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The Alternative Amending Clause in Article V: Reflections and Suggestions

Morris D. Forkosch*

I. INTRODUCTION

Current efforts to amend the Constitution to reverse or modify *Baker v. Carr*¹ and allow state legislatures to apportion themselves on standards other than the Supreme Court's "one man, one vote" standard necessitate a review of the Constitution's amending provisions.² Article V of the Constitution provides two methods for proposing constitutional amendments. First, amendments may be proposed by two-thirds of both Houses of Congress. Second, "on the application of the Legislatures of two-thirds of the several states, [Congress] shall call a convention for proposing amendments." Since 1787, the Constitution has been amended twenty-five times. In each case, the amendments were proposed by Congress pursuant to the first alternative.³ As a result, the appropriate powers and procedures relating to the first alternative are clearly understood.⁴

Given Congress' apparent unwillingness to take the initiative concerning a reapportionment amendment,⁵ the question becomes whether Congress will be forced to call a Constitutional Convention under the second alternative. Since the *Baker* decision in 1962, at least thirty-two state legislatures have sent forty-seven separate communications to Congress urging the proposal of a reapportionment amendment.⁶ Many of these communications

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5. The Dirksen proposal was sent to the Senate Judiciary Committee where it died.

6. Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota,
requested Congress to call for a Constitutional Convention, while others asked Congress to take the initiative as they have with previous amendments. Some states requested both procedures, resulting in uncertainty as to which should control. Even though the requests have not been uniform in substance or form, application by two-thirds or more states would appear to impose a mandatory obligation on Congress to call a Convention under the second alternative. This Article will consider the heretofore unused alternative in article V, the problems involved in its operation, and its proper role in the amending process.

II. GENERAL PRINCIPLES OF THE AMENDING CLAUSE

In general, the scheme of the Constitution's amending procedure is not very complex. Article V provides that amendments may be proposed either by two-thirds of both Houses of Congress or by a Convention called at the request of two-thirds of the states. The method of ratification of the proposed amendments is determined by Congress; ratification may be by three-fourths of the state legislatures or by three-fourths of state conventions.

The President has no power or place in the amending process, and, except to the extent construction of the law is required, neither has the judiciary. The states, with respect to their role in the amending process, may resist any federal interference, except that Congress necessarily dominates before a call is issued and in the designation of the ratification method.

Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Christian Science Monitor, April 3, 1967, p. 9. In addition, California and Rhode Island have expressed some dissatisfaction with the Baker result so that, in effect, the required two-thirds of the state legislatures have expressed some form of dissatisfaction with the existing state of the law. However, dissatisfaction must be translated into a constitutional form, which is the question here examined.

8. See, e.g., Mississippi, North Carolina, and South Carolina.
10. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). Neither has the Vice-President, even though he is the President of the Senate. See also Pierce Butler in the United States Senate on November 23, 1803, 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 400 (1911) [hereinafter cited FARRAND, RECORDS].
12. The major question implicit here, and throughout this paper, is the extent to which federal law will control the freedom of the states to act under article V.
Hence, while the federal government may be somewhat bypassed through state application and ratification, the states are always indispensable in the amending process.

III. THE STATE LEGISLATURE'S ROLE

A. The Nature and Composition of an Applying Legislature

The Supreme Court, in *Leser v. Garnett*, held that amendment ratification by the state legislature is "a Federal function derived from the Federal Constitution" and "transcends any limitations sought to be imposed by the people of the state." However, it is generally recognized that the state legislature's composition is the state's own affair, except where a constitutional right may be involved. For example, this view does not...

14. This bypassing involves the substantive content of a proposed amendment. Of course, procedures with respect to the call, etc., are initially within the federal jurisdiction. In the political theory of 1787, this procedure would make a nonresponsive federal body subject to the will of the people, although both of the bodies involved are representatives of the same people and should therefore reflect their desires. However, the federal-state type of governmental division, with its states' rights coloration and the fear of a sprawling gargantua, may conceivably also be found here, e.g., congressmen are federal, not local, officers. See *Preston v. Edmondson*, 263 F. Supp. 370, 372-73 (N.D. Okla. 1967). At the same time, state legislators are local officers. Since ratification is always a local function, and the local bodies are given a means of proposing amendments equal to the federal power, does this indicate a desired ultimate supremacy on the local level?

15. 258 U.S. 130 (1922). *Leser* involved the nineteenth amendment's extension of the vote to women. Two of several objections were: (1) the character of the amendment required a state's affirmative consent (Maryland's legislature had refused to ratify it), which the Court rejected; and (2) several of the state constitutions had specific provisions which rendered inoperative the ratifications by their legislatures, i.e., they were without power to do so. The argument involved the states' bill of rights which allegedly forbade the legislatures "to impair [the people's] right of self-government," and also Tennessee's provision forbidding the legislature to ratify any federal amendment proposed subsequent to their election. Justice Brandeis disposed of this summarily by stating that the Tennessee (and West Virginia) legislatures "had power to adopt the resolutions of ratification" (in effect refusing to go into a fact question that in West Virginia a first vote had rejected the proposal, and the second vote of ratification was unlawful under the state law), and that their "official notice to the Secretary [of State], duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts." *Id.* at 137. Cf. *Forroscher*, *Constitutional Law* 60-61 (1963).

16. 258 U.S. at 137.

authorize or justify federal intrusion into the bicameral or unicameral\textsuperscript{18} nature of the applying legislature. A single-bodied legislature is just as effective for purposes of ratification and, \textit{pari passu}, application for a Constitutional Convention, as is a double body.

However, in light of \textit{Baker v. Carr}\textsuperscript{19} and the cases following it, the question might arise whether a particular state legislature, at the time of its application, is a duly elected and valid body for purposes of the second alternative. It is submitted that this issue, subject to the exceptions herein noted, is peculiarly one of state law. Recognizing that a state legislature may now be under a legal obligation to reapportion, it does not follow that the legislature may not act until reapportionment is effected, or that if it does act all statutes, resolutions, and “applications” are subject to a later declaration of infirmity.

When the judicial determination of unconstitutional apportionment is subsequent to the questioned legislative action, the formalistic and logical \textit{ab initio} argument\textsuperscript{20} is either completely erroneous\textsuperscript{21} or must be substantially qualified.\textsuperscript{22} A \textit{reductio ad absurdum} argument is possible if ratification and not application is examined. Since the twenty-third amendment was

\begin{itemize}
\item \textsuperscript{18} Presently, Nebraska has a unicameral legislature. \textit{Neb. Const.} art. III, § 1.
\item \textsuperscript{19} 369 U.S. 186 (1962).
\item \textsuperscript{20} See, \textit{e.g.}, Norton v. Shelby County, 118 U.S. 425, 442 (1886), where it was held that “an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”
\item \textsuperscript{21} See, \textit{e.g.}, 39 \textit{Op. Atty Gen.} 22 (1937), advising the President that the Supreme Court's 1937 overruling of a 1923 decision meant that the congressional statute originally declared unconstitutional is now a valid act because the “statute continues to remain on the statute books” notwithstanding the 1923 declaration of unconstitutionality and may therefore now “be administered in accordance with its terms.”
\item \textsuperscript{22} In \textit{Chicot County Drainage Dist. v. Baxter State Bank}, 308 U.S. 371, 374 (1940), the court stated:
The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. . . . [T]he statutory state is manifest . . . that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

See also \textit{Griffin v. Illinois}, 351 U.S. 12, 26 (1956), where Justice Frankfurter concluded that “adjudication is not a mechanical exercise nor does it compel ‘either/or’ determinations.”
\end{itemize}
finally ratified just one year prior to the Baker case, it is likely that the Tennessee legislature was unconstitutionally apportioned at the time. Further, it is reasonable to assume that many other legislatures were malapportioned when they ratified the twenty-third amendment. Yet, is there any serious dispute whether a United States citizen residing in the District of Columbia is able to vote in a Presidential election?

