REPORT OF THE ABA SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE

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RECOMMENDATION

WHEREAS, the House of Delegates, at its July 1971 meeting, created the Constitutional Convention Study Committee "to analyze and study all questions of law concerned with the calling of a national Constitutional Convention, including, but not limited to, the question of whether such a Convention's jurisdiction can be limited to the subject matter given rise to its call, or whether the convening of such a Convention, as a matter of constitutional law, opens such a Convention to multiple amendments and the consideration of a new Constitution"; and

WHEREAS, the Constitutional Convention Study Committee so created has intensively and exhaustively analyzed and studied the principal questions of law concerned with the calling of a national constitutional convention and has delineated its conclusions with respect to these questions of law in its Report attached hereto,

NOW, THEREFORE, BE IT RESOLVED, THAT, with respect to the provision of Article V of the United States Constitution providing that "Congress... on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments" to the Constitution,

1. It is desirable for Congress to establish procedures for amending the Constitution by means of a national constitutional convention.
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.
3. Any Congressional legislation dealing with such a process for amending the Constitution should provide for limited judicial review of Congressional determinations concerning a constitutional convention.
4. Delegates to a convention should be elected and representation at the conventions should be in conformity with the principles of representative democracy as enunciated by the "one person, one vote" decisions of the Supreme Court.

BE IT FURTHER RESOLVED, THAT, the House of Delegates authorizes the distribution of the Report of the Constitutional Convention Study Committee for the careful consideration of federal and state legislators and other concerned with constitutional law and commends the Report to them; and

BE IT FURTHER RESOLVED, THAT, representatives of the American Bar Association designated by the President be authorized to present testimony on behalf of the Association before the appropriate committees of the Congress consistent with this resolution.

INTRODUCTION

There are few articles of the Constitution as important to the continued viability of our government and nation as Article V. As Justice Joseph Story wrote: "A government which...provides no means of change...will either degenerate into a despotism or, by the pressure of its inequities, bring on a revolution." James Madison gave these reasons for Article V:

"That useful alterations [in the Constitution] will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."

Article V sets forth two methods of proposing and two methods of ratifying amendments to the United States Constitution:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress..."

Up to the present time all amendments have been proposed by the Congress and all but one have been ratified by the state legislature mode. The Twenty-

First Amendment was ratified by conventions called in the various states. Although there has not been a national constitutional convention since 1787, there have been more than 300 applications from state legislatures over the past 184 years seeking such a convention. Every state, at one time or another, has petitioned Congress for a convention. These state applications have ranged from applications calling for a general convention to a convention dealing with a specific subject, as, for example, slavery, anti-polygamy, presidential tenure, and repeal of prohibition. The pressure generated by numerous petitions for a constitutional convention is believed to have been a factor in motivating Congress to propose the Seventeenth Amendment to change the method of selecting Senators.

Despite the absence at the national level since 1787, conventions have been the preferred instrument for major revision of state constitutions. As one commentator on the state constitution-making process has stated: "The convention is purely American, widely tested and used." There have been more than 200 conventions in the states, ranging from 15 in New Hampshire to one in eleven states. In a substantial majority of the states the convention is provided for by the state constitution. In the remainder it has been sanctioned by judicial interpretation and practice.

Renewed and greater efforts to call a national constitutional convention have come in the aftermath of the Supreme Court's decisions in *Baker v. Carr* and *Reynolds v. Sims*. Shortly after the decision in *Baker v. Carr*, the Council of State Governments recommended that the states petition Congress for a national constitutional convention to propose three amendments to the Constitution. One would have denied to federal courts original and appellate jurisdiction over state legislative apportionment cases; another would have established a "Court of the Union" in place of the Supreme Court; and the third would have amended Article V to allow amendments to be adopted on the basis of identically-worded state petitions. Twelve state petitions were sent to Congress in 1963 and 1964 requesting a convention to propose an amendment which would remove state legislative apportionment cases from the jurisdiction of the federal judiciary. In December 1964 the Council of State Governments recommended at its annual convention that the state legislatures petition Congress for a national constitutional convention to propose an amendment permitting one house of a state legislature to be apportioned on a basis other than population.

By 1967 thirty-two state legislatures had adopted applications calling for a constitutional convention on the question of apportionment. The wording of

these petitions varied. Several sought consideration of an amendment to abolish federal judicial review of state legislative apportionment. Others sought a convention for the purpose of proposing an amendment which would "secure to the people the right of some choice in the method of apportionment of one house of a state legislature on a basis other than population alone." A substantial majority of states requested a convention to propose a specific amendment set forth *haec verba* in their petitions. Even here, there was variation of wording among a few of these state petitions.

On March 18, 1967 a front page story in the *New York Times* reported that "a campaign for a constitutional convention to modify the Supreme Court's one-man, one-vote rule is nearing success. "It said that the opponents of the rule "lack only two states in their drive" and that "most of official Washington has been caught by surprise because the state legislative actions have been taken with little fanfare." That article prompted immediate and considerable discussion of the subject both in and out of Congress. It was urged that Congress would be under no duty to call a convention even if applications were received from the legislatures of two-thirds of the states. Others argued that the words of Article V were imperative and that there would be such a duty. There was disagreement as to whether applications from malapportioned legislatures could be counted, and there were different views on the authority of any convention. Some maintained that, once constituted, a convention could not be restricted to the subject on which the state legislatures had requested action but could go so far as to propose an entirely new Constitution. Adding to the confusion and uncertainty was the fact that there were no ground rules or precedents for amending the Constitution through the route of a constitutional convention.

As the debate on the convention method of initiating amendments continued into 1969, one additional state submitted an application for a convention on the reapportionment issue while another state adopted a resolution rescinding its previous application. Thereafter, the effort to call a convention on that issue diminished. Recently, however, the filing of state applications for a convention on the school busing issue has led to a new flurry of discussion on the question of a national constitutional convention.

The circumstances surrounding the apportionment applications prompted Senator Sam J. Ervin to introduce in the Senate on August 17, 1967 a bill to establish procedures for calling a constitutional convention. In explaining his reasons for the proposed legislation, Senator Ervin has stated:

"My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment – and I am admittedly a partisan on the issue – should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process."

