin Bill*]. On April 27, 1971, the Subcommittee on Separation of Powers reported the measure to the full Committee on the Judiciary. On July 31, 1971, the Committee reported S. 215 to the Senate with an accompanying report, S. REP. No. 92-336, 92d Cong., 1st Sess. (1971) [hereinafter cited as 1971 REPORT]. S. 215 passed the Senate on Oct. 19, 1971, 117 CONG. REC. 16,569 (1971). However, it received no action by the House Judiciary Committee during the 92d Congress. The bill has been reintroduced in the 93d Congress as S. 1272, sponsored by Senators Ervin and Brock.

5. These organizations were the National Legislative Conference, the National Society of State Legislators, and the National Conference of State Legislative Leaders.

6. States that applied to Congress for a convention on revenue sharing during this campaign were: Arizona, Delaware, Florida, Iowa, Massachusetts, New Jersey, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, and West Virginia. Louisiana passed the model application with slight variations.

7. The State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, was enacted by the House on October 12, 1972, and by the Senate on Oct. 13, 1972.

8. Article V states that Congress shall call "a Convention for proposing Amendments." If these words are literally construed, it might be argued that a convention could not create an entirely new instrument to supersede the present Constitution, since its work would be confined to proposing amendments. Nevertheless, the convention could propose the equivalent of a new Constitution by a series of separate amendments. *See* C. BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION, STAFF OF HOUSE COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. (Comm. Print 1957) [hereinafter cited as BRICKFIELD, 1957]. *But cf.* Black, *Amending the Constitution: A Letter to a Congressman,* 83 YALE L.J. 196 (1972): "It is my contention that Article V, properly construed, refers, in the phrase 'a Convention for proposing Amendments,' to a convention for proposing such amendments as to that convention seem suitable for being proposed."

9. It has been suggested that many of the significant questions raised by article V will not be resolvable by the courts. *See* L. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 7-36 (1942); Dowling, *Clarifying the Amending Process,* 1 WASH. & LEE L. REV. 215 (1940); Note, *Proposing Amendments to the United States Constitution by Convention,* 70 HARV. L. REV. 1067 (1957). In Coleman v. Miller, 307 U.S. 433 (1939), the Supreme 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 amend-

clear from the revenue sharing campaign that the limitation issue must be clarified before legislatures will confidently employ their constitutional prerogative to initiate amendments.[11]

This article will examine the limitation issue, initially analyzing the legislative history of article V. Additionally, the practical effects of the framers' decision to provide both the national and state legislatures an opportunity to initiate federal constitutional change will be examined.

HISTORY OF THE AMENDMENT PROCESS AT THE 1787 CONSTITUTIONAL CONVENTION

The Virginia Plan, consisting of fifteen resolutions, was presented to the convention delegates by Edmund Randolph on May 29. Resolution thirteen dealt directly with amendments:[12]

> 13. Resolved that provision ought to be made for the amendment of the Articles of the Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

Randolph's resolution was considered by the Commitee of the Whole on June 5 in a discussion focusing on the proposition "that provision ought to be made for [hereafter] amending the system now to be established, without requiring

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ment were non-justiciable political questions within the exclusive determination of Congress. Strong dicta in a concurring opinion by Justice Black suggests that all questions arising in the amendment process may be non-justiciable: "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, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." *Id.* at 459 (concurring opinion). However, there is evidence from several cases that some of the questions arising in the amendment process can be settled by the judiciary. *Compare* Leser v. Garnett, 258 U.S. 130 (1922); Dillen v. Glass, 250 U.S. 368 (1921); National Prohibition Cases, 253 U.S. 350 (1920); Hawke v. Smith, 253 U.S. 221 (1920). *See also* Trombatta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973), wherein the court held article 10, §1 of the Florida constitution unconstitutional under article V of the United States Constitution. The Florida article provided that the state legislature could not take action on any proposed amendment to the United States Constitution unless a majority of the members thereof were elected after the proposed federal amendment is submitted for state ratification.

10. "The campaign for direct election of Senators was stymied for decades by the understandable reluctance of the Senate to propose an amendment that jeopardized the tenure of many of its members. Frustrated by the Senate, the reform movement shifted to the States, and a series of petitions seeking to invoke the convention process were submitted to Congress. Rather than risk its fate at the hands of a convention, the Senate then relented and approved the proposed amendment, which was speedily ratified." 1971 REPORT, *supra* note 4, at 6.

11. Regarding the introduction of S. 215, Senator Ervin has commented: "Most important, there is no law on the books that would confine a convention to a specific amendment. If we are to avoid the possibility of a runaway convention and a constitutional crisis, I believe it is imperative that orderly procedures be established for the conduct of a constitutional convention." 117 CONG. REC. 16,510 (1971).

12. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (1911) [hereinafter cited as RECORDS].

the assent of the National Legislature."[13] Although Pinckney "doubted the propriety or necessity of it,"[14] Gerry favored the resolution and expressed the view that: "The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Government." Gerry further noted that "nothing had yet happened in the States where this provision existed to prove its impropriety."[15] Nevertheless, further consideration of the proposition was postponed.[16]

On June 11 Randolph's resolution was again considered by the Convention. Madison reports that "several members did not see the necessity of the [Resolution] at all, nor the propriety of making the comment of the National Legislature unnecessary."[17] Colonel Mason, however, urged the adoption of such a provision:[18]

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary and it will be 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 consent on that very account.

