

1979

# The Limited Constitutional Convention—The Recurring Answer

William W. Van Alstyne  
*William & Mary Law School*

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## Repository Citation

Van Alstyne, William W., "The Limited Constitutional Convention—The Recurring Answer" (1979). *Faculty Publications*. 805.  
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# THE LIMITED CONSTITUTIONAL CONVENTION—THE RECURRING ANSWER

WILLIAM W. VAN ALSTYNE\*

To the Editors:

Recently, this *Journal* carried a very brief essay of mine on amending the Constitution.<sup>1</sup> Immediately thereafter, Professor Dellinger published a more elaborate article in the *Yale Law Journal* on the same subject.<sup>2</sup> His article is a welcome addition to the growing literature in this area.<sup>3</sup> More amply documented than my original informal essay, his article also appears to reach quite different conclusions. Our differences are not so great, however, nor the basis of disagreement so abstruse, that they cannot be addressed in published correspondence rather than in a full-length reply. I write to share how I think he may have drawn some unwarranted inferences from the materials he has reviewed and yet, in the end, how rather marginal the area of actual disagreement turns out to be.

The general subject of our interest has been the portion of article V that provides for the Constitutional Convention:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, *or, on 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, when ratified by the Legislatures of three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.<sup>4</sup>

Our principal focus, and the point at which Professor Dellinger's views diverge from mine, is the extent to which a conscientious Congress may decline to call a convention despite receipt of at least thirty-four state applications requesting such a convention to consider a *particular* sub-

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\* William R. Perkins Professor of Law, Duke University.

1. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295.

2. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979).

3. See authorities cited in note 24 *infra*.

4. U.S. CONST. art. V (emphasis added).

ject or a *particular* amendment. The instance is one in contradistinction to thirty-four state requests for consideration of whatever revisions to the Constitution that a convention might deem appropriate, regardless of subject matter.

We quite agree that states may seek an unlimited constitutional convention, despite what others might reasonably regard to be the manifest unwisdom and possible unruliness of such an uncabined proceeding. We agree, that is, that when the desire for that style of convention is sufficiently plain, Congress should yield. Congress may not frustrate the demand of thirty-four states for an unlimited convention, notwithstanding whatever apprehensions Congress may (understandably) entertain of the wisdom of such a revolutionary group. It is significant that we do agree on this matter despite the very respectable argument that such a radical use of article V is itself improper for the states and that therefore Congress should turn back applications requesting an unlimited convention. I want to examine briefly the basis for this argument because I believe that while it falls short, it is most helpful in understanding why something much less than an unlimited convention is itself plainly allowed.

The argument that unlimited conventions are not authorized by article V, despite the absence of language so declaring, is an argument based on "constitutional purpose." If the provision for a state-triggered mode of amending the Constitution was included in contemplation of reviewing specific grievances, then even though the article does not on its face forbid state applications for an unlimited convention, perhaps Congress (and the Supreme Court, insofar as the matter might under some circumstances be subject to adjudication) ought so to interpret article V. There would be no novelty in this way of proceeding, as evidenced by the Supreme Court's own treatment of certain other constitutional provisions. For instance, the first amendment on its face excludes no kind of speech whatever from its protection. Nevertheless, the Supreme Court has presumed to determine that certain kinds of speech, such as obscenity, fall outside of the clause—that it was not the design of the first amendment to provide freedom for that kind of speech.<sup>5</sup> If article V were subjected to a similarly limiting "purpose"

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5. *Roth v. United States*, 354 U.S. 476 (1957). A counter example may be the famous commerce clause in article I, which provides Congress with the very general power to "regulate" commerce among the several states. A fair amount of evidence suggests that the principal purpose of the clause was to enable Congress to provide for a national free trade zone in order to overcome state discriminatory taxes (on out-of-state goods), dislodge state-granted monopolies on interstate commerce, and set aside discriminatory tariffs. *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), are classic applications of the clause for this purpose. Yet, the clause has not been thus limited and Congress has been sustained

construction, then, for the following reasons, we might conclude that unlimited conventions are the one kind of convention that may not be called.