After hearings and amendments to the original legislation, Senator Ervin's bill (S.215) passed the Senate by an 84 to 0 vote on October 19, 1971. Although there was no action in the House of Representatives in the Ninety-Second Session of Congress, comparable legislation is expected to receive attention in both Houses in the future.

ISSUES PRESENTED

The submission by state legislatures during the past thirty-five years of numerous applications for a national constitutional convention has brought into sharp focus the manifold issues arising under Article V. Included among these issues are the following:

1. If the legislatures of two-thirds of the states apply for a convention limited to a specific matter, must Congress call such a convention?
2. If a convention is called, is the limitation binding on the convention?
3. What constitutes a valid application which Congress must count and who is to judge its validity?
4. What is the length of time in which applications for a convention will be counted?
5. How much power does Congress have as to the scope of a convention? As to procedures such as the selection of delegates? As to the voting requirements at a convention? As to refusing to submit to the states for ratification the product of a convention?
6. What are the roles of the President and state governors in the amending process?
7. Can a state legislature withdraw an application for a convention once it has been submitted to Congress or rescind a previous ratification of a proposed amendment or a previous rejection?
8. Are issues arising in the convention process justiciable?
9. Who is to decide questions of ratification?

Since there has never been a national constitutional convention subsequent to the adoption of the Constitution, there is no direct precedent to look to in attempting to answer these questions. In searching out the answers, therefore, resort must be made, among other things, to the text of Article V, the origins of the provision, the intent of the Framers, and the history and workings of the amending article since 1789. Our answers appear on the following pages.

RECOMMENDATIONS

General

Responding to our charge, our Committee has attempted to canvass all the principal questions of law involved in the calling of a national constitutional convention pursuant to Article V. At the outset, we note that some, apprehensive about the scope of constitutional change possible in a national constitutional convention, have proposed that Article V be amended so as to delete or modify the convention method of proposing amendments. On the other hand, others have noted that a dual method of constitutional change was intended by the Framers, and they contend that relative ease of amendment is salutary, at least within limits. Whatever the merits of fundamental modification of Article V, we regard consideration of such a proposal as beyond the scope of our study. In short, we take the present text of Article V as the foundation for our study.

It is the view of our Committee that it is desirable for Congress to establish procedures for amending the Constitution by the national constitutional convention method. We recognize that some believe that it is unfortunate to focus attention on this method of amendment and unwise to establish procedures which might facilitate the calling of a convention. The argument is that the establishment of procedures might make it easier for state legislatures to seek a national convention, and might even encourage them to do so. Underlying this argument is the belief that, at least in modern political terms, a national convention would venture into uncharted and dangerous waters. It is relevant to note in this respect that a similar concern has been expressed about state constitutional conventions but that 184 years' experience at that level furnishes little support to the concern. We are not persuaded by these suggestions that we should fail to deal with the convention method, hoping that the difficult questions never arise. More than 300 applications during our constitutional history, with every state legislature represented, stand as testimony that a consideration of procedure is not purely academic. Indeed, we would ignore at great peril the lessons of the recent proposals for a convention

on legislative apportionment (the one-person, one-vote issue) where, if one more state had requested a convention, a major struggle would have ensued on the adequacy of the requests and on the nature of the convention and the rules therefor.

If we fail to deal now with the uncertainties of the convention method, we could be courting a constitutional crisis of grave proportions. We would be running the enormous risk that procedures for a national constitutional convention would have to be forged in time of divisive controversy and confusion when there would be a high premium on obstructive and result oriented tactics.

It is far more prudent, we believe, to confront the problem openly and to supply safeguards and general rules in advance. In addition to being better governmental technique, a forthright approach to the dangers of the convention method seems far more likely to yield beneficial results than would burying our heads in the sands of uncertainty. Essentially, the reasons are the same ones which caused the American Bar Association to urge, and our nation ultimately to adopt, the rules for dealing with the problems of presidential disability and a vice-presidential vacancy which are contained in the Twenty-Fifth Amendment. So long as the Constitution envisions the convention method, we think the procedures should be ready if there is a "contemporaneously felt need" by the required two-thirds of the state legislatures. Fidelity to democratic principles requires no less.

The observation that one Congress may not bind a subsequent Congress does not persuade us that comprehensive legislation is useless or impractical. The interests of the public and nation are better served when safeguards and rules are prescribed in advance. Congress itself has recognized this in many areas, including its adoption of and subsequent reliance on legislative procedures for handling such matters as presidential electoral vote disputes and contested elections for the House of Representatives. Congressional legislation fashioned after intensive study, and in an atmosphere free from the emotion and politics that undoubtedly would surround a specific attempt to energize the convention process, would be entitled to great weight as a constitutional interpretation and be of considerable precedential value. Additionally, whenever two-thirds of the state legislatures had applied for a convention, it would help to focus and channel the ensuing discussion and identify the expectations of the community.

In our view any legislation implementing Article V should reflect its underlying policy, as articulated by Madison, of guarding "equally against that

extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults." Legislation should protect the integrity of the amending process and assure public confidence in its workings.

Specific

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. In establishing procedures for making available to the states a limited convention when they petition for such a convention, Congress must not prohibit the state legislatures from requesting a general convention since, as we view it, Article V permits both types of conventions.

We consider Congress' duty to call a convention whenever two-thirds of the state legislatures have concurred on the subject matter of the convention to be mandatory.

We believe that the Constitution does not assign the President a role in either the call of a convention or the ratification of a proposed amendment.

We consider it essential that legislation passed by Congress to implement the convention method should provide for limited judicial review of congressional action or inaction concerning a constitutional convention. Provision for such review not only would enhance the legitimacy of the process but would seem particularly appropriate since, when and if the process were resorted to, it likely would be against the backdrop of some dissatisfaction with prior congressional performance.

We deem it of fundamental importance that delegates to a convention be elected and that representation at the convention be in conformity with the principles of representative democracy as enunciated by the "one-person, one-vote" decisions of the Supreme Court. One member of the Committee, however, does not believe that the one-person, one-vote rule is applicable to constitutional convention.

We believe also that a convention should adopt its own rules of procedure, including the vote margin necessary at the convention to propose an amendment to the Constitution.