The Committee of the Whole failed to accept the last portion of Mason's argument, but supported the proposition "that provision ought to be made for the amendment of the Articles of the Union, whensoever it seems necessary."[19]

Late in July the policy conclusions reached during the early sessions were submitted to a drafting committee known as the "Committee of Detail."[20]

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13. *Id.* at 121.

14. *Id.* at 121-22.

15. *Id.* Provisions for amending the colonial constitutions were incorporated into the charters of eight colonies. *See* S. FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 178-80 (1910). In Delaware, Maryland, and South Carolina use of the amendment process was reserved to the legislature. In Georgia, Massachusetts, New Hampshire, Pennsylvania, and Vermont amendments were to be made by conventions. Both of these methods were joined in article V. *See* BRICKFIELD, 1957, *supra* note 8, at 2.

16. Seven states voted to postpone consideration; three voted to debate the amendment process immediately. RECORDS, *supra* note 12, at 202.

17. *Id.* at 202-03.

18. *Id.* Article XIII of the Articles of Confederation authorized amendment only upon the assent of Congress and the legislatures of all the states. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED AT THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 84 (J. Elliot ed., reissue 1907) [hereinafter cited as DEBATES].

19. RECORDS, *supra* note 12, at 203.

20. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 97 (1911) [hereinafter cited as 2 RECORDS]. John Rutledge of South Carolina was designated chairman and Edmund Randolph, James Wilson, Oliver Ellsworth, and Nathaniel Gorham were elected to the Committee.

Article XIX of the Committee draft presented to the Convention on August 6 and adopted without amendment on August 30,[21] provided:[22]

> On application of the Legislatures of two-thirds of the states in the Union, *for an amendment* of this Constitution, the Legislature of the United States shall call a Convention *for that purpose.*

Careful consideration should be given the language of this article. Although some controversy existed concerning Congress' role in the amendment process,[23] the development of a specific amendment procedure was left to the Committee of Detail. Article XIX embodied a compromise between those delegates favoring state initiation of amendments, unfettered by the National Legislature, and those members wishing to preserve some national role in the amendment process. Hence, the draft enabled the states to apply for "an amendment" to the Constitution, and mandated Congress to assemble a convention "for that purpose." Of significance is the clause "for that purpose," which directly modifies "Convention." If two-thirds of the states apply for an amendment, article XIX clearly mandates that a convention called by Congress pursuant to such applications must be limited to the purpose or general subject matter contained in the state applications. Moreover, by employing the specific language "an amendment," the draftsmen of the Constitution demonstrated a clear intention to enable state legislatures to request a convention for consideration of limited constitutional change. Such intent was not modified by subsequent Convention action.

On September 10 Gerry moved to reconsider the Convention's adoption of article XIX. Since the Constitution was to be paramount to state constitutions Gerry was concerned with the possibility that "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether."[24] Hamilton seconded Gerry's motion, but with a different view in mind. "It had been wished by many and was much to have been desired," Hamilton observed, "that an easier mode for introducing amendments had been provided by the articles of confederation."[25] Hence, Hamilton contended:[26]

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21. *Id.* at 188 (emphasis added).

22. When the Convention took up article XIX on August 30, Gouverneur Morris suggested "that the Legislatures should be left at liberty to call a Convention, whenever they please." However, no delegate support was forthcoming for this concept and the article was adopted in the form proposed by the Committee on Detail. *Id.* at 468.

23. RECORDS, *supra* note 12, at 22, 121.

24. 2 RECORDS, *supra* note 20, at 557-58.

25. *Id. See also* RECORDS, *supra* note 12, at 121.

26. 2 RECORDS, *supra* note 20, at 557-58 (emphasis added). Madison joined the argument and attacked the "vagueness of the terms" previously adopted by the Convention. "How was a Convention to be formed? By what rule decide? What would be the force of its act?" queried Madison. *Id.* Substantive responses to these questions are provided in the *Ervin Bill*, *supra* note 4.

> It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers — the National Legislature will be the first to perceive and will be the most sensible to the necessity of amendments, and ought *also* to be empowered, whenever two thirds of each branch should concur, to call a Convention. . . .

Gerry's motion to reconsider carried[27] and, following several proposed amendments relating to granting the National Legislature initiating power,[28] Madison, seconded by Hamilton, proposed a substitute for the entire articles:[29]

> The Legislature of the United States 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 part 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 may be proposed by the Legislature of the United States.

The Madison-Hamilton compromise was adopted by the Convention, 9-1.[30]

Significantly, the Madison-Hamilton proposal did not attempt to limit or restrict in any manner the power of state legislatures to initiate particular amendments. Legislatures clearly were granted such authority under the originally adopted article XIX. Hamilton was concerned only with granting the National Legislature amendment parity with the state legislatures so as to preserve the federal-state balance of power; hence, his argument that the National Legislature "ought also to be empowered . . . to call a convention."[31] Scrutiny of convention debate and the legislative antecedents of article V thus

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27. The vote was 9-1. Only New Jersey voted to retain the language adopted on August 30. 2 RECORDS, *supra* note 20, at 557-58.