It seems even clearer that when the legislature merely requests a Convention rather than ratifies an amendment, an objection to the application on the basis of unequal apportionment will not be sustained. Moreover, such a contention overlooks political and pragmatic considerations. Subsequent constitutionally apportioned legislatures will be able to recall, rescind, or otherwise void the former applications, for apparently there is no restriction upon rescission as there seemingly is with respect to ratification.

B. THE MECHANICS OF MAKING AN APPLICATION

Procedural details relating to the time, place, etc., of legislative sessions in which an application for a Convention call may be made are clearly within the state's discretion. While a legislature may desire a special session for this purpose, it seems that this matter could be handled during a general session. The only real procedural question concerns the vote required to make an application. The answer will depend on the form the application takes and what a particular state's consti-

23. Justice Harlan, dissenting in Gray v. Sanders, 372 U.S. 368 (1963), pointed to "at least 30 state legislatures [which] had been challenged in state and federal courts, and, besides this one, 10 electoral cases of one kind or another are already on this Court's docket." The assumption is that at least one-quarter plus one of the states in 1960-61 were improperly apportioned when the twenty-third amendment was proposed and ratified.

24. At least twenty-six of the thirty-two legislatures which have applied for reconsideration of the Baker decision, were malapportioned at the time of application. Twenty of these legislatures have subsequently reapportioned, including Alabama, Nebraska, Maryland, Minnesota, and Tennessee. The reapportioned Maryland legislature in March, 1967, considered rescinding their communication and failed to do so by only one vote. But consider the situation where there is a continuing malapportionment or the reapportioned legislature is still not constitutional and the legislature rescinds. What result?


26. See, e.g., Coleman v. Miller, 307 U.S. 433 (1939), which holds that the efficacy of the internal rejection-and-then-ratification procedure by a legislature to be a political question.
tution, statutes, or legislative rules require. Presently, some applications can be made when supported by fifty-one per cent of the legislature. Other legislatures, however, cannot apply unless sixty-five per cent of their members favor such action. Arguably, some uniformity should be sought.

Several state constitutions require a referendum before the legislature may apply. This requirement has been held unconstitutional for purposes of amendment ratification, but it need not follow that for purposes of application the same result is required. However, since the constitutional language makes it clear that the legislatures have to make the applications, one may predict that mandatory referenda will be frowned upon. At the same time, if the legislature chooses to adopt a permissive referendum procedure, it seemingly has not violated its constitutional responsibility, for it must still make the ultimate decision to apply.

Perhaps the most important question facing the legislatures applying for a Convention call is the appropriate form for the application. In the past, Congress has received, inter alia, "memorials," "petitions," "resolutions," and "statutes." Are these documents effective? Do they each manifest the same thing in the present context? Historically, the term "application" was adopted in its generic sense, albeit within the framework of existing legal definitions. The Constitution's draftsmen, moreover, did not indicate any desire that a technical construction be

27. In Hawke v. Smith, 253 U.S. 221 (1920), the Court condemned the use of popular referenda during the ratification of the eighteenth and nineteenth amendments. The rationale was that a federal function is involved which "transcends any limitations sought to be imposed by the people of a State." Leser v. Garnett, 258 U.S. 130, 137 (1922).

28. If the referendum is to be binding when discretionarily held, a different problem would be presented, although here again the above conclusion seems applicable. See Hawke v. Smith, 253 U.S. 221 (1920).

29. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1534 (2d ed. unabr. 1934) gives several definitions, one being "a statement of facts, addressed to the government . . . often accompanied with a petition or remonstrance." BLACK, LAW DICTIONARY 1136 (4th ed. 1951) defines it as "a document presented to a legislative body . . . containing a petition . . . ."

30. In late 1964, the annual General Assembly of the States, sponsored by the Council of State Governments, published a model petition which called upon Congress to convene a Constitutional Convention to propose an amendment to permit one house of a state's legislature to be apportioned on a basis other than population. This model, however, has not been uniformly adopted. The model, in part, provided "The Legislatures of the State of ____________ , pursuant to joint resolution hereby makes Application to the Congress of the United States to call a Convention for proposing amendments to the Constitution of the United States."
given to the term. Since the state executive may not veto the application, because no law is being created, there is no reason why a "joint resolution" should not qualify as a proper application from the state legislature. The result would be analogous to the use of a congressional Joint Resolution in proposing the twenty-first amendment under the first alternative. In any event, the ultimate decision concerning the appropriate form will be made by Congress. While a uniform application form is desirable, any communication substantially manifesting a legislative desire that such a convention be called should suffice.

While consideration has focused thus far on the form of the application, several points concerning the substantive requirements should be noted. The prime question is what the application must say. Clearly, it should express the legislature's desire for a convention and should apply to Congress to call such a body into existence. Further, there appears to be no reason to require that the application be limited to one particular amendment as article V speaks of "amendments."

Finally, the amending clause clearly provides that each application must be made to Congress. There may be, however, some question as to what the term "Congress" means in this context. The Constitution creates "a Congress . . . which shall consist of a Senate and House . . . ." While joint sessions of Congress

31. Smiley v. Holm, 285 U.S. 355 (1932), where a federal census necessitated a loss of representation in the House of Representatives, the legislature reapportioned but the governor vetoed, and the Supreme Court upheld this gubernatorial participation in the lawmaking function, is distinguishable. The Court has refused to uphold a state legislature's concurrent resolution increasing the number of representatives, Koenig v. Flynn, 285 U.S. 375 (1932), or a bill decreasing them, Carroll v. Becker, 285 U.S. 380 (1932), where not submitted to the governor as required by their constitutions.

32. Recognizing that "legislature" has a particular meaning in article I, § 4, clause one of the Constitution, and the Governor may participate therein, it does not necessarily follow that such a construction must be given in all cases. As Chief Justice Hughes wrote:

The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V . . . . It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view. . . .


33. See Hollingworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

gress are authorized by the Constitution, delivery to these sessions should not be required. The more realistic procedure would be to recognize the applications as delivered when they are deposited with the presiding officer and the keeper of the records of both Houses.

IV. CONGRESS' ROLE

A. THE APPROPRIATE TEST FOR PROPER APPLICATION

Since Congress determines whether a proper and valid ratification has occurred, arguably it has a similar power with respect to applications. The rationale is that some body must have the power to decide such questions and, with judicial withdrawal or impotence, Congress is the only body external to the individual states capable of making this determination. Bootstrap validity to a state's application cannot be granted, even though congressional power may be exercised unwisely, for in this latter situation the state involved may easily reapply in a correct and valid manner. A hodge-podge of conflicting and even peculiar procedures is thus avoided, as a congressional determination in one instance will provide a precedent for the rest of the states.

In construing applications against the language of article V, the test appears to be whether the document substantially manifests a legislature's desire that a Convention call be made. Given that Congress will be the final arbiter, political rather than legal considerations will be involved. It is opined that when the basic political temper of thirty-four states is evidenced in slightly different fashions, as herein considered, Congress will not be likely to nit-pick the applications. Rather, applications will be given liberal constructions. At the same time, however, where an express limitation or requirement is set forth in such an application, restricting the scope of the Convention's authority, so that the application is inconsistent with the other applications, the Judiciary Committees of both Houses will have no choice but to ignore the document or, preferably, to reject and return it to the state legislature with an adequate explanation.