Our research and deliberations have led us to conclude that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment.

Finally, we believe it highly desirable for any legislation implementing the convention method of Article V to include the rule that a state legislature can withdraw an application at any time before the legislatures of two-thirds of the states have submitted applications on the same subject, or withdraw a vote rejecting a proposed amendment, or rescind a vote ratifying a proposed amendment so long as three-fourths of the states have not ratified.

DISCUSSION OF RECOMMENDATIONS

Authority of an Article V Convention

Central to any discussion of the convention method of initiating amendments is whether a convention convened under Article V can be limited in its authority. There is the view, with which we disagree, that an Article V convention would be a sovereign assemblage and could not be restricted by either the state legislatures or the Congress in its authority or proposals. And there is the view, with which we agree, that Congress has the power to establish procedures which would limit a convention's authority to a specific subject matter where the legislatures of two-thirds of the states seek a convention limited to that subject.

The text of Article V demonstrates that a substantial national consensus must be present in order to adopt a constitutional amendment. The necessity for a consensus is underscored by the requirement of a two-thirds vote in each House of Congress or applications for a convention from two-thirds of the state legislatures to initiate an amendment, and by the requirement of ratification by three-fourths of the states. From the language of Article V we are led to the conclusion that there must be a consensus among the state legislatures as to the subject matter of a convention before Congress is required to call one. To read Article V as requiring such agreement helps assure "that an alteration of the Constitution proposed today has relation to the sentiment and felt needs of today..."

The origins and history of Article V indicate that both general and limited conventions were within the contemplation of the Framers. The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing with the congressional method. As Madison observed: Article V "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." The "state" method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution "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." A number of suggestions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787:

"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*."

This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention "whenever it pleased" was not accepted. There is a reason to believe that the convention contemplated under the proposal "was the last step in the amending process, and its decisions did not require any ratification by anybody."

On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it "two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether." His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that "an easy mode should be established for supplying defects which will probably appear in the new System." He felt that Congress would be "the first to perceive" and be "most sensible to the necessity of Amendments," and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression "call a convention for the purpose" was sufficient reason for reconsideration. He then asked: "How was a Convention to be formed? by what rule decide? what the force of its acts?" As

a result of the debate, the clause adopted on August 30 was dropped in favor of the following provision proposed by Madison:

"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."

On September 15, after the Committee of Style had returned its report, George Mason strongly objected to the amending article on the ground that both modes of initiating amendments depended on Congress so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive..." Gerry and Gouverneur Morris then moved to amend the article "so as to require a convention on application of" two-thirds of the states. In response Madison said that he "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 added that he had no objection against providing for a convention for the purpose of amendments "except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided."

Thereupon, the motion by Morris and Gerry was agreed to and the amending article was thereby modified so as to include the convention method as it now reads. Morris then successfully moved to include in Article V the proviso that "no state, without its consent shall be deprived of its equal suffrage in the Senate."

There was little discussion of Article V in the state ratifying conventions. In *The Federalist* Alexander Hamilton spoke of Article V as contemplating "a single proposition." Whenever two-thirds of the states concur, he declared, Congress would be obliged to call a convention. "The words of this article are peremptory. The Congress 'shall call a convention'. Nothing in this particular is left to the discretion of that body." Madison, as noted earlier, stated in *The Federalist* that both the general and state governments are equally enabled to "originate the amendment of errors."

While the Constitutional Convention of 1787 may have exceeded the purpose of its call in framing the Constitution, it does not follow that a convention convened under Article V and subject to the Constitution can lawfully assume

such authority. In the first place, the Convention of 1787 took place during an extraordinary period and at a time when the states were independent and there was no effective national government. Thomas Cooley described it as "a revolutionary proceeding, and could be justified only by the circumstances which had brought the Union to the brink of dissolution." Moreover, the Convention of 1787 did not ignore Congress. The draft Constitution was submitted to Congress, consented to by Congress, and transmitted by Congress to the states for ratification by popularly-elected conventions.

Both pre-1787 convention practices and the general tenor of the amending provisions of the first state constitutions lend support to the conclusions that a convention could be convened for a specific purpose and that, once convened, it would have no authority to exceed that purpose.

Of the first state constitutions, four provided for amendment by conventions and three by other methods. Georgia's Constitution provided that:

"no alteration shall be made in this constitution without petitions from a majority of the counties...at which time the assembly shall order a *convention to be called for that purpose* specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid."

Pennsylvania's Constitution of 1776 provided for the election of a Council of Censors with power to call a convention:

"if there appear to them an absolute necessity of amending any article of the constitution which may be defective...But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject."

The Massachusetts Constitution of 1780 directed the General Court to have the qualified voters of the respective towns and plantations convened in 1795 to collect their sentiments on the necessity or expediency of amendments. If two thirds of the qualified voters throughout the state favored "revision or amendment," it was provided that a convention of delegates would meet "for the purpose aforesaid."

The report of the Annapolis Convention of 1786 also reflected an awareness of the binding effect of limitations on a convention. That Convention assembled to

consider general trade matters and, because of the limited number of state representatives present, decided not to proceed, stating:

"That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstances of so partial and defective a representation."

In their report, the Commissioners expressed the opinion that there should be another convention, to consider not only trade matters but the amendment of the Articles of Confederation. The limited Authority of the Annapolis Commissioners, however, was made clear:

"If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction. "Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States."

From this history of the origins of the amending provision, we are led to conclude that there is no justification for the view that Article V sanctions only general conventions. Such an interpretation would relegate the alternative method to an "unequal" method of initiating amendments. Even if the state legislatures overwhelmingly felt that there was a necessity for limited change in the Constitution, they would be discouraged from calling for a convention if that convention would automatically have the power to propose a complete revision of the Constitution.

Since Article V specifically and exclusively vests the state legislatures with the authority to apply for a convention, we can perceive no sound reason as to why they cannot invoke limitations in exercising that authority. At the state level, for example, it seems settled that the electorate may choose to delegate only a portion of its authority to a state constitutional convention and so limit it substantively. The rationale is that the state convention derives its authority from the people when they vote to hold a convention and that when they so vote they adopt the limitations on the convention contained in the enabling

legislation drafted by the legislature and presented on a "take it or leave it" basis. As one state court decision stated:

"When the people, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention, they are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention."