28. Sherman, seconded by Gerry, moved to add to the article the words: "[O]r the Legislature may propose amendments to the several States for their approbation but no amendments shall be binding until consented to by the several States." Wilson offered a motion to make consent of two-thirds of the states sufficient, which was rejected 5-6. A later motion to permit three-fourths of the states to make an amendment effective was adopted without dissent. *Id.*

29. *Id.* at 559.

30. *Id.* The single "no" vote was Delaware. *See* Kurland, *Article V and the Amending Process,* in D. BOORSTIN, AN AMERICAN PRIMER 130 (1966): "The nature of the political compromises that resulted from the 1787 Convention was reason for those present not to tolerate a ready method of undoing what they had done. Article V, like most of the important provisions of the Constitution, must be attributed more to the prevailing spirit of compromise that dominated the Convention than to dedication to principle." *See also* HOUSE COMM. ON JUDICIARY, PROBLEMS RELATING TO STATE APPLICATION FOR A CONVENTION TO PROPOSE A CONSTITUTIONAL LIMITATION ON TAX RATES, 82d Cong., 2d Sess. 4 (1952) [hereinafter cited as 1952 REPORT].

31. 2 RECORDS, *supra* note 20, at 557-58.

reveals that Madison and Hamilton viewed the two modes of initiating amendments as equivalent alternatives and that they envisioned a process whereby both the state and National Legislatures would be able to apply to Congress for specific constitutional amendments.[32]

On September 15 the Convention considered the report of the Committee on Style, which had been appointed "to revise and place the several parts" approved by the Convention "under their proper heads."[33] The Committee integrated former article XIX, as amended, into a new article V. Initially, Gouverneur Morris moved to amend article V so as to require a convention on application of two-thirds of the states.[34] The previously adopted language of the Madison-Hamilton proposal would have required the states to petition Congress, which would presumably propose and develop specific amendments. Morris' proposal would enable two-thirds of the states to require Congress to call a convention to propose amendments. 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 convention on the *like application*."[35] Nevertheless, he raised no objection to the Morris motion, which was adopted unanimously.[36]

Finally, and significantly, two further acts of the delegates merit consideration. Sherman moved to amend article V in a manner so as "to leave future conventions to act like the present Convention, according to circumstances."[37] Additionally, Randolph moved "that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by another general Convention."[38] Both of these proposals were rejected by the 1787 Convention. Opposing the motions, Pinckney reflected the general feeling of the delegates: "The Deputies to a second Convention coming together under the discordant impressions of their Constituents, will never agree. Conventions are serious things, and ought not be repeated . . . ."[39] All states rejected the Sherman and Randolph proposals, thus evincing a definite desire not to open the Constitution to general revision in the future. Such action by the delegates reflects their concern that general conventions are indeed "serious things, and ought not to be repeated" whenever a particular amendment is desired. Hence, they insured that the Constitution, through article V, provided

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32. The Senate Judiciary Committee has concluded that the framers "refrained from any evaluation or differentiation of the two procedures for amendment incorporated into Article V; they tended to view the convention merely as an alternative safeguard available to the States whenever Congress ceased to be responsive to popular will and persisted in a refusal to originate and submit constitutional amendments for ratification." 1971 RECORDS, *supra* note 4, at 4.

33. 2 RECORDS, *supra* note 20, at 554.

34. *Id.* at 629.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.*

38. *Id.* at 631. Randolph and Mason were concerned that: "This Constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it." *Id.* at 631-32.

39. *Id.*

both Congress and the states with a constitutional mechanism to correct particular and specific constitutional infirmities. Such action effectively obviated the need for frequent general conventions, which might vitiate the fruits of the delegates' labor during the summer of 1787.

A General Convention — Argument and Rebuttal

Dual Purpose Argument

Opponents of a limited federal constitutional convention[40] have suggested that by providing two different processes for originating amendments, the framers of article V contemplated different responses to different problems. It is therefore contended that, since one process clearly contemplates congressional initiation of particular amendments, the alternative process may be used by the states only to initiate a call for a general constitutional convention.[41]

Certainly the final language of article V lacks clarity on this point.[42] No specific power is explicitly granted the legislatures to initiate individual amendments; however, it is suggested that the states may petition Congress to convene a limited federal constitutional convention.[43] Initially, three points should be noted. First, if the framers intended that the legislatures should be able to request only a general convention, would they not have explicitly provided for such authority, instead of leaving it to inference?[44] Second, the dual purpose argument presumes the framers intended that the convention called

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40. *See, e.g.*, Black, *supra* note 8, at 201: "Nothing 'desirable or practical' is to be served by the alternative route, except a possible need . . . . to take care of a *general* dissatisfaction with the national government, or a breakdown thereof." *See also* Wheeler, *Is a Constitutional Convention Impending?*, 21 Ill. L. Rev. 782, 795 (1927). *But cf.*, Child, *Revolutionary Amendments to the Constitution*, 10 Constitutional Rev. 27 (1926), *quoted in* Brickfield, 1957, *supra* note 8, at 19: "Conventions must be limited to specific subject matter and under no circumstances could it be given general revisionary powers . . . ."

41. Convention must be general in scope and a state application calling for a specific amendment can have no binding or legal effect on a convention. Wheeler, *supra* note 40, at 795.