The felt necessity to establish a means of securing amendment to the Constitution not dependent upon the concurrence of Congress was a persistent theme at the Philadelphia Convention. A principal reason for its persistence was the anxiety that the proposed Constitution might prove defective insofar as it established broad powers for Congress in terms intrinsically susceptible of abuse. If Congress were to exceed its new powers and be sustained by a new, national supreme court in respect to its usurpations,<sup>6</sup> it would make no sense to commit constitutional amendment exclusively to Congress. As Congress' usurpations of power in derogation of states rights or of personal liberties would be the very occasion for moving to amend and repair the breach, the Constitution needed an emphatic provision to allow such repairs without recourse to Congress.

Professor Dellinger accurately notes what was presented "at the outset of the Convention,"<sup>7</sup> and he appropriately notes the animating concern reflected in "[t]he Thirteenth Virginia Resolve, introduced on May 29, 1787, . . . 'that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.'"<sup>8</sup> He is also proper in recording that "the principal issue, according to Madison's notes, was 'the propriety of making the consent of the Natl. Legisl. unnecessary,'"<sup>9</sup> and that "Randolph and Mason of Virginia defended the part of the resolution that made congressional assent unnecessary."<sup>10</sup> Congruent with this emphasis, he points out how well the very first draft to emerge from the Committee of Detail on August 6,

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in enacting laws that inhibit or forbid commerce among the states. See, e.g., *Champion v. Ames*, 188 U.S. 321 (1903). The primary reason for including the power may have been to secure a national free trade zone, but the power given was broader—"to regulate," "to prescribe the rule by which [such] commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 195. The Court yielded to the clause as written, and the clause contains no delimiting statement of purposes to confine its use. Compare U.S. CONST. art. I, § 8, cl. 8 (copyright and patent clause) with U.S. CONST. amend. II ("right" to bear arms), both of which expressly limit the power or right thus granted by specifying the purpose to which it shall be related.

6. As allegedly occurred almost at once in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The decision sustained an act of Congress providing federal court jurisdiction in a private diversity suit against a state, contrary to assurances of sovereign immunity given when the constitution was under debate. The eleventh amendment was adopted in immediate response to the *Chisholm* decision.

7. Dellinger, *supra* note 2, at 1626 (emphasis added) (citation omitted).

8. *Id.* (emphasis added).

9. *Id.*

10. *Id.*

1787, reflected that concern in its proposed nineteenth article: "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."<sup>11</sup>

Less noted by Professor Dellinger were Madison's misgivings respecting the reinsertion of *any* congressional role in respect to this mode of securing amendments. Under the proposed article, "the Legislature of the United States" would have to call a convention. The provision evidently meant to leave the national legislature no room to manipulate the amendment process, but since the principal purpose of the provision was to provide a means of checking untoward congressional usurpations, to involve Congress at all, even in this presumably ministerial role, might be vexing: "Mr. Madison remarked on the vagueness of the terms, 'call a Convention for the purpose,' as sufficient reason for reconsidering the article. How was a Convention to be formed? by what rule decide? what the force of its acts?"<sup>12</sup> Accordingly, the article was reconsidered.<sup>13</sup> Madison, in the same session, reformulated it in the following form, which, as Professor Dellinger properly noted,<sup>14</sup> was approved by a remarkable majority of nine states to one (with one state divided):

The legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution which shall be valid to all intents and purposes as 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 U.S.<sup>15</sup>

Madison quite clearly regarded the role of Congress now reduced to a manageable one: particular amendments would be formulated in state legislatures and, when two-thirds agreed on an amendment, Congress would be under a duty to direct it to state legislatures or state conventions in all the states for consideration.

Madison's Virginia colleague, George Mason, nonetheless thought the congressional role remained excessive:

Col. Mason thought the plan of amending the Constitution exceptional and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately on Congress, no amendments of the proper kind would

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11. *Id.* 1627. This formulation was agreed to at once.

12. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (M. Farrand ed. 1937).