And another:

"Certainly, the people, may, if they will, elect delegates for a particular purpose without conferring on them all their authority..."

In summary, we believe that a substantively-limited Article V convention is consistent with the purpose of the alternative method since the states and people would have a complete vehicle other than the Congress for remedying specific abuses of power by the national government; consistent with the actual history of the amending article throughout which only amendments on single subjects have been proposed by Congress; consistent with state practice under which limited conventions have been held under constitutional provisions not expressly sanctioning a substantively-limited convention; and consistent with democratic principles because convention delegates would be chosen by the people in an election in which the subject matter to be dealt with would be known and the issues identified, thereby enabling the electorate to exercise an informed judgment in the choice of delegates.

Power of Congress with Respect to an Article V Convention

Article V explicitly gives Congress the power to call a convention upon receipt of applications from two-thirds of the state legislatures and to choose the mode of ratification of a proposed amendment. We believe that, as a necessary incident of the power to call, Congress has the power initially to determine whether the conditions which give rise to its duty have been satisfied. Once a determination is made that the conditions are present, Congress' duty is clear it "shall" call a convention. The language of Article V, the debates at the Constitutional Convention of 1787, and statements made in *The Federalist*, in the debates in the state ratifying conventions, and in congressional debates during the early Congresses make clear the mandatory nature of this duty.

While we believe that Congress has the power to establish standards for making available to the states a limited convention when they petition for that type of convention, we consider it essential that implementing legislation not preclude

the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention.

In formulating standards for determining whether a convention call should issue, there is a need for great delicacy. The standards not only will determine the call but they also will have the effect of defining the convention's authority and determining whether Congress must submit a proposed amendment to the states for ratification. The standards chosen should be precise enough to permit a judgment that two-thirds of the state legislatures seek a convention on an agreed-upon matter. Our research of possible standards has not produced any alternatives which we feel are preferable to the "same subject" test embodied in S. 1272. We do feel however, that the language of Sections 4, 5, 6, 10 and 11 of S. 1272 is in need of improvement and harmonization so as to avoid the use of different expressions and concepts.

We believe that standards which in effect required applications to be identical in wording would be improper since they would tend to make resort to the convention process exceedingly difficult in view of the problems that would be encountered in obtaining identically worded applications from thirty-four states. Equally improper, we believe, would be standards which permitted Congress to exercise a policy-making role in determining whether or not to call a convention.

In addition to the power to adopt standards for determining when a convention call should issue, we also believe it a fair inference from the text of Article V that Congress has the power to provide for such matters as the time and place of the convention, the composition and financing of the convention, and the manner of selecting delegates. Some of these items can only be fixed by Congress. Uniform federal legislation covering all is desirable in order to produce an effective convention.

Less clear is Congress' power over the internal rules and procedures of a convention. The Supreme Court's decisions in *Dillon v. Gloss* and *Leser v. Garnett* can be viewed as supporting a broad view of Congress' power in the amending process. As the Court stated in *Dillon v. Gloss*: "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule." On the other hand, the legislative history of Article V reflects a purpose that the convention method be as free as possible from congressional domination, and the text of Article V grants

Congress only two express powers pertaining to a convention, that is, the power (or duty) to call a convention and the power to choose the mode of ratification of any proposed amendment. In the absence of direct precedents, it perhaps can be said fairly that Congress may not by legislation interfere with matters of procedure because they are an intrinsic part of the deliberative characteristic of a convention. We view as unwise and of questionable validity any attempt by Congress to regulate the internal proceedings of a convention. In particular, we believe that Congress should not impose a vote requirement on an Article V convention. We are influenced in this regard by these factors:

First, it appears from our research that throughout our history conventions generally have decided for themselves the vote that should govern their proceedings. This includes the Constitutional Convention of 1787, the constitutional conventions that took place between 1776 and 1787, many of the approximately two hundred state constitutional conventions that have been held since 1789, and the various territorial conventions that have taken place under acts passed by Congress. Second, the specific intent of the Framers with regard to the convention method of initiating amendments was to make available an alternative method of amending the Constitution – one that would be free from congressional domination. Third, a reading of the 1787 debates suggests that the Framers contemplated that an Article V convention would have the power to determine its own voting and other internal procedures and that the requirement of ratification by three-fourths of the states was intended to protect minority interest.

We have considered the suggestion that Congress should be able to require a two-thirds vote in order to maintain the symmetry between the convention and congressional methods of initiating amendments. We recognize that the convention can be viewed as paralleling Congress as the proposing body. Yet we think it is significant that the Constitution, while it specifies a two-thirds vote by Congress to propose an amendment, is completely silent as to the convention vote.

Judicial Review

The Committee believes that judicial review of decisions made under Article V is desirable and feasible. We believe Congress should declare itself in favor of such review in any legislation implementing the convention process. We regard as very unwise the approach of S. 1272 which attempts to exclude the courts from any role. While the Supreme Court's decision in *Ex parte McCardle* indicated that Congress has power under Article III to withdraw

matters from the jurisdiction of the federal courts, this power is not unlimited. It is questionable whether the power reaches so far as to permit Congress to change results required by other provisions of the Constitution or to deny a remedy to enforce constitutional rights. Moreover, we are unaware of any authority upholding this power in cases of original jurisdiction.

To be sure, Congress has discretion in interpreting Article V and in adopting implementing legislation. It cannot be gainsaid that Congress has the primary power of administering Article V. We do not believe, however, that Congress is, or ought to be, the final dispositive power in every situation. In this regard, it is to be noted that the courts have adjudicated on the merits a variety of questions arising under the amending article. These have included such questions as: whether Congress may choose the state legislative method of ratification for proposed amendments which expand federal power; whether a proposed amendment requires the approval of the President; whether Congress may fix a reasonable time for ratification of a proposed amendment by state legislatures; whether the states may restrict the power of their legislatures to ratify amendments or submit the decision to a popular referendum; and the meaning of the requirement of two-thirds vote of both Houses.

Baker v. Carr and *Powell v. McCormack* suggest considerable change in the Supreme Court's view since *Coleman v. Miller* on questions involving the political process.