42. *See* note 8 *supra*.

43. *Ervin Bill*, *supra* note 4, §2, authorizes state legislatures to request the calling of a convention for the purpose of proposing one or more amendments to the Constitution. Questions concerning the adoption of a state resolution are to be determined solely by Congress (§3(b)). State applications remain in effect seven years (§5(a)). This approach is consistent with a 1957 draft prepared by Dr. Brickfield for the House Committee on the Judiciary, which authorizes state legislatures to request either a general convention or a convention to propose specific amendments. Brickfield, 1957, *supra* note 8, at 27-28.

44. State constitutions have explicitly reserved to the voters the power to convene a general constitutional convention to consider a revision of the entire constitution. *E.g.*, Fla. Const. art. XI, §4(a). Prior constitutions of this state enabled the legislature to call a convention to propose amendments or to propose an entirely new constitution. Fla. Const. art. XIV, §§1-3 (1838, 1861, 1865). *See also* Alas. Const. art. XIII, §4: "Constitutional Conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention." *But cf.* Nev. Const. art. 16, §2; N.Y. Const. art. 19, §1; Tenn. Const. art. 16, §3.

by the states could conceivably have no relationship to the subject that originally motivated the applications.[45] Finally, if the states may initiate a call for only a general convention, must it follow that Congress may only propose individual amendments and be precluded from proposing a general convention? Such an unreasonable conclusion must necessarily be drawn from the premise offered by the dual purpose argument, which, as will be shown, is totally unsupported by convention action and debate, as well as the framers' intent supplied in *The Federalist Papers.*

The history of the 1787 Convention provides helpful insight as to the legislative compromise that ultimately became article V. As previously noted, the framers were concerned with developing a reasonable procedure for amending the Constitution, which at the same time would be responsive to popular will and would secure a stable governmental foundation. Meeting only four years after the end of the Revolutionary War, the delegates were understandably sensitive to the possibility that rights and powers delegated in the Constitution might need to be withdrawn or rearranged in light of the exigencies of future years. Experience under the Articles of Confederation had revealed the undesirability of binding the new government to an amendatory process requiring consent of every state.[46] Hence, the original Virginia Plan recognized the necessity for, in Colonel Mason's words, "an easy, regular, and Constitutional" amendatory process.[47] The proposal of the Committee on Detail adopted by the Convention on August 30, explicitly empowered the state legislatures to apply to Congress for "an amendment" to the Constitution. The Madison-Hamilton substitute, which provided the basic article V framework, skillfully meshed the philosophies of states rights supporters and staunch centralists by providing dual initiation procedures. The compromise met the objections raised by both camps: (1) that the national government would be loathe to correct its own failings and that such abuses could only be constitutionally remedied by state initiative; and (2) that improprieties in the states and deficiencies in national power would most likely be corrected only through initiative taken by the National Legislature. Hence, the Madison-Hamilton substitute was not an attempt to limit in any manner the power of state legislatures to initiate particular amendments. The substitute merely sought to grant the National Legislature initiation parity with state legislatures. The two amendment processes, therefore, must be viewed as equal alternatives.[48] The reports of the Convention do not rebut this conclusion and provide no indication that the framers intended for state legislatures to concern themselves only with total constitutional revision, while Congress alone would initiate specific

45: *See* text accompanying notes 50-53 *infra* for a more intensive consideration.

46. *See* text accompanying note 18 *supra.* Charles Pinckney of South Carolina expressed the general dissatisfaction with the unanimous consent requirement for amendments by stating: "It is to this unanimous consent the depressed situation of the union is undoubtedly owing." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 601 (1911).

47. RECORDS, *supra* note 12, at 202-03.

48. HOUSE COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION 7 (Comm. Print 1959) [hereinafter cited as STATE APPLICATIONS (1959)].

amendments. In addition, the Convention's September 15 vote to reject proposals that would have required general national convention consideration of proposed amendments further reveals the delegates' reasonable intention that a general convention "ought not to be repeated" whenever a particular amendment is desired.

This interpretation is further supported by reference to article V in *The Federalist Papers*. In *Federalist*, No. 43, Madison explained:[49]

> That useful 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 Governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.*

Consistent with the Convention debate, Madison's commentary clearly draws no distinction between the prerogatives of the state and national governments to originate "an amendment of errors," as revealed through experience with the Constitution over a period of time.[50]

Moreover, Hamilton, in the 85th *Federalist*, convincingly supported the authority of state legislatures, as well as the Congress, to originate specific amendments:[51]

> *Every* amendment to the Constitution, if once established, would be a *single proposition*, and might be brought forward *singly*. There would then be no necessity for management or compromise, in relation to any other point — no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten states, were united in the desire of a *particular* amendment, that amendment must infallibly take place.

Hamilton specifically emphasized the desirability of isolating support for each amendment as a safeguard against logrolling through a general revision of the Constitution. Careful attention, therefore, must be given the language "single proposition," "singly," and "particular amendment." Again, any dis-

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49. *As quoted in* 1971 REPORT, *supra* note 4, at 8 (emphasis added).