Another consideration in determining whether a proper application has been made is the timeliness of the application. More particularly, is there any time limitation imposed by Con-

35. U.S. Const. art. II, § 3.
36. Cf. Coleman v. Miller, 307 U.S. 433 (1939). The Court held that Congress, not the courts, is the body to determine whether a proper ratification has been made, for the question is "political" rather than "legal."
gress or the Constitution within which the required number of applications must be received? Several recent proposed amendments have required that ratification must occur within seven years to be effective. The child labor amendment, however, contained no such limitation. Thirteen years later, it still had not been ratified. In the interim there had been rejections, refusals to ratify, ratifications, and even some states taking one position and subsequently reversing it. In *Coleman v. Miller*, the Court considered a twelve year lapse of time in the Kansas legislature's ratification. Three Justices reasoned that "in the absence of a limitation by the Congress, the Court can [not] and should [not] decide what is a reasonable period within which ratification may be had . . . [as] the questions they involve are essentially political and not justiciable." Four concurring Justices felt that even this holding was beyond the Court's power for "undivided control of that [amending] process has been given by the [Fifth] Article exclusively and completely to Congress." By analogy, therefore, Congress has complete power to determine the reasonableness of the time within which the required two-thirds of the legislatures must apply and, regardless of its decision, no judicial relief is possible. However, if the ratification period heretofore used for certain proposed amendments is any criterion, there is support for the view that seven years between the first application by a legislature and that of the last could and should be the standard. As with ratification, a seven

37. See the congressional proposals for the eighteenth, twentieth, twenty-first, and twenty-second amendments.
40. As noted in Coleman, the Kansas Legislature had, *inter alia*, rejected the amendment in 1925. Twelve years later the legislature reversed its position and ratified the amendment. Id. at 435-36.
41. Id. at 452, 454.
42. Id. at 459. The two dissenters felt the Court should and could decide that more than a reasonable time had elapsed. They quoted at length from and based their dissent upon Dillon v. Gloss, 256 U.S. 368, 375 (1921), although there a congressional requirement of 7 years for ratification of the eighteenth amendment was met in a year and half. Included in this quotation was:

[T]here is a fair implication [in article V] that [ratification] must be sufficiently contemporaneous in that number [three-quarters] 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. . . .

Id. at 472. One may therefore conclude that *Dillon v. Gloss* has lost its judicial gloss but, it is suggested, the policy may still be applicable to applications because Congress, and not the judiciary, decides this matter.
year period for application would afford states, whose legislatures do not meet annually, sufficient time to consider the proposal adequately while allowing for local discussion. Yet, such a period would require that the necessary number of legislatures must agree, somewhat contemporarily, that such a convention is necessary.

B. **The Convention Call—Mandatory or Permissive?**

Assuming that the required number of state legislatures make proper applications, the question arises whether the term "shall," found in the second alternative, places a mandatory obligation on Congress to issue the convention call. To illustrate the importance of this issue, one need only consider the 1929 communication from the Wisconsin legislature informing Congress that with its own application more than two-thirds of the state legislatures had submitted applications for a Constitutional Convention (although on various subjects), that the constitutional language was mandatory, and that Congress should perform its duty. Congress failed to act or even acknowledge the request. If, in disregard of support for a Constitutional Convention, Congress ignores such applications, and the judiciary refuses to exert jurisdiction because of the political nature of the issues involved, then what value can the alternative have?

Further, "shall" has been interpreted by the judiciary as meaning "may" or "must" depending on the particular context.

43. Of course these great debates are not a necessity, as the “sleeper” applications—applications passed by one legislature and subsequently reconsidered by the same legislature—seemingly indicate. However, it does seem desirable to allow sufficient time for such discussion.

44. See Martig, *Amending the Constitution—Article Five: The Keystone of the Arch*, 35 MicH. L. Rev. 1253, 1267, 1269, 1270 (1937), where it is stated that since 1789 “at least thirty-six of the states have at one time or another made application to Congress for a convention. . . .” Since the early applications concerned the later-ratified Bill of Rights, these can be subtracted so that between 1833 and 1929 at least 32 requests were made. However, some of these may be time-condemned and, after 1893 eleven of the thirty-three states applying were satisfied when the seventeenth amendment was submitted and ratified.

45. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873) held that “shall” in the context of article IV, § 2, clause 2 is not absolute and is qualified by the requirements of the surrounding states. This decision is surprising because earlier Congress had imposed a mandatory duty upon the governors to deliver up fleeing criminals. 1 Stat. 302 (1793), 18 U.S.C. § 3182. See also Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861) (federal statute imposed nonmandatory obligation on recalcitrant official).
If the former meaning is attributed to the amending provision, it would result in the circumscription of the state legislature's role in amending the Constitution.\textsuperscript{46} While the members of Congress are subjected to some political pressure from their constituents, this begs the question and is an unsatisfactory safeguard for such a crucial matter.

The more reasonable construction, in view of the alternatives in article V, is that Congress has a mandatory obligation to call the Convention. Thus, Congress is relegated to a purely intermediate role under the second alternative with no power to consider the wisdom and necessity of a Convention call.

The 1787 Convention debates appear to sustain this construction. Madison's Notes disclose that Morris of Pennsylvania, when the amending article was being discussed just two weeks before the Convention terminated, “suggested that the [national] Legislature should be left at liberty [exclusively]\textsuperscript{47} to call a convention, whenever they please. The art: was agreed to nem: con: [without contradiction].”\textsuperscript{48} To that time the major proposals reaching the Convention limited the institution of the amending process to the state legislatures, with Congress required to follow suit, i.e., “shall call a Convention for that purpose” when two-thirds of the state legislatures make “application” therefor.\textsuperscript{49} Morris wanted to have only Congress “at liberty to call a convention, whenever they please,”\textsuperscript{50} and the Pinckney Plan,\textsuperscript{51} with

\textsuperscript{46} This was the fear expressed by Mason on September 17, 1787 when he successfully moved the amendment of the proposed article. This stifling of the people's will could be done, for example, in the Senate by a minority of the members where they constitute a majority of a minimum quorum to transact business or where they engage in a filibuster.

\textsuperscript{47} Mason gives this account of what transpired:
Anecdote. the constn as agreed at first was that amendments might be proposed either by Congr. or the legislatures a commee was appointed to digest & redraw. Gov. Morris & King were of the commee. one mornig. Gov. M. moved an instrn for certain alterns (not ½ the members yet come in) in a hurry & without understanding it was agreed to. the Commee reported so that Congr. shd have the exclusive. power of proposg. amendmts. G. Mason observd it on the report & opposed it. King denied the constrn. Mason demonstrated it, & asked the Commee by what authority they had varied what had been agreed. G. Morris then impudently got up & said by authority of the convention & produced the blind instruction beforementd. which was unknown by ½ of the house & not till then understood by the other. they then restored it as it stood originally.

FARRAND, RECORDS 367-68.

\textsuperscript{48} 2 FARRAND, RECORDS 468.

\textsuperscript{49} Id. at 467, n.23.

\textsuperscript{50} See note 48 supra and accompanying text. It is susceptible to the interpretation that “also” may be inserted between “Legislature”
both alternative methods utilized, seemed to have been ignored. However, one week before the delegates terminated their labors both Gerry of Massachusetts and Hamilton of New York contended that the inability of Congress to propose amendments was a defect too great to be permitted, whereupon a motion to reconsider was passed. Madison, seconded by Hamilton, successfully moved a new proposal which modified the desires of Morris slightly. The original major plans and suggestions placed the proposing power exclusively in the hands of the states, (the Virginia Plan specified “that the assent of the National Legislature ought not be required,”) so that the states' application required Congress to call an amending convention. Madison and Hamilton wanted to permit only the Congress itself to propose amendments, without any convention, but such proposals were to be made either when both legislative bodies so desired or when the states applied to Congress to propose an amendment. Despite early fears that the Congress may abuse its power, the and “should.” If this is the interpretation then Morris, in effect, was adopting a modified version of the Pinckney alternatives. See note infra. The text interpretation is utilized, although even with this alternative interpretation the same conclusions would result.

51. The Pinckney Plan provided:
   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 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.

3 Farrand, Records 601.

52. 2 Farrand, Records 557-59.

53. Ibid. The Madison proposal was that the Congress “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 . . . .”

54. 1 Farrand, Records 22.

55. “13. Resd. that provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.” 1 Farrand, Records 23. For Randolph's additional views on why article V may not be a sufficient protection against the Constitution's imperfections, see his letter to the Speaker of the Virginia House of Delegates on Oct. 10, 1787. 3 Farrand, Records 126-27.