In *Coleman*, the Court held that a group of state legislators who had voted not to ratify the child labor amendment had standing to question the validity of their state's ratification. Four Justices dissented on this point. The Court held two questions non-justiciable: the issue of undue time lapse for ratification and the power of a state legislature to ratify after having first rejected ratification. In reaching these conclusions, the Court pointed to the absence of criteria either in the Constitution or a statute relating to the ratification process. The four Justices who dissented on standing concurred on non-justiciability. They felt, however, that the Court should have disapproved *Dillon v. Gloss* insofar as it decided judicially that seven years is a reasonable period of time for ratification, stating that Article V gave control of the amending process to Congress and that the process was "political in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." Even though the calling of a convention is not precisely within these time limits and the holding in *Coleman* is not broad, it is not at all surprising that commentators read that

case as bringing Article V issues generally within the rubric of "political questions."

In *Baker v. Carr*, the Court held that a claim of legislative malapportionment raised a justiciable question. More generally, the Court laid down a number of criteria, at least one of which was likely to be involved in a true "political question," as follows:

"a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question."

Along with these formulas, there was additional stress in *Baker v. Carr* on the fact that the Court there was not dealing with Congress, a coordinate branch, but with the states. In reviewing the precedents, the Court noted that it had held issues to be non-justiciable when the matter demanded a single-voiced statement, or required prompt, unquestioning obedience, as in a national emergency, or contained the potential embarrassment of sitting in judgment on the internal operations of a coordinate branch.

Perhaps the most striking feature of *Baker* and its progeny has been the Court's willingness to project itself into redistricting and reapportionment in giving relief. In addition, some of the criteria stressed by the Court as determinative of "political question" issues were as applicable to Congress as to the states.

In *Powell*, the Court clearly marked out new ground. The question presented was the constitutionality of the House of Representatives' decision to deny a seat to Congressman-elect Powell, despite his having fulfilled the prerequisites specified in Article I, Section 2 of the Constitution. Even though it was dealing with Congress, and indeed with a matter of internal legislative operation, still it held that the question was a justiciable one, involving as it did the traditional judicial function of interpreting the Constitution, and that a newly elected Representative could be judged as to qualifications only as to age, citizenship, and residence. The Court limited itself to declaratory relief, saying that the question of whether coercive relief was available against employees of Congress was not being decided. But the more important aspect of the

decisions is the Court's willingness to decide. It stressed the interest of voters in having the person they elect take a seat in Congress. Thus, it looked into the clause on qualifications and found in the text and history that Congress was the judge of qualifications, but only of the three specified.

It is not easy to say just how these precedents apply to judicial review of questions involving a constitutional convention under Article V. It can be argued that they give three different doctrinal models, each leading to a different set of conclusions. We are inclined to a view which seeks to reconcile the three cases. *Powell* may be explained on the theory that specially protected constitutional interests are at stake, that the criteria for decisions were rather simple, and that an appropriate basis for relief could be found. *Baker* is more complex, but it did not involve Congress directly. The state legislatures had forfeited a right to finality by persistent and flagrant malapportionments, and one person, one vote supplied a judicially workable standard (though the latter point emerged after *Baker*). Thus, *Coleman* may be understood as good law so far as it goes, on the theory that Congress is directly involved, that no specially protected interests are threatened, and that the issues are not easily dealt with by the Court.

Following this approach to the three cases, some tentative conclusions can be drawn for Article V and constitutional conventions. If two-thirds of the state legislatures apply, for example, for a convention to consider the apportionment of state legislatures, and Congress refuses to call the convention, it is arguable that a *Powell* situation exists, since the purpose of the convention method was to enable the states to bring about a change in the Constitution even against congressional opposition. The question whether Congress is required to act, rather than having discretion to decide, is one very similar in quality to the question in *Powell*. The difficulty not confronted in *Powell* is that the relief given must probably be far-reaching, possibly involving the Court in approving a plan for a convention. There are at least two answers. The Court might find a way to limit itself to a declaratory judgment, as it did in *Powell*, but if it must face far-reaching relief, the reapportionment cases afford a precedent. In some ways, a plan for a convention would present great difficulties for a court, but it could make clear that Congress could change its plan, simply by acting.

If one concludes that the courts can require Congress to act, one is likely to see the courts as able to answer certain ancillary questions of "law," such as whether the state legislatures can bind a convention by the limitations in their applications, and whether the state legislatures can force the call of an unlimited convention. Here we believe Congress has a legislative power, within

limits, to declare the effects of the states' applications on the scope of the convention. Courts should recognize that power and vary their review according to whether Congress has acted.

Consequently, this Committee strongly favors the introduction in any implementing legislation of a limited judicial review. It would not only add substantial legitimacy to any use of the convention process but it would ease the question of justiciability. Moreover, since the process likely would be resorted to in order to effect a change opposed by vested interests, it seems highly appropriate that our independent judiciary be involved so that it can act, if necessary, as the arbiter.

In view of the nature of the controversies that might arise under Article V, the Committee believes that there should be several limits on judicial consideration. First, a Congressional determination should be overturned only if "clearly erroneous." This standard recognizes Congress' political role and at the same time insures that Congress cannot arbitrarily void the convention process.

Second, by limiting judicial remedies to declaratory relief, the possibility of actual conflict between the branches of government would be diminished. As *Powell* illustrated, courts are more willing to adjudicate questions with "political" overtones when not faced with the institutionally destructive need to enforce the result.

Third, the introduction of judicial review should not be allowed to delay the amending process unduly. Accordingly, any claim should be raised promptly so as to result in an early presentation and resolution of any dispute. We favor a short limitation period combined with expedited judicial procedures such as the selection of a three-judge district court. The possibility of providing original jurisdiction in the Supreme Court was rejected for several reasons. Initiation of suit in the Supreme Court necessarily escalates the level of the controversy without regard to the significance of the basic dispute. In addition, three-judge district court procedures are better suited to an expedited handling of factual issues.