50. Judge Story, commenting on the framers' intent as to the amendment process has observed: "It was obvious, too, that the means of amendment might avert, the most serious perils to which confederated republics are liable and by which all have hitherto been shipwrecked. . . . They knew the price and jealousy of state power in confederacies; and they wished to disarm them of their potency, by providing a safe means to break the force . . . which would, from time to time . . . be aimed at the Constitution. They believed that the power of amendment was . . . the safety-valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery when out of order or in danger of self-destruction." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 599 (1891).

51. *As quoted in* 1971 REPORT, *supra* note 4, at 8 (emphasis added).

tinction between "single" amendments originating with the states and those derived from Congress is noticeably absent.

In addition, as a practical matter, tying state applications exclusively to a call for a wide-open convention would effectively destroy the legislatures' power to propose amendments.[52] Given the sole option of petitioning Congress for a general convention, it is unrealistic to expect states to exercise article V powers.[53] Thus barring massive national discontent with the existing constitutional framework, the power of state legislatures to originate the "amendment of errors" contemplated by Madison would effectively be vitiated if every state petition for a specific amendment were interpreted as a request for a general convention.

Finally, Congress has long recognized the prerogative of states to petition for a single purpose convention or for a general convention. Congress has treated as substantively separate, rather than cumulative, the over 300 state requests for a convention.[54] To treat these diverse requests for limited reformation as requests for general revision would be illogical and contrary to the stated desires of the petitioning states. For example, article V would be reduced to an absurdity if Congress were forced to call a general convention upon the application of ten states seeking to outlaw busing, seven states desiring to modify the income tax, eleven states wanting revenue sharing, and six states supporting a reversal of federal reapportionment policy. If cumulative treatment had been intended, a general convention is clearly long overdue. Fortunately, Congress has concluded that a convention shall be assembled only when the petitions dealing with a particular subject are received from two-thirds of the states.

1787 Convention Precedent Argument

Arguably, since the original 1787 Convention was not limited to the specific subject areas that were ostensibly the reasons for convocation, precedent for wide-open article V conventions does exist. However, any possible precedential value is weakened by the fact that the 1787 Convention was called to amend the Articles of Confederation, which lacked reasonable and effective provisions for amendment,[55] whereas the Constitution does not suffer from such infirmity.

Additionally, although the 1787 Convention's actions were clearly ultra vires and beyond the scope of the Convention call, Congress ratified the Con-

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52. BRICKFIELD, 1957, *supra* note 8, at 20: "The convention method . . . would be reduced to an unworkable absurdity both from the standpoint of the states having a voice in the convention process and from the magnitude of the operation and its ultimate effect on our government, if only general conventions were permissible under Article V."

53. Kauper, *The Alternative Amendment Process: Some Observations,* 66 MICH. L. REV. 912 (1968).

54. *See* 117 CONG. REC. 16,519 (1971) (remarks of Senator Ervin); STATE APPLICATIONS (1959), *supra* note 48, at 7.

55. The Federal Constitutional Convention called by the Congress of the Confederation under the Articles was "for the sole and express purpose of revising the Articles of Confederation." Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 46 (1927).

vention's action and transmitted the proposals to the states. At no time did the Convention seek to bypass or overrule the Congress.[56] There is, therefore, precedent for submitting the work product of the Convention to congressional scrutiny before transmittal to the states, allowing Congress to disapprove convention proposals that vary from the general subject matter outlined in the convention call.[57] In addition, if a convention today proposed amendments on subjects other than those specified in the call, those proposals and any implementing legislation enacted pursuant thereto could arguably be deemed unconstitutional under article V. Hence, the Constitution provides a possible limitation on a runaway convention through the courts and a definite limitation through the ratification process that were not formally available under the Articles of Confederation.

Constitutional Sovereignty Argument

An additional stance espoused by general convention proponents suggests that a constitutional convention is a "premier assembly" of the people, charged by the people with the duty of framing, amending, or revising a constitution. For such purposes the convention is vested with the total sovereign power of the citizens and is therefore supreme to all other branches of government.[58] From this premise, it is argued that neither Congress nor the states may limit the scope of the convention's deliberations.[59] This argument initially implies

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56. J. BECK, THE CONSTITUTION OF THE UNITED STATES: YESTERDAY, TODAY — AND TOMORROW? 173 (1924), *quoted in* BRICKFIELD, 1957, *supra* note 8, at 17. Jameson has drawn a useful distinction between "revolutionary" and "constitutional" conventions. Revolutionary conventions consist of bodies that in time of crisis assume or are provisionally delegated the functions of government. Hence, they either supplant or supplement the existing government. In contrast, constitutional conventions are creatures of the government's fundamental law and therefore "ancillary and subservient and not hostile and paramount" to the existing government. J. JAMESON, CONSTITUTIONAL CONVENTIONS 6, 10 (4th ed. 1867). A convention convened pursuant to article V clearly would be of the constitutional type and subservient to the strictures and limitations placed upon it in the convocation call. *See also* Dennis v. United States, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 404 (1951), wherein Judge Learned Hand rejected the theory that a convention once convened may disregard directions and article V procedures and adopt extra legal means to establish a new Constitution. The Supreme Court, in affirming, observed that the Constitution can only be changed by peaceful and orderly means. United States v. Dennis, 341 U.S. 494, 501 (1951).