13. *Id.*

14. Dellinger, *supra* note 2, at 1628.

15. II Farrand, *supra* note 12, at 559.

ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.<sup>16</sup>

Note again Mason's own reiterated concern—that the likely occasion for particular amendments would arise from self-aggrandizing usurpations by the national government—for which he wanted a swift and effective means of state-controlled correction utterly independent of Congress.<sup>17</sup> Mason evidently feared that involving Congress, even for the purpose of routing specific amendments already proposed in applications of two-thirds of the state legislatures, would imperil the security of this mode of securing amendments insofar as Congress might willfully refuse to perform that task.

Madison's immediate response to his colleague is illuminating. He expresses no disagreement at all respecting the need to provide a fail-safe means by which state legislatures could move for amendments responsive to particular developments. Rather, he argues that the draft

16. *Id.* 629.

17. That article VI as finally formulated was meant to provide recourse against particular shortcomings and that it was meant to provide state legislatures with the means of moving against those particular shortcomings, was emphatically reiterated both by Madison and by Hamilton in the Federalist Papers. Thus, in Federalist No. 43, Madison endorsed the Constitution by observing:

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 [Philadelphia] 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 perpetrate 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.

I THE FEDERALIST NO. 43, at 301-02 (E. Bourne ed. 1901). And note how Hamilton (the thoroughgoing nationalist), wrote even more reassuringly of the state mode of securing particular amendments once the Constitution would be ratified, in Federalist No. 85:

If . . . the Constitution proposed should once be ratified by all the States as it stands, alterations in it may at any time be effected by nine States. Here, then, the chances are as thirteen to nine<sup>†</sup> in favor of subsequent amendment, rather than of the original adoption of an entire system. [Hamilton's footnote, †, read instructively: "It may rather be said TEN, for though *two thirds may set on foot the measure*, three fourths must ratify." (Emphasis added.) Hamilton then continues as follows.]

This is not all. Every Constitution for the United States must inevitably consist of a great variety of particulars, in which thirteen independent States are to be accommodated in their interests or opinions of interest. \* \* \*

But 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 nor 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.* There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.

II The Federalist No. 85, at 168-69 (E. Bourne ed. 1901) (emphasis added). The paragraphs seem very plain: nine states united on the desirability of a particular amendment may require a convention to be held for its speedy and uncompromised review; should the proposal be agreed to in convention, ratification by ten states insures that the particular amendment "infallibly take(s) place."

he is now defending (which omits any provision for Congress to call a convention at which such amendments shall be considered) is at least as failsafe as the earlier draft pursuant to which Congress must call a convention to consider such amendments. He is perplexed by Mason's objection only in the following respect:

Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc. which in Constitutional regulations ought to be as much as possible avoided.<sup>18</sup>

We need to pause here, before running through so many snippets of quotation and drafts as to become confused about where all this is supposed to lead. I have reviewed things thus far only to show some modest (but not trivial) points of agreement. The first point is that securing a way to propose and to submit for ratification amendments other than those that might originate in or be congenial to extraordinary majorities in Congress was a steadfast determination in the Philadelphia Convention. The second point is that the most expected use of that authority would be in response to alleged usurpations, whether of states' rights or of personal liberties, by the national government itself. As to all other kinds of amendments, provision for Congress to propose them was presumably both safe and sufficient. So far, so good, without in the least presuming to say that nothing else happened or that we have yet worked out all the issues.

But pausing here is useful because it raises a fair question. Is an *unlimited* constitutional convention within article V *at all*? If the purpose of article V is by one mode to permit Congress to propose whatever amendments it deems appropriate from time to time (whether one or several, whether narrow or very broad), and by a different mode to enable the states to gain specific recourse against *particular* usurpations that Congress may have no interest whatever in correcting, then it might not be unreasonable for Congress to reject state legislative applications that seek a convention of unlimited revisory power over the entire Constitution. *That* kind of "second Philadelphia" (or new Armageddon), one might argue, so far outstrips the rationale for an independent state mode of securing particular kinds of amendments that Congress would be warranted in turning back such applications. In brief, a modest case can be made that article V presupposes that when state legislatures wish to secure constitutional amendment, they will

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18. II Farrand, *supra* note 12, at 629-30.

identify the particular proposal adequately to enable Congress to determine whether that felt need is sufficiently well shared by thirty-three other states to require calling a convention. Subject-matter consensus among the applications is implicitly required because state-initiated conventions are inappropriate forums for merely generalized grievances, much less for revolutionary purposes, but entirely appropriate for the thoughtful review of more particularized proposals.