We do not believe that our recommendation of a three-judge court is inconsistent with the American Bar Association's position that the jurisdiction of such courts should be sharply curtailed. It seems likely that the judicial review provided for will occur relatively rarely. In those instances when it does, the advantages of three-judge court jurisdiction outweigh the disadvantages which the Association has perceived in the existing three-judge court

jurisdiction. In cases involving national constitutional convention issues, the presence of three judges (including a circuit judge) and the direct appeal to the Supreme Court are significant advantages over conventional district court procedure.

Role of Executive

President

There is no indication from the text of Article V that the President is assigned a role in the amending process. Article V provides that "Congress" shall propose amendments, call a convention for proposing amendments and, in either case, choose the mode for ratification of amendments. Article I, Section 7 of the Constitution, however, provides that "every Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President" for his approval and, if disapproved, may be repassed by a two-thirds vote of both Houses.

It has, we believe, been regarded as settled that amendments proposed by Congress need not be presented to the President for his approval. The practice originated with the first ten amendments, which were not submitted to President Washington for his approval, and has continued through the recently proposed amendment on equality of rights. The question of whether the President's approval is required was passed on by the Supreme Court in *Hollingsworth v. Virginia*. There, the validity of the Eleventh Amendment was attacked on the ground that it had "not been proposed in the form prescribed by the Constitution" in that it had never been presented to the President. Article I, Section 7 was relied upon in support of that position. The Attorney General argued that the proposing of amendments was "a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of investing the President with a qualified negative on the Acts and Resolutions of Congress." It was also urged that since a two-thirds vote was necessary for both proposing an amendment and overriding a presidential veto, no useful purpose would be served by a submission to the President in such case. It was argued in reply that this was no answer, since the reasons assigned by the President for his disapproval "might be so satisfactory as to reduce the majority below the constitutional proportion." The Court held that the amendment had been properly adopted, Justice Chase stating that "the negative of the President applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the

Constitution." What was not pointed out, but could have been, is that had the President's approval been found necessary, it would have created the anomaly that only amendments proposed by Congress would be subject to the requirements inasmuch as Article I, Section 7 by its terms could not apply to action taken by a national constitutional convention.

Subsequent to *Hollingsworth*, the question of the President's role in the amending process has been the subject of discussion in Congress. In 1803 a motion in the Senate to submit the Twelfth Amendment to the President was defeated. In 1865 the proposed Thirteenth Amendment was submitted to President Lincoln and, apparently through an inadvertence, was signed by him. An extensive discussion of his action took place in the Senate and a resolution was passed declaring that the President's signature was unnecessary, inconsistent with former practice, and should not constitute a precedent for the future. The following year President Andrew Johnson, in a report to the Congress with respect to the Fourteenth Amendment, made clear that the steps taken by the Executive Branch in submitting the amendment to the state legislatures was "purely ministerial" and did not commit the Executive to "an approval or a recommendation of the amendment." Since that time, no proposed amendment has been submitted to the President for his approval and no serious question has arisen over the validity of amendments for that reason. Thus, the Supreme Court could state in 1920 in *Hawke v. Smith* that it was settled "that the submission of a constitutional amendment did not require the action of the President."

While the "call" of a convention is obviously a different step from that of proposing an amendment, we do not believe that the President's approval is required. Under Article V applications from two-thirds of the state legislatures must precede a call and, as previously noted, Congress' duty to issue a call once the conditions have been met clearly seems to be a mandatory one. To require the President's approval of a convention call, therefore, would add a requirement not intended. Not only would it be inconsistent with the mandatory nature of Congress' duty and the practice of non-presidential involvement in the congressional process of initiating amendments but it would make more difficult any resort to the convention method. The approval of another branch of government would be necessary and, if not obtained, a two-thirds vote of each House would be required before a call could issue. Certainly, the parallelism between the two initiating methods would be altered, in a manner that could only thwart the intended purpose of the convention process as an "equal" method of initiating amendments.

While the language of Article I, Section 7 expressly provides for only one exception (i.e., an adjournment vote), it has been interpreted as not requiring presidential approval of preliminary votes in Congress, or, as noted, the proposal of constitutional amendments by Congress, or concurrent resolutions passed by the Senate and the House of Representatives for a variety of purposes. As the Supreme Court held in *Hollingsworth*, Section 7 applies to "ordinary cases of legislation" and "has nothing to do with the proposition or adoption of amendments to the Constitution." Thus, the use of a concurrent resolution by Congress for the issuance of a convention call is in our opinion in harmony with the generally recognized exceptions to Article I, Section 7.

State Governor

We believe that a state governor should have no part in the process by which a state legislature applies for a convention or ratifies a proposed amendment. In reaching this conclusion, we are influenced by the fact that Article V speaks of "state legislatures" applying for a convention and ratifying an amendment proposed by either Congress or a national convention. The Supreme Court had occasion to focus on this expression in *Hawke v. Smith* in the context of a provision in the Ohio Constitution subjecting to a popular referendum any ratification of a federal amendment by its legislature. The Court held that this requirement was invalid, reasoning that the term "legislatures" had a certain meaning. Said the Court: "What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." The ratification of a proposed amendment, held the Court, was not "an act of legislation within the proper sense of the word" but simply an expression of assent in which "no legislative action is authorized or required." The Court also noted that the power to ratify proposed amendments has its source in the Constitution and, as such, the state law-making procedures are inapplicable.

That the term "Legislature" does not always mean the representative body itself was made clear by *Smiley v. Holm*. That case involved a bill passed by the Minnesota legislature dividing the state into congressional districts under Article I, Section 4. The bill was vetoed by the governor and not repassed over his veto. As for the argument that the bill was valid because Article I, Section 4 refers to the state "Legislatures," the Court stated:

"The use in the Federal Constitution of the same term in different relations does not always imply the same function... Wherever the term 'legislature' is used in

the Constitution it is necessary to consider the nature of the particular action in view..."

The Court found that the governor's participation was required because the function in question involved the making of state laws and the veto of the governor was an integral part of the state's legislative process. In finding that Article I, Section 4 contemplated the making of laws, the Court stated that it provided for "a complete code for congressional elections" whose requirements "would be nugatory if they did not have appropriate sanctions." The Court contrasted this function with the "Legislature's" role as an electoral body, as when it chose Senators, and a ratifying body, as in the case of federal amendments.