57. *Ervin Bill, supra* note 4, §10(b), provides that questions concerning the scope of the convention's work are to be determined solely by Congress. Section 11(b)(1) enables Congress to disapprove a proposed amendment on the ground that it pertains to a subject different from that described in the resolution calling the convention. Pursuant to such action, the ultra vires proposal would not be transmitted to the states for ratification. *But cf.* Note, *Amending the Constitution*, 85 HARV. L. REV. 1631 (1972), for a critique of this enforcement mechanism.

58. BRICKFIELD, 1957, *supra* note 8, at 16; 46 CONG. REC. 2769 (1911) (remarks of Senator Heyburn). "A constitutional convention even if elected under a congressional mandate that it could deal with only one subject, could run away. After all, it would be a duly created constitutional convention, and it could propose any amendments which it decided it wished to propose, subject to ratification." 113 CONG. REC. 10,108 (1967) (remarks of Senator Javits).

59. *See* Livermore v. Waite, 103 Cal. 113, 36 P. 424, 426 (1894); Koehler & Lange v. Hill,

that the people cannot, or prefer not to, delegate to a convention a portion of their sovereign power, as opposed to surrendering total sovereignty.[60] No grounds for such an unreasonable conclusion are suggested by the proponents of the sovereignty argument. Moreover, such a contention ignores the fact that a convention is not *sui generis* — it cannot exist by itself, but must be convened by Congress pursuant to article V.[61] The convention, therefore, exercises no governmental power beyond that granted by congressional call.[62] Further, the product of the convention would not have the force of law until ratified by the requisite number of states, pursuant to article V. A constitutional convention that exceeds the bounds of existing constitutional and statutory provisions must be considered extra-legal and its acts would not alter existing provisions.[63]

Congressional Responsibility To Call a Convention

Given that state legislatures may initiate a call for a limited convention pursuant to article V, the question naturally arises whether Congress must call a convention upon receipt of the requisite number of state applications. A number of commentators have viewed Congress' responsibility in calling a convention as obligatory.[64] For example, Senator Ervin has commented:[65]

> Article V states that Congress "shall" call a convention upon the applications of the legislatures of two-thirds of the states. I have absolutely no doubt that the article is peremptory and that the duty is mandatory, leaving no discretion to the Congress to review the wisdom of the state applications. . . . To concede to the Congress any discretion to consider the wisdom and necessity of a particular convention call would in effect destroy the role of the states.

Support for this position is gleaned from Hamilton in *Federalist,* No. 85:[66]

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60 Iowa 543, 14 N.W. 738, 751 (1883); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); McMullen v. Hodge, 5 Tex. 34, 73, 77 (1849); Loomis v. Jackson, 6 W. Va. 613, 708 (1873).

60. *Cf.* the Pennsylvania Supreme Court's declaration in Wood's Appeal, 75 Pa. 59, 70 (1874): "The right of the people is absolute in the language of the bill of rights, 'to alter, reform, or abolish their government in such manner as they may think proper.' This right being theirs, they may impart so much or so little of it as they deem expedient."

61. *See* discussion in note 56 *supra.*

62. *See* Bonfield, *The Dirksen Amendment and the Article V Convention Process,* 66 MICH. L. REV. 949, 993 (1968); BRICKFIELD, 1957, *supra* note 8, at 16; Note, *The Constitutional Convention, Its Nature and Powers and the Amending Process,* 1916 UTAH L. REV. 403, 404.

63. *See* discussions of Jameson's revolutionary-constitutional convention distinction, note 56 *supra. See also* discussion of *Ervin Bill* §11(b)(1), *supra* note 57.

64. 1952 REPORT, *supra* note 30, at 15; Bonfield, *supra* note 62, at 977; BRICKFIELD, 1957, *supra* note 8, at 19. For a discussion of a possible ninth amendment remedy if Congress refuses to call a convention upon proper state application, see Ritz, *The Original Purpose and Present Utility of the Ninth Amendment,* 25 WASH. & LEE L. REV. 17 (1968).

65. Ervin, *Proposed Legislation To Implement the Convention Method of Amending the Constitution,* 66 MICH. L. REV. 875, 885 (1968).

66. 1971 REPORT, *supra* note 4, at 12 (emphasis added).

> By the fifth article of the plan the Congress will be *obliged,* "on the application of the legislatures of two-thirds of the states [which at present amounts to nine] to call a convention for proposing amendments, which *shall be valid* to all intents and purposes, as part of the constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof." The words of this article are peremptory. The Congress "*shall* call a convention." Nothing in this particular is left to discretion.

Thus, under constitutional mandate, Congress must assemble a convention when the required two-thirds of the states have submitted petitions.

A Limited Convention

Although little controversy exists regarding Congress' duty to call a convention when article V requirements are satisfied, there is substantial argument concerning congressional authority to restrict the deliberations of a federal constitutional convention.[67] Although without clear legal or historical precedent, it appears that, since Congress must call the convention and since no specifics concerning the nature of the conventions' proceedings are constitutionally provided, Congress is vested with implied power under the necessary and proper clause[68] to establish policy concerning such procedural matters as the time and place of the meeting, the number of delegates, the manner and date of delegate elections, the nature of representation at the convention, as well as voting and adoption procedures.[69] Moreover, given the breadth of the necessary and proper executing authority, it is further suggested that Congress may define and limit the substantive parameters of the convention's work.[70] Such congressional limitation would directly implement the federal constitutional prerogative of the states under article V, and would further enable Congress to execute its article V responsibilities. Congressional restriction would therefore adequately meet the Supreme Court's test in *McCulloch v. Maryland* that "any means which tended directly to the execution of the constitutional powers of the government, [are] in themselves constitutional."[71]

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67. *See* notes 8, 41, 52, 58, 59 *supra.*

68. U.S. Const. art. I, §8.

69. L. Orfield, The Amending of the Federal Constitution 43-44 (1939); 1952 Report, *supra* note 30, at 15; Note, 70 Harv. L. Rev., *supra* note 9, at 1067, 1075-76.