The first discussion by the Convention (as a Committee of the Whole House) of this proposal discloses that “several members did not see the necessity of the [entire] Resolution at all, nor the propriety of making the consent of the Natl. Legisl. unnecessary.” 1 Farrand, Records 202. Mason urged the necessity of the Resolution. Concerning the role of the federal legislature, he felt:

It would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an
Madison-Hamilton language was retained until the last day of the Convention's labors, but the new and additional fears expressed by Mason and others resulted in the language now found in the Constitution.56

It may be remarked that Hamilton, in seconding Madison's proposal, was playing a somewhat foxy game. He did not like the Virginia Plan which expressly placed the amending power out of reach of the federal government, but he did not care (dare?) to make a direct assault upon it. His objections stressed the contention that state amending power would be exercised only to increase the states' powers, whereas the Congress would be the first to perceive and would be most sensitive to the need for amendment on behalf of the new federal Union; therefore, this federal body "ought also to be empowered . . . to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case."57 In other words he would merely add to the pending proposal a second method and body able to call a Convention. Madison's proposal, however, went even beyond Hamilton's desires and the latter, therefore, enthusiastically and quickly seconded it, utilizing Madison's respect and influence amongst the delegates to attain a stronger central government. But, it must be concluded, that when Hamilton's new plan eventually failed, he willingly settled for what still was more than he had suggested. If Congress now could itself propose, without the states, then the states, without the Congress (save for the ministerial call) could have a Convention called for "proposing" new amendments.

This background of conflicting plans, the apparent compromise at the last moment, and the language ultimately adopted, suggests that the draftsmen's intent was that Congress should be able to propose amendments directly and that the states should be able to accomplish the same indirectly. Therefore, unless one does violence to the legislative history, it is clear that

1 FARRAND, RECORDS 203. Randolph "enforced" these arguments, and the final clause, i.e., without the consent of the Congress, was postponed, while the first provision was passed. 1 FARRAND, RECORDS 202-04. Eventually, of course, this final clause was deleted, other changes made, and Congress given independent power to propose.

On June 19th the Committee of the Whole House, by a 7-3 vote of the states, decided not to agree to the Jersey propositions but to report those offered by Mr. Randolph. 1 FARRAND, RECORDS 313.

56. See, e.g., the language of the Pinckney Plan, note 51 supra.

57. 2 FARRAND, RECORDS 558 (Emphasis added).
the term “shall” in the present context imposes a mandatory obligation on Congress to call a proposing Convention when two-thirds of the state legislatures properly apply.\(^5\)

Even under the above construction, there is a problem of enforcement should Congress choose to ignore proper and sufficient applications. Arguably, legal recourse is available. The federal judiciary might conceivably take the position that it has jurisdiction to interpret the term “application.” It is highly unlikely, however, that the courts would become so involved, let alone attempt to force Congress by a writ of mandamus or otherwise to issue such a call. However, the states may be able to achieve the necessary action by applying political pressure. Were two-thirds of the state legislatures uniformly to move for a Convention, it is politically unrealistic to expect that Congress would ignore the matter. Additionally, personal communications from

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58. Madison’s contributions to the Federalist, number forty-three, is the only one of the eighty-five papers that significantly mentions the amending article. In the eighth subdivision only one paragraph is found on this power. The fifth sentence reads: “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. . . .”

In the First Congress Madison, on May 4, 1789, gave notice “that he intended to bring on the subject of amendments” so as to comply with the (implied) promises to the ratifying conventions that a Bill of Rights would be added to the Constitution. 1 ANNALS 247 (Gales ed. 1834). [This is discussed in greater detail in Forkosch, Who Are the “People” in the Preamble to the Constitution?, 51 WEST RES. L. REV. — (1967).]

The next day Bland (Va.) presented an application by that state’s legislature for amendments, attempting thereby to follow the alternative amending procedures. Objections were made to its consideration until the proper number of states “concurred in similar applications,” and Madison also “doubted the propriety of” the procedures:

until two-thirds of the State Legislatures concurred in such application, 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. . . . From . . . [the Fifth (Amending) Article’s language] it must appear, that Congress have no deliberative power on this occasion . . . .

Therefore, he suggested the Virginia application be entered on the House minutes and remain on file until the proper number of “similar applications” arrive. The objecting member agreed with these views but the introducing member, Bland, while agreeing that Congress was “obliged to order the convention when” the proper number of legislatures applied, still felt that as the present application contained “a number of reasons why it is necessary to call a convention,” these reasons should “be properly weighed” now in a Committee. A few others discussed this briefly and one member suggested the applications be placed in the minutes and wait for others, the original to be deposited in the archives; to this Bland agreed. Ibid. at 249-251.
constituents and state legislators should sufficiently motivate any Congressman interested in re-election. Beyond this, unfortunately, Congress may be free to ignore its obligation if it so chooses. This, perhaps, is the most important defect in the amending provision.

C. THE MECHANICS OF A CONVENTION CALL

Assuming that the necessary two-thirds of the states satisfy the above requirements, how does Congress call a Convention? It seems that a Joint Resolution, analogous to the one employed for the ratification of the twenty-first amendment, should be sufficient. Moreover, a simple majority of each House should be able to pass such a resolution, as the two-thirds requirement applies only to the state legislatures' applications. This is proper since Congress' function is procedural, and a majority vote should be sufficient to determine how the call is to be worded.

Further, a congressional "call" implies that Congress will do more than inform the states that the requisite number of applications has been received. The importance of this call must not be overlooked. It becomes the guideline for all procedures up to the time of the Convention and, to an extent, is the jurisdictional support for that body. It is, therefore, essential that the call be drafted with care and foresight. The Congress may, of course, delegate some of the procedural matters to the states as it did with respect to ratification of the twenty-first amendment. In any event, the call should make clear who has the power to establish procedures.

V. THE CONSTITUTIONAL CONVENTION

Assuming that Congress issues a call, it is fairly well established that each state need not affirmatively respond. Historical support for this proposition is found in the 1787 Convention. There Rhode Island refused to participate or even sign the proposed Constitution, and it did not ratify until more than a year after the required ninth state had so done. Simi-


61. On May 29, 1790. The required ninth state had ratified on June 21, 1788, followed by Virginia (June 25) and New York (July 26).
larly, not all states have ratified all proposed and adopted amendments. Still others have rescinded prior ratifications. It would, therefore, appear that a state may not only refuse to support the Convention but, judicially, no method exists to compel participation.

A. SELECTION OF CONVENTION DELEGATES

The amending provision is silent on the method of choosing delegates to the Convention. It seems clear that even if Congress has the authority to designate a method of selection, such decisions should be left to the respective states. It is further submitted that a special election, totally unconnected with any other issues, should be held in each state to select the delegates. Such elections should take place no less than thirty days after the final nomination of delegates so as to allow adequate local discussion. This approach is clearly consistent with the tradition, political theory, and spirit of article V.

The qualifications of the voters in such a special election should present little difficulty. Congress could either establish the necessary requirements or delegate this power to the states. Although the Constitution permits Congress to alter regulations (except as to the places of choosing Senators) adopted by the states for national elections, it has not exercised this power. It would seem unlikely that Congress would now attempt to exercise such powers under the alternative amending clause. And since the voters “in each state shall have the qualifications requisite for [voters] of the most numerous branch of the state legislature,” state law may be employed to define these qualifications.

62. E.g., New Jersey, Ohio, and Oregon later rescinded their ratifications of the fourteenth amendment.

63. While the original jurisdiction of the Supreme Court permits a recusant state to be sued, and procedurally a suit is therefore feasible, the substantive cause of action remains unclear regardless of whether the Court would undertake to pass upon the question. Carried to an extreme, suppose not one or two states so refrained but one more than one-third, so that there would be an insufficiency if two-thirds of the states were required to propose under article V.

64. The importance of the Convention and its work suggest a special election. Where ratifying conventions were used for the twenty-first amendment, the delegates were elected.


The amending provision does not cover expressly or implicitly qualifications and requirements for other delegates to a Constitutional Convention or delegates to a ratifying convention. Thus, a degree of parallel interpretation may be used, and the method and manner of qualifying delegates for a ratifying convention may be drawn upon by analogy.