This, as I say, is simply the bare outline of an argument. It is not inconsistent with the text of article V and it is respectful of concerns that played a crucial role in the production of article V. Moreover, were the country caught up in the hysteria of a proverbial "man on horseback," a charismatic figure capable of galvanizing passions for fascism to sweep away the Constitution by precipitating a convention "called" for that purpose, I would be sorely tempted to embrace this argument and fervently to urge Congress to turn aside state legislative applications demanding an "unlimited" convention. I would argue that the applications exceed *any* proper purpose consistent with article V and hope, thereby, to gain time until calm might be restored. Barring those extraordinary circumstances, however, I would not embrace the argument against state-initiated unlimited conventions. While I regard the argument against them as "not bad," I also think it is unsound. The principal reasons why particular portions of the Constitution were included are always of historical interest, of course, and, in very close cases of contemporary interpretation, may appropriately make some difference. Quite often, however (as with the commerce clause, the declaration of war clause, and I dare say article V as well), the particular reasons that gave rise to agreement to include a particular power in the Constitution were not enacted as a limitation on the uses of that power. And as enacted, the power of state legislatures to secure a convention did not restrict them to a convention at which *only* a particular amendment or only a particular subject might be considered. Thus, though a convention of broader purposes would seem to me undesirable to contemplate (at best pointless to hold, and at worst disastrous in its work products), I do not think that article V forbids such a convention or that such an implied limitation should be "read into" article V by Congress. If thirty-four state applications call for an unlimited constitutional convention, then that is what Congress should provide.

Willing to construe article V generously in this regard (that is, favorably with respect to the authority it vests in state legislatures and without implied limitations on its use), however, I do find it perfectly remarkable that some have argued for a construction not merely limiting the power of state legislatures to have a convention, but limiting

that power to its *least* expected, *least* appropriate, and yet most dangerous use. This is the argument that article V forbids the states from applying for a convention to consider a particular amendment and authorizes them, rather, to secure a convention only if the convention is to be of unlimited proposing authority. There are two variations of this argument. Neither seems either plausible or desirable, as each frames an arbitrary "Catch 22" as a deliberate discouragement to state applications for the least dangerous kind of convention—a convention to meet and to determine whether a specific (and not necessarily very far-reaching) requested amendment should be proposed for ratification. One variant holds that Congress should flatly disregard petitions for such a limited convention.<sup>19</sup> The other variant, Professor Dellinger's, holds that state legislatures should be instructed by Congress that whatever their application may say, *if* Congress does call such a convention *it will only call one of unlimited power*. Unless, then, the grievance of thirty-four state legislatures is of such intensity that those states are willing to take their chances in an unlimited convention, they may have no constitutional convention at all. Nothing we have reviewed thus far supplies any reason for such a peculiar (and hostile) construction of article V. Were there nothing else to be said, I do not know what could support that view except, perhaps, an abiding apprehension that state-initiated amendments to the Constitution are likely to be destructive or ill-advised and therefore article V should be [inis]construed to make them virtually impossible.

Professor Dellinger has written that there is more to be said, however, and that the case against the validity of a limited convention is stronger. He locates the centerpiece of that stronger case in Madison's initial draft<sup>20</sup> (first approved by a vote of nine to one, one state divided), which provided for but two steps with respect to state-initiated amendments: whenever the applications of two-thirds of the state legislatures agreed on the wording of an amendment to be proposed, Congress would, upon receipt of those applications, be under a clerical duty to submit the amendment to all legislatures or conventions for ratification. This formulation, as we know, ultimately was modified to provide for three steps: whenever sufficient applications were received, they first had to clear a convention that itself agreed to propose the amendment, and only then would Congress remit to state legislatures or conventions for ratification. Professor Dellinger infers that the convention is not to be limited and cannot be limited, because that would be incompatible with the requirement that there be a convention added to

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19. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).