70. *See* Brickfield, 1957, *supra* note 8, at 16, 19. "[N]one but the legislature can either prescribe or indicate the purposes for which it [the convention] is to assemble. Accordingly, as we shall see, our legislatures nearly always expressly declare, with more or less precision, those purposes, whether to make a general revision of the Constitution, or to consider specific subjects, accompanying that declaration sometimes with a prohibition to consider other subjects." J. Jameson, *supra* note 56, at 364.

71. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819). "But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

Thus, Congress may restrict convention consideration to a single subject, a limited number of subjects, or a total revision of the Constitution.[72] This conclusion requires only that the convention's will must be exercised within the framework set by the act or resolution calling the convention,[73] and does not restrict the convention's freedom to exercise its will and develop specific substantive responses to issues presented.

A more difficult question arises regarding the power of state legislatures to restrict the work of the convention through state application. Although neither the states nor Congress may limit an article V convention to the specific terms of a proposed amendment, the history of article V suggests that Congress has a constitutional duty under article V to reflect the will of the state legislative applications in its convention call. An article V convention should therefore be restricted through the call to proposing amendments dealing with the general subject matter contained in state applications.[74]

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72. Congress' role in the article V convention process is similar to the role state legislatures play in convening state constitutional conventions. Although the people exercise ultimate control over a state convention, as a practical matter, the legislature plays an effective and controlling role in convening the convention. Specifically, the powers of state conventions may be effectively limited by the terms of the legislative act calling it into existence, if the approval for such limitation is obtained from the people at an election for that purpose. *See* Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239 (1871); Gaines v. O'Connell, 305 Ky. 397, 408, 204 S.W.2d 425, 431 (1947); State v. American Sugar Refining Co., 137 La. 407, 415, 68 So. 742, 745 (1915); Opinion of the Justices, 60 Mass. (6 Cush.) 573, 575 (1833); State *ex rel.* Wineman v. Dahl, 6 N.D. 81, 85-86, 68 N.W. 418, 420 (1896); Wells v. Bain, 75 Pa. 39, 48, 15 Am. Rep. 563, 572-73 (1874); Woods' Appeal, 75 Pa. 59, 69-70 (1874); *In re* The Constitutional Convention, 55 R.I. 56, 98-99, 178 A. 433, 452-53 (1935); State *ex rel.* McCready v. Hunt, 9 S.C. (2 Hill) 1, 222-23 (1834); Cummings v. Beeler, 189 Tenn. 151, 171-78, 223 S.W.2d 913, 921-24 (1949); Staples v. Griemer, 183 Va. 613, 622-23, 33 S.E.2d 49, 54-55, 158 A.L.R. 495, 515 (1945). *See also* 1 T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 84-85 (8th ed. 1927). Sturm reports that during the 31 year period, 1938-1968, there were 23 referenda in 16 states on the question of unlimited conventions and 10 in five states on a limited convention. Referenda on limited convention calls resulted in a higher percentage of public approval than those dealing with unlimited authorizations. Sturm concludes that the limited convention has grown greatly in popularity and the authority of such assemblies has been successfully limited to stated subjects. A. STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING: 1938-1968, 64-67 (1970). *See also* A. Sturm, *State Constitutions,* in 19 THE BOOK OF THE STATES: 1972-73, at 10 (1972).

73. STATE APPLICATIONS (1959), *supra* note 48, at 3-4: "There is little argument concerning the power of the convention to develop specific responses to the problems presented to it. The process of proposing amendments clearly requires convention consideration of a number of possible alternative solutions to a problem before a specific proposal is developed. Hence, development of the specific wording of a proposed amendment should be left to the convention. *But cf. Amending the Constitution To Strengthen the States in the Federal System,* 36 STATE GOV'T 10 (1963).

74. *Ervin Bill, supra* note 4, §6(a), provides that if both Houses of Congress determine that the requisite number of states have applied for a convention on the same subject, Congress must convene a convention on that subject. Section 8 restricts the convention's work to the subject or subjects named in the congressional resolution convening the convention. As a further safeguard, delegates would be required to subscribe to an oath to refrain from proposing or voting in favor of any proposed amendment not named in the convention resolution. *But cf.* Note, *Proposing Amendments to the United States Constitution by Con-*

This contention, however, has not received universal support. The suggestion has been made that the nature of the right conferred upon state legislatures in requesting Congress to call a convention is nothing more than the right of petition.[75] Moreover, it has been insisted that, since Congress must call the convention and specify the details relative to such convocation, only the National Legislature, in its discretion, may define the convention's agenda.[76] Hence, the assertion that:[77]

> 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.