The initial question is whether Congress has the power to prescribe qualifications for the Convention delegates. The Constitution's silence allows one to argue that by omitting qualifying language the 1787 Convention intended to give Congress such a discretionary substantive power.67 This position finds some support in the composition and qualifications of the delegates to the 1787 Constitutional Convention.68 The call by Congress for the original Convention was simply for "delegates who shall have been appointed by the several states."69 This call, in effect, permits the inference that Congress could have specified the necessary requirements but chose to leave the matter with the states.70

Further support for this position is found in the fact that Constitutional Conventions are a federal function. Since ratifying legislators, when Congress chooses this mode, engage in a federal function,71 a proposing Convention and its delegates, by parity of reasoning, should be similarly viewed as engaging in a


67. This finds support in the February 21, 1787, call by Congress for a convention "of delegates who shall have been appointed by the several states" implying that the qualifications might have been stated but were being left up to the states. 3 FARRAND, RECORDS 13-14.

68. For example, while there were only four delegates under thirty, namely, Dayton (27, N.J.), Mercer (28, Md.), Pinckney (29, S.C.), and Spaight (29, N.C.), there were fifteen in their thirties. Franklin, at eighty-one, was the elder of the Convention. The average age of the delegates was 42. Whether or not the qualifications for a future Senator included the attainment of the age of thirty because of the large number above that age, or shortly to meet it, is conjectural; but the fact that the age for the House was set at twenty-five, when only Dayton (a nonentity) was, for practical purposes, then ineligible for the Senate, suggests that the preponderance of young men in the Convention predisposed youthful qualifications.

69. 3 FARRAND, RECORDS 14.

70. For example, at the New York Convention ratifying the twenty-first amendment, the qualifications for the convention delegates were silent as to age. This was not astonishing as the state constitution omits any requirement of age as a qualification for the state legislature.

71. See notes 27, 31 supra.
federal function. Either by analogy to the preceding conclusions, or because Congress issues the call, or because the process results in one national convention, as opposed to fifty local ones, a federal function is clearly involved in the second alternative.

While it would appear that Congress has the power to establish the qualifications for future Convention delegates, practical political considerations make it unlikely that this power will be exercised. It is far more consistent with a politician's behavioral pattern for him to follow a parallel method, where none else is available, than to blaze new trails. Once a precedent is established, the procedure is thereafter continued save where substantial defects are disclosed. Accordingly, common sense and political considerations conduce to the suggestions hereafter made.

Assuming, therefore, that Congress directs that the delegates to the proposing Convention be selected locally, the question becomes what probable substantive qualifications must the delegates satisfy? The experience under the twenty-first amendment's ratifying conventions should supply part of the answer. There, a congressional Joint Resolution was deposited in the Department of State calling for ratifying conventions, and the state legislatures were promptly notified. The legislatures then passed statutes calling for a "state convention" to be held at a specified time, place, and hour "to consider and act upon the ratification of the proposal." In other words, a procedure had to be improvised, and, to allay any objection, the legislature carefully established procedures consistent with those used in the state functions. The New York statute, for example, provided that one hundred fifty delegates to the Convention were

to be elected from the state at large, each of whom shall be a citizen and inhabitant of the state. . . . A person qualified at the time of such election to vote . . . for a member of assembly [the lower or more popular body] . . . shall be qualified . . . .

Statutes disqualifying a person for public office because he then holds another public office shall not apply . . . .

72. 47 Stat. 1625 (1933).
74. Id. at § 2. There was no primary election but nominations were to be by petition, which was then described (§ 3); election details, ballot sample, etc., were then set forth in §§ 4-7; other provisions led up to the convention itself, with delegates to "take the constitutional oath of office" and to be called to order by the governor or lieutenant governor acting as temporary president (§ 10); the "convention shall be the judge of the election and qualification of its members . . . ." enact its own rules, elect officers, etc. (§ 11); ratification was to be by "a majority of the total number of delegates" and a certificate, in triplicate, by the con-
The election and convention were duly held and the amendment was ratified without any objection as to the procedural matters. It should be noted that delegates did not have to possess the same qualifications as a congressman or a senator. Rather, citizenship and inhabitancy were the only requirements.\textsuperscript{75}

By analogy, delegates to a proposing Convention should not have to satisfy constitutional requirements imposed upon senators or congressmen. Two factors, however, seem to militate against this conclusion. The Constitution permits ratification by state legislatures or state conventions, and no great violence is done to this language if such legislators or delegates, chosen locally, satisfy local qualifications. But with respect to proposing Conventions, it is a national legislature or convention which is involved, and it would appear that the states are, therefore, completely proscribed from any substantive intrusion.\textsuperscript{76} This

\textsuperscript{75} Of course, state requirements for its lower house applied, but this was by choice

\textsuperscript{76} Are the states proscribed from determining substantive qualifications unless and until Congress affirmatively so permits? Or may the states act, assuming Congress fails so to do, unless and until Congress prevents them from so doing? These usual proscription-preemption doctrines briefly state that where the subject-matter involved is national in character and requires national uniform legislation the states are proscribed from action, assuming they can act otherwise (e.g., constitutionally they cannot declare war in any conceivable situation), unless and until Congress permits it. See, e.g., Leisy v. Hardin, 135 U.S. 100 (1890); In re Rahrer, 140 U.S. 545 (1891). However, where such character and uniformity are not found, and assuming the states can otherwise act, the states may do so unless Congress either denies state action, even though it does not itself act, or acts thereon and thereby preempts the subject-matter. Congress may specifically permit the states to act until federal legislation is enacted, as in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

In the instant situation it would appear that the substantive qualifications of proposing delegates is very definitely a national matter requiring uniformity, and thus precluding state action. But does this proscription mean that Congress may affirmatively permit the states, when Congress issues the Convention call, to set any substantive qualifications? Proscription has a coin-face, namely, that in certain instances the states can never act, and Congress has no authority to delegate any
means that Congress, in its Convention call, must set the qualifications, because the states, lacking this power, either cannot hold elections or must attempt to utilize some undefined minimum.\textsuperscript{77} In such a call it is simple for Congress to follow the Constitution's qualifications for the House of Representatives and require that delegates be at least twenty-five years of age, a United States citizen for at least seven years, and an inhabitant of the state from which he was chosen.\textsuperscript{78} Of course, the good sense of the voters may be urged as a sufficient safeguard against unqualified candidates, but this is a rather slim reed upon which to build a Convention empowered to alter our constitutional framework.

A separate question is whether any limitations are imposed by the Constitution precluding otherwise qualified candidates from becoming Convention delegates. For example, article I, section six, clause two, states that Congressmen shall not "be appointed to any civil office under the authority of the United States" created, or having its emoluments increased, "during the time for which he was elected." The key words in this article are "appointed" and "civil office." Since the delegates are elected, no reason should be found in this clause to preclude members of Congress from being delegates. Further, the delegates do not hold a "civil office." Although a federal function is involved, the delegates are more like legislators than civil servants. Clearly, the original clause sought to prevent corruption\textsuperscript{79} that would ruin government by conflicts of interest and patronism.\textsuperscript{80} Arguably, the Constitutional Convention does such power, \textit{e.g.}, to declare war. It is suggested this aspect of proscription be applied in the instant situation.

\textsuperscript{77} Although not further discussed, it would be simple for the states, if the Congressional call omits the suggested clause, to follow the constitutional requirements for the House of Representatives, whereupon, it is opined, the Supreme Court will find it difficult to hold that Congress intended otherwise.

\textsuperscript{78} U.S. Const. art. I, § 2, cl. 2, & § 3, cl. 3. The call might simply state that "Delegates are to possess the qualifications required of a member of the House of Representatives of the United States at the time of their elections [convening]." The bracketed choice is analogized to the situation when Senator Rush D. Holt was elected before reaching the minimum age of thirty but waited to take the oath of office until reaching the required age. S. Rep. No. 904, 74th Cong., 1st Sess. (1935), 79 Cong. Res. 9651–653 (1935).

\textsuperscript{79} Rutledge also used this term, 1 Farrand, Records 386, as did others, \textit{e.g.}, Martin (reporting to the Maryland Legislature Nov. 29, 1787), 3 Farrand, Records 201.