20. See text accompanying note 14 *supra*.

the process for the very purpose of forestalling precipitous amendments. In my earlier essay,<sup>21</sup> I had hypothesized the following case:

If two-thirds of the state legislatures might perchance agree on the exact wording of an amendment they would wish to be reviewed in a called convention for discussion and vote, this would seem to me to state the paradigm case in which Congress should proceed with the call—and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event.<sup>22</sup>

Professor Dellinger demurred:

This approach, though it provides a means of proposing amendments that is free of congressional control, is not responsive to the second aim of the Philadelphia Convention; state legislatures should not be given authority to propose amendments without the involvement of some national body in the formulation of such amendments. To permit the state legislatures to dictate to the convention the exact terms of its proposals is to short-circuit the carefully structured division of authority between state and national interests.<sup>23</sup>

Respectfully, I think Professor Dellinger has read into the change from the Madison formulation to the final formulation more than can be found there. I quite agree that the addition of a convention was meant to provide a useful check against unduly precipitate state-proposed/state-ratified amendments. The question is the extent of the check thus provided. The answer is that the check is substantial and wholly consistent with a very deliberative, national body convoked in contemplation of a specific agenda. In brief, we do not need to impute to a convention the unlimited power to propose amendments contrary to a uniform stipulated desire of the applicant state legislatures in order to understand that a convention may serve nonetheless as an additional and important buffer against hasty or ill-considered particular amendments.

The final form of article V does indeed differ significantly from Madison's original draft. First, in calling a convention to consider a subject or proposal that thirty-four state legislatures may submit by application, Congress has the acknowledged discretion (at least within reason) to compose that convention as it believes best serves national interests—a marked departure from Madison's proposal. Indeed, as you will recall, Madison expressly adverted to this difference and personally expressed misgivings about it. It is a material change; in specifying how delegates to that convention are to be selected (or elected), in specifying the formula for determining the size of the convention, et cetera, Congress may provide for an array of representatives both

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21. See note 1 *supra*.

22. Dellinger, *supra* note 2, at 1632 (quoting Van Alstyne, *supra* note 1, at 1305-06).

23. *Id.*

broader than and different from the state office holders or particular constituencies originally successful in having the convention convoked. Second, the convention would include persons and states that had not joined in the common call, who would be heard in this common national forum from perspectives not necessarily so well represented among the legislatures of the convoking states. Third, the convention, without doubt free to debate the wisdom of an amendment, might well conclude as a deliberative body that the proposal is not as simple or as free from disabling criticism as it may first have appeared to the states. Fourth, all of the preceding developments (each added to the Madison formula) take time—a further buffer against hasty or precipitate use of the amending process. Finally, *after* the convention rises, Congress still retains full discretion as to which mode of ratification to require for any amendment already affirmatively reviewed and approved by the convention. This congressionally controlled choice itself provides additional moderate leverage, since Congress may elect the mode that, in its view, is more likely to provide the “safer” course.

Thus, to require a national convention assembled as a deliberative body to consider the appropriateness of a proposed amendment—a convention flanked on both sides by congressional discretion to designate both the composition of that convention and thereafter the mode of ratification—is itself a major change. This is true even supposing that two-thirds of the state legislatures may already have agreed with remarkable uniformity to the need for a precisely framed amendment to the Constitution. Indeed, the compromise thoroughly guards against the possibility that rash or ill-considered, state-formulated amendments will become part of the Constitution, in contrast to the far greater celerity with which congressionally-proposed amendments may pass into fundamental law.<sup>24</sup>

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24. In accord with this view are the following.

The States, of course, are given a major role under Article V both in initiating a convention movement and in finally ratifying a convention's work. In addition, as we have seen, one of the major reasons for incorporating the convention method of amending the Constitution into our basic law was to create a remedy by which the States, in the event Congress was unwilling to act, could compel action. The convention method of amending the Constitution 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.