These arguments lack appreciation of the framers' intent in providing the convention alternative. The drafters included the convention method in the amending article to enable states to initiate constitutional reform if the National Legislature refused to do so.[78] The first version of article V endorsed by the 1787 Convention explicitly provided that a constitutional convention shall be limited by Congress to the subject matter contained in state applications.[79] Subsequent Convention action did not modify such policy. This view is supported by debates in the state ratifying conventions revealing that proponents of the proposed Constitution clearly contemplated that the work of a convention would cohere to state wishes.[80] Moreover, in view of the trend in the states to request only a limited convention, the Judiciary Committee of the House of Representatives has concluded:[81]

> [T]here would seem to be no logical reason whatsoever for overlooking the language contained in the petitions of the states and forcing a gen-

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vention, 70 HARV. L. REV. 1067, 1076 (1957) (the convention is morally obligated to restrict its debates to the subject matter set out in the state applications. Nevertheless, Congress may not properly limit the scope of the convention's deliberations through the call).

75. Wheeler, *supra* note 40, at 795.

76. 1952 REPORT, *supra* note 30, at 15.

77. L. ORFIELD, *supra* note 69, at 45.

78. "Sir, the most powerful obstacle to the members of Congress betraying the interest of their constituents is the state legislatures themselves, who will be standing bodies of observation, possessing the confidence of the people, jealous of federal encroachments, and armed with every power to check the first essays at treachery." Remarks of Alexander Hamilton, New York State Ratifying Convention, as quoted in 2 DEBATES, *supra* note 18, at 261.

79. *See* text accompanying notes 18-23, *supra*.

80. *See* remarks of Mr. Adams (Mass.) and Mr. Stillman (Mass.), 2 DEBATES, *supra* note 18, at 136, 173-74. A similar view is reflected in the editorial by a contemporary advocate of the Constitution, James Sullivan of Massachusetts: "The 5th Article also provides that the states may propose any alterations which they see fit, and that Congress shall take measures for having them carried into effect." Cassius XI, *The Massachusetts Gazette*, No. 394, Dec. 25, 1787, *quoted in* P. FORD, ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 45 (1892).

81. 1952 REPORT, *supra* note 30, at 11-12. In 1931, New York State applied for a convention to repeal the 18th amendment "and no other Article of the Constitution," 75 CONG. REC. 48 (1931).

eral convention upon those states requesting nothing more than a single amendment to the Constitution. A contrary determination would oftentimes be at variance with the very wishes of those States submitting applications to the Congress as well as constitute a very narrow and restrictive interpretation of Article V itself.

Additionally, since article V requires Congress to call a convention only when a consensus exists among two-thirds of the states with regard to the subject of a proposed change, the convention should not be allowed to ignore such a consensus and address problems not contemplated by state applications. Madison, in *The Federalist,* No. 43, recognized article V as a means to enable the general and state governments to originate "the amendment of errors pointed out by experience."[82] That both the National Legislature and the states may initiate useful alterations suggested by their unique perspectives and experiences is evident. If Congress does not incorporate the consensual desires of the states into the convention call, the experiences of the states would effectively be ignored.

Moreover, Madison expressed concern in this same tract with "that extreme facility which would render the Constitution too mutable."[83] If the general subject matter of the convention were not limited by Congress to the problem agreed upon by at least thirty-four states, the Constitution would indeed "be rendered too mutable." Constitutional change should not be considered by a convention until two-thirds of the states conclude that such change is desirable. If thirty-four states request a convention on a particular subject, and Congress refuses to limit the convention to such subject, the National Legislature would be empowered to convene a convention totally disassociated from the state consensus that served as the constitutional prerequisite for its creation and legitimate action.[84]

Finally, since it would require only a majority vote of Congress to adopt a convention resolution,[85] the National Legislature, if allowed to ignore the will of the states in defining the convention's work, would be able to bypass the article V requirement that two-thirds of both Houses must support a congressionally initiated amendment. Such a process would dilute the two-thirds mandate by subjecting the Constitution to change at the will of only a congressional majority, and would clearly render the Constitution more mutable than intended under the procedures envisioned by the framers.

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82. *As quoted in* 1971 REPORT, *supra* note 4, at 8.

83. *Id.*

84. *See* Bonfield, *supra* note 62, at 992-98.

85. "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, etc., where not otherwise expressly provided." L. Deschler, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 439, 91st Cong., 2d Sess. 252 (1971). Since article V simply provides that Congress shall call a convention, only a majority vote of the Congress is required to convene such a convention. The *Ervin Bill, supra* note 4, §6(a), provides Congress shall convene a convention by concurrent resolution of both Houses. Since such a resolution is not legislative in nature, it is not sent to the President for approval. L. DESCHLER, *supra* at 186.

Conclusion

The foregoing analysis reveals that state legislatures may petition Congress to convene a constitutional convention for proposing amendments dealing with a particular subject, several subjects, or general constitutional revision. Congress, by virtue of its necessary and proper clause powers, may define and restrict the work of an article V convention through the convention call. Finally, consistent with the reasonable intent of the framers, Congress is obliged to limit the scope of a convention to the general subject matter or problem at which the state applications are directed. Concomitantly, Congress should not recognize the validity of proposals developed by a convention that exceed congressional strictures reflected in the convention call.