\textsuperscript{80} See 1 Farrand, Records 376, where Butler spoke of the exper-
not come within this fear, for betterment by conflicts of interest should result from participation. Moreover, in light of the delegates' function and possible impact on the constitutional scheme, it seems desirable that interested members of Congress be allowed to participate. Finally, the fact that some of the delegates to the 1787 Convention were legislators under the Articles of Confederation should create a significant precedent in favor of congressmen's eligibility.\textsuperscript{81}

Similarly, it should be noted that nothing in the Constitution or the legislative history precludes members of the federal judiciary\textsuperscript{82} from being Convention delegates. Seemingly, arguments favoring the eligibility of congressmen are equally persuasive in this context. It is suggested, however, that federal judges should refrain from becoming delegates. In fact, Congress may be wise to exclude the judiciary expressly in the call and in its regulation of federal courts.\textsuperscript{83} This conclusion is based on policy considerations, rather than dictated by constitutional law. The rationale is that a proposing Convention is distinguishable from a ratifying convention in purpose and in function, and that the Convention may desire to reverse judicial decisions, with resulting embarrassment, conflicts of interest, and a possibility that discussion will be inhibited or restricted if the federal judiciary is present.

The final question in the selection of delegates involves the total number to be selected and their apportionment among the states. The 1787 Constitutional Convention consisted of several in Great Britain; Mason also spoke of this, 1 Farrand, Records 387. Martin, supra note 79, was still more caustic.

\textsuperscript{81} If the precedent of ratifying conventions is applicable, then either all those conventions having federal legislators are (perhaps) void and the twenty-first amendment has not been duly ratified, or else such an interpretation was never given or was rejected. See, e.g., note 74, supra where the New York ratifying convention stated the non-application of disqualifying statutes. In the current New York Constitutional Convention (for New York's own constitution) meeting during 1967, there are included as members forty-one present or former legislators. Present legislators occupy all the important majority and minority positions. Any conflicting federal statutes could easily be removed from application temporarily.

\textsuperscript{82} The question whether administrative bodies, whose members at times exercise quasi-judicial power, are subsumed under the article III language must be answered in the negative, for decisions to the contrary are legion. See, e.g., Forkosch, Administrative Law § 43 (1956). New York's current convention has several former and present judges serving on committees.

\textsuperscript{83} An objection as to its application to current judges may be made but, it is opined, even if such a statute may be so questioned, judges will undoubtedly not avail themselves of this possible flaw.
enty-four appointed delegates, but only fifty-five ever attended. Moreover, as a result of absentees and abstentions only thirty-nine signed the final proposal. This example, however, should not be adopted as controlling precedent. The ideal Convention must not prove unwieldy but must at the same time fairly represent the people in order to be consistent with its nature and purpose. It is submitted that the number of delegates called for by Congress should equal the number of congressmen as established by the Constitution—presently five hundred and thirty-eight—and a sufficient number of alternates so that full representation throughout the convention can be guaranteed. By allowing each person to vote for one delegate from his congressional district (or at-large as may now be required) plus two delegates at-large in the state (by analogy to senators), this number could easily be selected.

B. THE CONVENTION'S AUTHORITY

The function of the Convention, as expressly stated in article V, is to propose constitutional amendments. The question remains, however, whether there are any limitations upon the power or scope of the Convention to propose such amendments.

Article V, for example, contains the proviso "that no State, without its consent, shall be deprived of its equal suffrage in the Senate." Since the amending article was incorporated to overcome the inability of the states to amend the Articles of Confederation, and since the Great Compromise gave the smaller states equal senatorial representation, this express language clearly means that there can be no amendment depriving any objecting state of its equal senatorial suffrage. Similarly, ar-

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85. Alaska, in 1958, and Hawaii, in 1960, each elected one Representative, raising the total to 437, with Hawaii thereafter (1962, 1964) electing 2 (also at-large). Representative "at-large" seats are not discussed in any detail, on which see, e.g., U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF UNITED STATES 379 (30th ed. 1965), for notes on single and double seats through at-large elections. On the problem of equitableness in such at-large seats see, e.g., Hacker, CONGRESSIONAL DISTRICTING 73, n.4 (1963).
86. See, e.g., 2 FARRAND, RECORDS 630-31. On September 15th, the last day when the Convention debated the numerous proposals, this proviso to article V was adopted in the identical language found there today, with Madison's Notes stating: "This motion dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no." See also Jonathan Dayton's remarks in the Senate on November 24, 1803, given in 3 FARRAND, RECORDS 400-01.
Article IV, section three, clause one, empowers Congress to admit new states:

but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

However, it appears that these limitations would also have been incorporated in article V if the desire of the Constitutional Convention of 1787 was to prevent future amendment without the consent of the state. While the quoted clause seeks to continue the territorial dignity and relative power of all states vis-a-vis each other and in the federal-state relationship, the only conclusion possible is that the only proviso constitutionally protected from change by amendment is the one included in article V.

Constitutional limitations aside, article V gives both Congress and the Convention authority to propose amendments. The enabling language in each alternative is identical save for the infinitive-gerund distinction. The use of the plural “amendments” in the second alternative indicates that the Convention may propose as many amendments as it deems necessary and that Congress is constitutionally unable to restrict this right.

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87. See, e.g., U.S. Const. art. I, § 9, cl. 1, preventing Congress, before 1808, from prohibiting the importation of slaves, and id. cl. 4, concerning taxes, which are repeated in article V’s proviso.
88. See also Madison’s views, note 58 supra, where the last two sentences are:

The exception in favor of the equality of suffrage in the Senate, was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by the principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality.

The other exception must have been admitted on the same considerations which produced the privilege defended by it. The other proviso has lapsed because of its built in time limitation, i.e., no amendment prior to 1808 is to be made concerning the importation of slaves, or permitting direct taxes except as there given. The thirteenth amendment, of course, additionally acts upon all those persons covered by the first such item, and the sixteenth amendment has replaced the second.

89. The 1787 Convention is a true illustration of a runaway body. It was called for a single purpose. 3 Farrand, Records 14. The Randolph-Patterson confrontation pointed up the clash between those who desired to create a new government and those who desired to amend the old. See, e.g., Bowen, Miracle at Philadelphia 104-08 (1966); Forkosch, Constitutional Law 5-7 (1963).

From this it may be concluded that any federal Constitutional Convention has a precedent to enable it to propose any and all amendments, save as otherwise constitutionally limited.
Reference to the article's legislative history supports this conclusion. Throughout the chronological entirety of the Convention's proposals, committee reports, debates, and re-formulations, the assumption seeps through that amendments (plural) were to be proposed by a Convention initially applied for by the legislatures. Hamilton, Madison, and Mason, even though at odds with respect to exact procedure, all consistently referred to the Convention's power by using plurals. Thus, there can be little doubt that the Constitution's draftsmen never intended that article V be so narrowly construed as to limit the power of the Constitutional Convention to propose more than one amendment.

90. The Convention adjourned on July 26, 1787, referring its proceedings to a Committee of Detail, chaired by Rutledge of South Carolina and including Wilson of Pennsylvania, see 1 FARRAND, RECORDS at xxii, to report a proposed constitution on August 6th. FARRAND, RECORDS inserts, between these dates, a nearly complete series of documents representing the various stages of the work of the Committee. One of these states that “This Constitution ought be be amended . . . and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that purpose.” [2 id., Document VIII, at 159. Farrand notes this is from a document found among the Wilson papers]. From the chronological background of this reference on July 26th it would appear that the Virginia (Randolph) Plan, proposed on May 29th, influenced these committee views, although the amending portion of the Pinckney Plan, proposed immediately after the Virginia one, seems eventually to have carried the day. It is, however, notable that even this latter Plan’s two methods commenced with the convention and then, seemingly as an inserted after-thought, included the Congress. Notwithstanding the ultimate form, the Committee of Detail reported back a proposed constitution which included language practically identical to the Virginia proposal: “On the 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.” 2 FARRAND, RECORDS 188, 557.