It is hard to see how the act of applying for a convention invokes the law-making processes of the state any more than its act of ratifying a proposed amendment. If anything, the act of ratification is closer to legislation since it is the last step before an amendment becomes a fundamental part of our law. A convention application, on the other hand, is several steps removed. Other states must concur, a convention then must be called by Congress, and an amendment must be proposed by that convention. Moreover, a convention application, unlike legislation dividing congressional districts, does not have the force of law or operate directly and immediately upon the people of the state. From a legal point of view, it would seem to be contrary to *Hawke v. Smith* and *Leser v. Garnett* to require the governor's participation in the application and ratification processes.

The exclusion of the governor from the application and ratification processes also finds support in the overwhelming practice of the states, in the views of text-writers, and in the Supreme Court's decision in *Hollingsworth v. Virginia* holding that the President was excluded from any role in the process by which amendments are proposed by Congress.

Article V Applications

Content

A reading of Article V makes clear that an application should contain a request to Congress to call a national convention that would have the authority to propose an amendment to the Constitution. An application which simply expressed a state's opinion on a given problem or requested Congress itself to propose an amendment would not be sufficient for purposes of Article V. Nor would an application seem proper if it called for a convention with no more

authority than to vote a specific amendment set forth therein up or down, since the convention would be effectively stripped of its deliberative function. A convention should have latitude to amend, as Congress does, by evaluating and dealing with a problem.

On the other hand, an application which expressed the result sought by an amendment, such as providing for the direct election of the President, should be proper since the convention itself would be left free to decide on the terms of the specific amendment necessary to accomplish that objective. We agree with the suggestion that it should not be necessary that each application be identical or propose similar changes in the same subject matter.

In order to determine whether the requisite agreement among the states is present, it would seem useful for congressional legislation to require a state legislature to list in its application all state applications in effect on the date of its adoption whose subject or subjects it considers to be substantially the same. By requiring a state legislature to express the purpose of its application in relation to those already received, Congress would have additional guidance in rendering its determination. Any such requirement, we believe, should be written in a way that would permit an application to be counted even though the state involved might have inadvertently but in good faith failed to identify similar applications in effect.

Timeliness

In *Dillon v. Gloss*, the Court upheld the fixing by Congress of a period during which ratification of a proposed amendment must be accomplished. In reaching that conclusion the Court stated that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after proposal, which Congress is free to fix." The Court observed that:

"as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."

We believe the reasoning of *Dillon v. Gloss* to be equally applicable to state applications for a national constitutional convention. The convening of a convention to deal with a certain matter certainly should reflect the "will of the people in all sections at relatively the same period..." In the absence of a uniform rule, the timeliness or untimeliness of state applications would vary, it

seems, from case to case. It would involve, as the Supreme Court suggested with respect to the ratification area in *Coleman v. Miller*, a consideration of political, social and economic conditions which have prevailed during the period since the submission of the [applications]..."

A uniform rule, as in the case of ratification of proposed amendments since 1918, would add certainty and avoid the type of confusion which surrounded the apportionment applications. Any rule adopted, however, must take into account the fact that some state legislatures do not meet every year and that in may states the legislative sessions end early in the year.

Although the suggestion of a seven year period is consistent with that prescribed for the ratification of recent proposed constitutional amendments, it can be argued that such a period is too long for the calling of a constitutional convention, since a long series of years would likely be involved before an amendment could be adopted. A shorter period of time might more accurately reflect the will of the people at a given point in time. Moreover, at this time in our history when social, economic and political changes frequently occur, a long period of time might be undesirable. On the other hand, a period such as four years would give states which adopted an application in the third and fourth year little opportunity to withdraw it on the basis of further reflection. This is emphasized when consideration is given to the fact that a number of state legislatures do not meet every year. Hence, a longer period does afford more opportunity for reflection on both the submission and withdrawal of an application. It also enables the people at the time of state legislative elections to express their views. Of course, whatever the period it may be extended by the filing of a new proposal.

The Committee feels that some limitation is necessary and desirable but takes no position on the exact time except it believes that either four or seven years would be reasonable and that a congressional determination as to either period should be accepted.

Withdrawal of Applications

There is no law dealing squarely with the question of whether a state may withdraw an application seeking a constitutional convention, although some commentators have suggested that a withdrawal is of no effect. The desirability of having a rule on the subject is underscored by the fact that state legislatures have attempted to withdraw applications, particularly during the two most recent cases where a large number of state legislatures sought a convention on a

specific issue. As a result, uncertainty and confusion have arisen as to the proper treatment of such applications.

During the Senate debates of October 1971 on S. 215, no one suggested any limitation on the power to withdraw up to the time that the legislatures of two-thirds of the states had submitted proposals. Since a convention should reflect a "contemporaneously-felt need" that it take place, we think there should be no such limitation. In view of the importance and comparatively permanent nature of an amendment, it seems desirable that state legislatures be able to set aside applications that may have been hastily submitted or that no longer reflect the social, economic and political factors in effect when the applications were originally adopted. We believe Congress has the power to so provide.

From a slightly different point of view, the power to withdraw implies the power to change and this relates directly to the question of determining whether two-thirds of the state legislatures have applied for a convention to consider the same subject. A state may wish to say specifically through its legislature that it does or does not agree that its proposal covers the same subject as that of other state proposals. The Committee feels that this power is desirable.

Finally, we can see no problem with respect to a state changing a refusal to request a convention to a proposal for such a convention. All states, of course, have rules of one sort or another which restrict the time at which a once-defeated proposition can be again presented. If these rules were to apply to the call of a federal convention and operate in a burdensome manner, their validity would be questionable under *Hawke v. Smith*.

The Article V Convention

Election of Delegates

We believe it of fundamental importance that a constitutional convention be representative of the people of the country. This is especially so when it is borne in mind that the method was intended to make available to the "people" a means of remedying abuses by the national government. If the convention is to be "responsive" to the people, then the structure most appropriate to the convention is one representative of the people. This, we believe, can only mean an election of convention delegates by the people. An election would help assure public confidence in the convention process by generating a discussion of the constitutional change sought and affording the people the opportunity to express themselves to the future delegates.