C. BRICKFIELD, PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION, 85TH CONG. 1ST SESS. 20 (Comm. Print 1957) (footnote omitted). “It is our conclusion that Congress has the power to establish procedures governing the calling of a national constitutional convention limited to the subject matter on which the legislatures of two-thirds of the states request a convention.” SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V 9 (1973).

The above conclusion, unanimously endorsed by the Committee (which included Professor

In retrospect we may note that given the compromise, it can come as no surprise that this mode of amendment to the Constitution still has

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Albert Sacks, Dean of the Harvard Law School), was approved by the ABA House of Delegates. The resolution stated: "2. Congress has the power to establish procedures limiting a convention to the subject matter which is stated in the applications received from the state legislatures." *Id.* vii.

If Congress receives within a "reasonable" time period, proper applications for an article V convention to deal with a certain subject from two-thirds of the state legislatures, it is absolutely bound to convene such a body.

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 The argument that an article V convention is sovereign and therefore beyond external control is specious.

.....  
 [A]n agreement that a convention ought to be held is required among two-thirds of the state legislatures before Congress is empowered to convene such a body. No article V convention may be called in the absence of such a consensus. If the agreement contemplates a convention dealing only with a certain subject matter, as opposed to constitutional revision generally, then the convention must logically be limited to that subject matter.

If the state applications, of their own force, can so bind the convention, then Congress must disregard and refuse to transmit for ratification any proposed amendment which concerns a different subject matter.

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 Certainly Congress would be under a duty to call a general convention if two-thirds of the state legislatures properly ask for one. Equally obvious should be its right and obligation to limit the scope of a convention to the subject matter requested by the state applications.

Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 977, 994, 996 (1968).

If the requisite majority of legislatures is directed solely to the end of calling a convention to propose amendment on a given subject matter, it is in keeping with the underlying purpose of the alternative amendment procedure for Congress to limit the convention to such proposals. The general purpose of the alternative amendment provision is to provide something of a safety valve in case the state legislatures are deeply troubled about a matter in which Congress refuses to correct by invoking its own power to propose amendments. . . . Indeed, the usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention.

Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 912 (1968). "As to the scope of a convention's deliberations, would it not be illogical to allow the states to bring about a convention while giving Congress power to thwart the whole undertaking by assigning responsibilities other than those originally contemplated by the states?" McCleskey, *Along the Midway: Some Thoughts on Democratic Constitution-Amending*, 66 MICH. L. REV. 1001, 1005 (1968).

Congress is to call a Convention on the application of the legislatures of the states. Congress is not free to call a Convention at its pleasure. It can only act upon the states' application; and if Congress can only act upon their application, it cannot go beyond the purpose for which the states have applied. If they apply for a Convention on a balanced budget, Congress must call a Convention on a balanced budget. It cannot at its pleasure enlarge the topics. Nor can the Convention go beyond what Congress has specified in the call.

Noonan, *The Convention Method of Constitutional Amendment—Its Meaning, Usefulness, and Wisdom*, 10 PAC. L.J. 641, 642 (1979).

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

not been successfully employed. The carefully wrought delays, references, and cross references it involves may well have been *too* careful. Viewed in that light, perhaps Madison was correct in desiring the somewhat easier way he originally outlined for amendments originating with the states—the proposal not requiring the insertion of any convention at all. And however that may be, it is truly quite startling that some writers have presumed to urge that the state mode of securing amendments be “interpreted” to make it even *more* difficult to employ.<sup>25</sup>

Finally, I want to go back to the very beginning of this letter, to a declaration that might now otherwise seem very odd. It was the suggestion that in fact, appearances to the contrary notwithstanding, the “area of actual disagreement” between Professor Dellinger’s views and my own is, in the end, “rather marginal.” In an effort to see just how differently we think Congress should respond if it were to receive identically worded state legislative applications contemplating a particular amendment to be considered in convention, I prepared the following hypothetical case. It imagines an extremely popular two-term President, barred from re-election by the twenty-second amendment which

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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.

Rhodes, *A Limited Federal Constitutional Convention*, 26 U. FLA. L. REV. 1, 18 (1973).