The Convention proceeded to take up each of the proposed twenty-three separate articles and it was not until August 30th that the nineteenth was reached. The Journal discloses that “On the question to agree to the 19 article as reported it passed in the affirmative,” but Madison’s Notes disclose that a suggestion by Morris was accepted. On the 31st of August the entirety of the proceedings were referred to an elected Committee of Eleven. On the following day and thereafter Brearley reported partially each time on behalf of the Committee, and the Convention debated the items so reported, but it was not until September 10th that, on Gerry’s motion to reconsider, the amending proposal was taken up. Both Gerry and Hamilton felt that the proposal then was deficient, though for different reasons, as did Madison. See notes 47–74 supra and accompanying text, for an account of what then occurred.
This broad power in the Convention, and the absence of anything contrary in the proposals, debates, or the Constitution itself, also seem to indicate that no time limit is imposed upon the Convention's ability to propose amendments. Thus, a "runaway" Convention may ape the charge that the Supreme Court is a continuing constitutional convention and, at least theoretically, could remain in session indefinitely. Even practical obstacles, such as appropriations and places to meet, need not deter the members from adjourning from month to month or year to year. Apparently, no way out of this political dilemma exists, for the judiciary cannot intervene, and the call cannot restrict. As a practical matter this conjured fear is like the proverbial straw man, albeit when the situation materializes it becomes steel.91

C. VOTING REQUIREMENTS IN THE CONVENTION

Given the above, the Convention's efforts may, and theoretically should, result in proposals. By implication, neither the Congress nor the judiciary has the power to supervise or review the Convention's procedures.92 Thus, once the Convention is convened, it is free to establish any voting requirements, rules of order, and other procedural framework it desires. For most matters, a simple majority of a quorum should suffice. However, with respect to the method of voting, the Convention should adopt the policy that each delegate may vote individually,

91. See, e.g., Holmes' comment in Buck v. Bell, 274 U.S. 200, 208 (1927): "It is the usual last resort of constitutional arguments to point out shortcomings of this sort. . . ."

92. Article V states the Convention is called "for proposing Amendments," so that it appears that Congress has no degree of superintendence, especially as it has its own separate power to propose. Neither has the Supreme Court any power to review procedural or substantive determinations.

The analogy is not to an "ordinary" statute or act of legislation by Congress but to the political concepts inhering in such a body. For example, the 1787 Convention was called "for the sole and express purpose of revising the Articles of Confederation," but, as Madison phrased it, "the absolute necessity of the case" permitted it to go beyond this mandate. FORKOSCH, CONSTITUTIONAL LAW 5-6 n.10 (1963). So, if the Supreme Court, for example, is able to examine procedure or substance, a constitutional convention becomes another congress and now not only is subject to judicial review but has its endeavors treated as statutes, not amending proposals. In this respect Justice Black's concurring language in Coleman v. Miller, 307 U.S. 433, 456-60 (1939) (concorded in by Douglas, Frankfurter, and Roberts, J.J.), should apply even more forcefully.
not as part of a state or political party unit. Any other procedure would be contrary to the Constitution's spirit and legislative history, for it would deprive the people of their fundamental right to propose amendments. If required, there are appropriate analogies to the Congress and the ratifying conventions for the twenty-first amendment, where the participating representatives each cast a separate vote.

For the purpose of adopting amendment proposals, a voting requirement analogous to the two-thirds of those entitled to vote on such proposals in Congress and the state legislatures may be appropriate even though such a requirement is not expressed anywhere in the Constitution or its legislative history. Numerous reasons may be advanced for the two-thirds requirement. First, little justification can be found for lowering this figure when such a vote is required of Congress to propose amendments. Also, whatever the number of delegates selected, the chances of combining politicking, emotionalism, bias, prejudice, and other shortsighted subjective considerations to obtain a simple majority are too great to allow. The primary consideration, therefore, should be our historical and political approach to such an important vote and, accordingly, the Convention's rules should require a two-thirds vote to propose an amendment.

VI. RATIFICATION OF THE CONVENTION'S PROPOSALS

Once the Convention has proposed one or more constitutional amendments the question of ratification becomes relevant. The basic question is whether the Convention is to forward the proposals to the states, or whether Congress is to intervene to establish the mode of ratification. Both constitutionally and practically, the solution is for the Convention to forward its proposals to Congress and then dissolve, leaving Congress to handle the ratification procedure. This conclusion stems from language in article V which provides that amendments are valid "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 . . . ." Clearly, Congress has the sole power to determine which alternative mode of ratification will be employed. Moreover, article V seems to indicate that the Convention's sole purpose is to propose amendments, for it is not mentioned

93. Any analogy to the 1787 Convention would be disastrous and not in accord with the requirements of article V.
in any other place. Thus, any mention of the mode of ratification by such a Convention will be viewed as surplusage by Congress, but such surplusage cannot be construed to render a proposal invalid.\footnote{94} It is further suggested that the original call should express the mode of ratification, as the amendment proposals then would not have to be returned to Congress except for mere mechanical or procedural effectuation. A contrary procedure would give Congress a superintending power to withhold submission if the proposed amendments did not conform to its desires without fear of judicial interference.\footnote{95} Congress has its own independent machinery to propose amendments in the first alternative, and to give Congress the power to review the proposals necessarily deprives the second alternative of its independence. As a result, Congress would become supreme, and article V would automatically read that “The Congress . . . shall call a[n advisory] Convention for proposing Amendments [to it] . . . .” This would be an adoption of the very system rejected by the 1787 Convention. Therefore, the best time and place to make such a choice is in the call, and thereafter any further congressional function should be extremely and strictly limited to simple procedural duties.

While the method of selection is basically a policy consideration, it is suggested that ratification by state legislatures should be the mode selected by Congress in its call. The people already have elected delegates to one proposing convention, and having a second ratifying convention would be asking the same people to approve their own handiwork. In theory there should be two different bodies, one to check on the other; the different sets of delegates to the Convention and to the state's legislature may and should produce different reasons and ar-

\footnote{94} See, e.g., United States v. Sprague, 262 U.S. 716, 732-33 (1931), where the eighteenth amendment was attacked because of the tenth amendment's distinction between powers reserved to the states and those reserved to the people; the argument was that states could ratify only their own reserved rights, but that only the conventions could ratify the people's reserved rights; and, since the eighteenth amendment involved the reserved rights of the people, the ratification by states' legislatures was invalid. The Court unanimously rejected this contention: “This court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress.” Id. at 732. The Court also stated that the people in adopting the original Constitution, "deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. . . . Congress must [so] function as the delegated agent . . . ." Id. at 733.

arguments for so amending the Constitution. Expenses, time, effort, and difficulties, not only of the states but of their delegates, would increase to a regressive point if a separate body was again convened.

In proposing amendments in the past Congress has, in several instances, placed a seven-year limitation for ratification by the states. Does the Convention have such a power under the alternative method or is it still in Congress, through the latter's power to propose the mode of ratification? The amendments which have been so limited have contained the language as a separate section; it would appear that Congress has, by such use, indicated its substantive nature. From this point of view the Convention must have this power, but the counter-argument, based upon Congress' ability to determine the mode of ratification, may prove more persuasive. If a choice must be made, the Convention's power to limit is here accepted, but there is no reason why any difference or disagreement need develop. From a policy approach, a seven-year limit is suggested for all amendments proposed through the alternative method because otherwise the judiciary may enter the picture.96

Finally, upon receipt of the official notification of the proposed amendments, the state should promptly begin the process of ratification. Assuming this occurs, properly authenticated and certificated copies of ratification should be promptly forwarded to the appropriate official—the Administrator of General Services.97 While the date of ratification by the last required state is the operative date of an amendment,98 a central federal location for purposes of binding the United States and, when "certified to by ... proclamation, conclusive upon the courts,"99 is advisable to obviate all objections as to regularity.

VII. CONCLUSION

The foregoing analysis permits the formulation of a suggested procedure whereby the alternative method of amending the Constitution may be effectuated. Criticism and counter-suggestions may thus be provoked, hopefully with the result that a useful uniform mode can be set before the state legislatures, the Congress, and the Supreme Court. Such a plan or

96. Ibid.
procedure, it is submitted, should contain the following points.

First, the application by state legislatures should be by at least majority vote for a (joint) resolution, not requiring a governor's approval, and should be couched in the language suggested: The Legislature of the State of __________, pursuant to (Joint) Resolution, hereby makes application to the Congress of the United States to call a Convention for proposing amendments to the Constitution of the United States.

Second, in accordance with the states' own procedures, but sufficient to qualify under the Federal Rules of Civil Procedure for introduction as an exhibit in a federal district court trial, such an application should be certified by the necessary and required officers as an official document of the state, and officially forwarded in an appropriate manner to and filed with at least the parliamentary officers of the House and the Senate. While there is no constitutional need to file with the Secretary of State, the Administrator of General Services, or any other officer, no harm can result therefrom. The forwarding language might be: To the [officer, title, and description] of the United States: Please be informed and take notice that the following (Joint) Resolution was adopted by at least a majority of both houses of the legislature of the State of __________ on the ___ day of __________, 19______, is properly certified as such in accordance with all applicable laws, and is forwarded to you as an officer of the Congress of the United States required to be notified so that application to the said Congress is duly now made and completed: [set forth resolution, certification, etc., and conclude entire notice with names, titles, etc., of the forwarding officials].

Third, the federal officials receiving such an application should respond in an appropriate manner: To the [state's forwarding official]. This will acknowledge receipt this day of your notice dated the ___ day of __________, 19______.

Fourth, when two-thirds of such, or analogous, applications have been received, the persons so receiving them, and now exercising a ministerial function, should forward all such applications to the Senate and House as per their own respective internal procedures, assuming that the next paragraph does not apply, notifying each body of the receipt and date of receipt of each such application and, because of a possible lack of uniformity, perhaps also pointing this out, although this is not strictly required as the forwarded applications will so indicate.

Fifth, depending upon the internal procedures of the two Houses, provision should be had for automatically raising such
applications on the floor of each body when the required number has been duly received, or else, if not so presented, then when each House is notified.

Sixth, depending upon the internal procedures of the Senate and House, such applications and notifications may possibly be referred to the appropriate committees. After examination, and if required, verification of the application, the Committee should be required promptly to report back to its legislative body with a proposed Joint Resolution directing issuance of a call for a Constitutional Convention.

Seventh, this combined Joint Resolution call must be detailed, and may include an overall procedure to be followed to the point where, as in an amending proposal by Congress itself, the proposed amendment is forwarded to the states for ratification and the notification by the states thereof. The proposed call given below indicates details which may be utilized.

Eighth, a majority of each House is sufficient to pass such a Joint Resolution call, official copies thereafter being sent to all states as all other official notices and documents are sent.

Ninth, upon receipt of such official calls each state, in accordance with its official legislative procedures and machinery, should enact the appropriate legislation for a special election of delegates who, after the necessary formalities, should be certified as such by the necessary state officials just as federal congressmen are certified by them.

100. This may include hearings, although no reason superficially appears why these should ordinarily be necessary.
101. A Concurrent Resolution may be utilized and, in the sense that one body may institute and adopt the procedures and the call in toto, the analogy is to a bill enacted by the House or Senate independently of the other body and then sent over. The form of the Resolution is a political determination to be settled initially by the first Congress confronted by the question and thereafter, perhaps, the precedent is established. What is being suggested in the text makes for an earlier Resolution and call.
102. Both committees may easily correlate their work on the details of this Joint Resolution so as to obviate the necessity for a later conference to iron out differences in language, as there is nothing here of a major substantive nature. However, if the respective committees do not so cooperate, a conference must then so do and the Conference Report will then be utilized; future such Joint Resolutions would then have this as a precedent.
103. There is no provision made in article V concerning travel or other personal expenses, payment for serving, etc., and, it is suggested that these should all be provided for by the states. The costs of the Convention itself should be defrayed by the federal government.
Tenth, at the time and place called for, and under temporary officers set forth in the call, the delegates should meet, approve credentials, choose permanent officers, adopt their own rules, propose amendments, debate, enact, and otherwise function in accordance with the call.

Eleventh, a majority of the Convention delegates, assuming a quorum present, should be sufficient to determine organizational and procedural rules and matters, but at least two-thirds of those present and voting should be required to pass amendments to be proposed for ratification.

Twelfth, the Convention should, as part of its organizational rules, provide that all proposed amendments be forwarded to the appropriate congressional officials so designated for the purpose of processing amendments proposed by Congress, and also that a time limit of seven years be set within which the proposals may be ratified. Moreover, the call by Congress should contain appropriate parallel requirements.

Thirteenth, the mode of ratification being left to Congress, the call should contain this choice and, as a matter of policy, ratification should be by the state legislatures.

Fourteenth, the call should also contain a provision that proper certificates of ratification are to be filed with the Administrator of General Services, and that he, in turn, when the required number of proper certificates is received by him, is to make due proclamation thereof.

Finally, given the importance of the congressional call in view of the role it plays with regard to substantive and procedural matters before and after the Convention, the following is submitted as a form that may well be adopted by Congress:

A PROPOSED CALL BY CONGRESS

Whereas pursuant to article V of the Constitution of the United States at least two-thirds of the Legislatures of the several States of the United States have duly and validly made proper and timely application to the Congress of the United States to call a Convention for proposing amendments to the said Constitution, namely, the States of . . .; be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That this Joint Resolution be and be required to be considered as and is a call, pursuant to article V of the Constitution of the United States, for a Convention for proposing amendments to the said Constitution as is more fully set forth hereafter.

Sec. 2. This Joint Resolution is directed to be duly forwarded by the appropriate officers of both Houses of this Congress to the appropriate officials of each of the several States of the United States within five (5) days after it is approved.
Sec. 3. The appropriate officials of each of the several States of the United States shall thereafter take such action and perform such acts as may be required by or in consonance with their applicable laws to enforce and comply with this Joint Resolution and call.

Sec. 4. No later than [date] each of the said States is to conduct a special election for the sole purpose of electing delegates to said Convention, in accordance with each State's duly enacted or to be enacted laws, Provided, however, that at least thirty days elapse between final nominations for delegates and the election; that the number of delegates elected be equal to the number of Congressmen each said State is then represented by with one to be chosen within each Congressional district within said State plus two at-large; that the qualifications of the voters for delegates be no different than those required for the more numerous body of the State's legislature; that delegates are to possess the qualifications required of a member of the House of Representatives of the United States at the time of convening; and that all statutes of the United States and the several States disqualifying a person for public office because he then holds another public office shall not apply except as to the judges and justices of the United States.

Sec. 5. The delegates so duly elected and properly certified shall meet on the [date] at [place, building, hall] in Washington, District of Columbia, at ten o'clock in the forenoon, present their credentials to the temporary secretary who is hereby designated as [name or office], meet under the temporary chairmanship of [name or office], and when at least a majority thereof is so assembled then duly and regularly organize and deliberate for the purpose for which called, Provided, however, that any amendments to the Constitution of the United States which may be proposed shall receive the approval of at least two-thirds of the members then present and voting at the said Convention.

Sec. 6. The said Convention may authorize and direct that all such proposed amendments be forwarded to the appropriate officials designated by the Congress of the United States for the purpose of forwarding to the States amendments proposed by the said Convention, and said officials are hereby authorized and directed so to act and forward said proposed amendments within five (5) days after receipt thereof, together with a copy of the section following.

Sec. 7. All such proposed amendments shall be inoperative unless they shall have been ratified as amendments to the Constitution by the legislatures of [or by conventions in] the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States.

Sec. 8. Copies of all said ratifications, properly and duly authenticated and certified, shall be forwarded to and filed with the Administrator of General Services of the United States who is hereby authorized and directed to receive and file the same and, when the required number thereof pursuant to article V of the Constitution has been so received and filed, shall make appropriate proclamation thereof.

Sec. 9. There are hereby authorized to be appropriated not more than [\$_____] for necessary expenses in conducting
and defraying the costs of such Convention, but none of these moneys is to be used for any travel, pay, allowances or like purposes of any delegates to or member of such Convention.  

104. If there is any question concerning the necessity for a statute, requiring the President's signature, this can be easily accomplished. However, does this mean that the President may veto the Convention? Or that if two-thirds of Congress cannot be mustered the Convention will not be held? It is suggested that here, if at all, is a justification for an appropriation by Joint Resolution, without such a signature being required.