Although it would be contrary to article V if Congress attempted to limit the scope of a convention when the states had applied for an open convention, it would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant states.

Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1628-29 (1972) (footnote omitted). In 1971, S. 215, 92d Cong., 1st Sess. provided that “[w]henver applications made by two-thirds or more of the States with respect to the same subject have been received . . . [i]t shall be the duty of such House to determine that there are in effect valid applications made by two-thirds of the States with respect to the same subject [and] it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject.” The bill was approved by eighty-four votes to zero in the Senate. 117 CONG. REC. 36804 (1971). A vote in the House was forestalled by adjournment.

25. Ackerman, *Unconstitutional Convention*, New Republic, Mar. 3, 1979, at 8 (essentially a brief editorial); Black, *Amendment by National Constitutional Convention: A Letter To A Senator*, 32 OKLA. L. REV. 626 (1979); Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1979); Dellinger, *supra* note 2.

The prolific Professor Tribe, in an article based upon testimony before the California State Assembly, strenuously opposed a call for a limited convention but went no further than to maintain that the validity of a limited convention lacks an authoritative answer. Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L. REV. 627 (1979). Professor Gunther writes that his “own best judgment is that ‘Applications’ from the states can be limited in subject matter, so long as they are not too specific,” (!), Gunther, *Constitutional Brinkmanship: Stumbling Toward a Convention*, 65 A.B.A.J. 1046, 1049 (1979), but suggests that should a convention nevertheless insist upon producing amendments on other matters (a likelihood that in turn strikes me as exceedingly remote), “it has a persuasive claim to have its proposals submitted to ratification.” *Id.*

Congress (being dominated by the opposing party) will not propose for repeal. In response, thirty-four states submit identically worded resolutions to Congress during a nine-month period, all declaring:

WHEREAS The Constitution of the United States did not originally restrict the election of a person as President;

WHEREAS The restriction imposed solely by force of the Twenty-Second Amendment does not now appear to be a necessary or proper limitation on the means or ends of enlightened government in the United States; and

WHEREAS The Congress of the United States has itself not proposed an amendment to repeal the Twenty-Second Amendment,

THEREFORE BE IT RESOLVED that the Legislature of [name of state] hereby submits its application to The Congress of the United States pursuant to Article V of the Constitution, respectfully requesting that a Convention be called for the purpose of considering an amendment that, when duly proposed and ratified, would repeal the Twenty-Second Amendment.

*Question:* How should Congress respond to these identically-worded, state legislative applications?

1. Decline to take any action whatever.
2. Resolve affirmatively that the applications thus received are insufficient applications under article V insofar as each, in the opinion of Congress, fails to request that a convention be called not merely to consider a particular proposal but all other proposals for amending the Constitution as may be brought before it as well.
3. Proceed to call a convention "for the purpose of considering an amendment that, when duly proposed and ratified, would repeal the Twenty-Second Amendment."
4. Proceed to call a convention "in accordance with the applications properly submitted by the legislatures of two-thirds of the several states."
5. Do something else, for example, itself at once propose by two-thirds majority an amendment that, if ratified within seven years by the legislatures of three-fourths of the states, would repeal the twenty-second amendment, and thereupon direct that notice be sent to the respective petitioning state legislatures inquiring whether in light of the congressional action just taken, the legislatures still deem their applications for a convention appropriate.

Quite plainly, my own view would be that the proper answer is either 3 or 4; that is, Congress might appropriately proceed to call a convention "in accordance with the applications properly submitted by the legislatures of two-thirds of the several states," although I believe answer 3 would be a proper and not unreasonable manner of framing the call as well. It is instructive that Professor Dellinger checked answer 4, rather than either answers 1 (decline to act) or 2 (declare the applications insufficient). He did, however, footnote his answer with

this qualification: "Unless it appears from the context that the applications were based upon an understanding that the convention would be precluded from considering alternatives (such as a six-year term)."<sup>26</sup>

Insofar as the difference between us is truly as slight as this, I am pleased with the outcome.

Sincerely,

William Van Alstyne

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26. Personal communication.