Apportionment of Delegates

Although there are no direct precedents in point, there is authority and substantial reason for concluding, as we do, that the one-person, one-vote rule is applicable to a national constitutional convention. In *Hadley v. Junior College District*, the Supreme Court held that the rule applied in the selection of people who carry on governmental functions. While a recent decision, affirmed without opinion by the Supreme Court, held that elections for the judiciary are exempt from the rule, the lower court stated that "judges do not represent people." Convention delegates, however, would represent people as well as perform a fundamental governmental function. As a West Virginia Supreme Court observed with respect to a state constitutional convention: "[E]ven though a constitutional convention may not precisely fit into one of the three branches of government, it is such an essential incident of government that every citizen should be entitled to equal representation therein." Other decisions involving conventions differ as to whether the apportionment of a state constitutional convention must meet constitutional standards.

Of course, the state reapportionment decisions are grounded in the equal protection clause of the Fourteenth Amendment, and the congressional decision in *Wesberry v. Sanders* was founded on Article I, Section 2. Federal legislation providing for a national constitutional convention would be subject to neither of these clauses but rather to the Fifth Amendment. Yet the concept of equal protection is obviously related to due process and has been so reflected in decisions under the Fifth Amendment.

Assuming compliance with the one-person, one-vote rule is necessary, as we believe it is, what standards would apply? While the early cases spoke in terms of strict population equality, recent cases have accepted deviations from this standard. In *Mahan v. Howell*, the Supreme Court accepted deviations of up to 16.4% because the state apportionment plan was deliberately drawn to conform to existing political subdivisions which, the Court felt, formed a more natural basis for districting so as to represent the interests of the people involved. In *Abate v. Mundt*, the Court upheld a plan for a county board of supervisors which produced a total deviation of 11.9%. It did so on the basis of the long history of dual personnel in county and town government and the lack of built-in bias tending to favor a particular political interest or geographic area.

Elaborating its views on one person, one vote, the Committee believes that a system of voting by states at a convention, while patterned after the original Constitutional Convention, would be unconstitutional as well as undemocratic

and archaic. While it was appropriate before the adoption of the Constitution, at a time when the states were essentially independent, there can be no justification for such a system today. Aside from the contingent election feature of our electoral college system, which has received nearly universal condemnation as being anachronistic, we are not aware of any precedent which would support such a system today. A system of voting by states would make it possible for states representing one-sixth of the population to propose a constitutional amendment. Plainly, there should be a broad representation and popular participation at any convention.

While the representation provisions of S. 1272 allowing each state as many delegates as it has Senators and Representatives in Congress are preferable to a system of voting by states, it is seriously questionable whether that structure would be found constitutional because of the great voting weight it would give to people of one state over the people of another. It can be argued that a representation system in a convention which parallels the structure in Congress does not violate due process, since Congress is the only other body authorized by the Constitution to propose constitutional amendments. On the other hand, representation in the Congress and the electoral college are explicit parts of the Constitution, arrived at as a result of compromises at the Constitutional Convention of 1787. It does not necessarily follow that apportionment plans based on such models are therefore constitutional. On the contrary, the reapportionment decisions make clear that state plans which deviate from the principle of equal representation for equal numbers are unconstitutional. As the Supreme Court stated in *Kirkpatrick v. Preisler*:

"Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes."

In our view, a system allotting to each state a number of delegates equal to its representation in the House of Representatives should be an acceptable compliance with one-person, one-vote standards. We reach this conclusion recognizing that there would be population deviations of up to 50% arising from the fact that each state would be entitled to a delegate regardless of population. It would be possible to make the populations substantially equal by redistricting the entire country regardless of state boundaries or by giving Alaska one vote and having every other state elect at large a multiple of 300,000 representing its population or redistrict each state on the new population unit. None of these methods, however, seems feasible or realistic.

The time and expense involved in the creation and utilization of entirely new district lines for one election, especially since state election machinery is readily available, is one factor to be weighed. Another is the difficulty of creating districts crossing state lines which would adequately represent constituents from both states. There is also the natural interest of the voter in remaining within his state. Furthermore, the dual nature of our political system strongly supports the position that state boundaries be respected. *Abate v. Mundt*, although distinguishable regarding apportionment of a local legislative body, suggests an analogy on a federal level. The rationale of the Court in upholding the legislative districts within counties drawn to preserve the integrity of the towns, with the minimum deviation possible, could be applicable to apportionment of a convention. The functional interdependence and the coordination of the federal and state governments and the fundamental nature of the dual system in our government parallel the relationship between the county and towns in *Abate*. Appropriate respect for the integrity of the states would seem to justify an exception to strict equality which would assure each state at least one delegate. Thus, a system based on the allocation of Representatives in Congress would afford maximum representation within that structure.

Members of Congress as Delegates

We cannot discern any federal constitutional bar against a member of Congress serving as a delegate to a national constitutional convention. We do not believe that the provision of Article I, Section 6 prohibiting congressmen from holding offices under the United States would be held applicable to service as a convention delegate. The available precedents suggest that an "office of the United States" must be created under the appointive provisions of Article II or involve duties and functions in one of the three branches of government which, if accepted by a member of Congress, would constitute an encroachment on the principle of separation of powers underlying our governmental system. It is hard to see how a state-elected delegate to a national constitutional convention is within the contemplation of this provision. It is noteworthy in this regard that several delegates to the Constitutional Convention of 1787 were members of the Continental Congress and that the Articles of Confederation contained a clause similar to Article I, Section 6.

We express no position on the policy question presented, or on the applicability and validity of any state constitutional bars against members of Congress simultaneously serving in other positions.

Ratification

As part of our study, the Committee has considered the advisability of including in any statute implementing the convention method a rule as to whether a state should be able to rescind its ratification of a proposed amendment or withdraw a rejection vote. In view of the confusion and uncertainty which exists with respect to these matters, we believe that a uniform rule would be highly desirable.

The difficult legal and policy question is whether a state can withdraw a ratification of a proposed amendment. There is a view that Article V envisions only affirmative acts and that once the act of ratification has taken place in a state, that state has exhausted its power with respect to the amendment in question. In support, it is pointed out that where the convention method of ratification is chosen, the state constitutional convention would not have the ability to withdraw its ratification after it had disbanded. Consequently, it is suggested that a state legislature does not have the power to withdraw a ratification vote. This suggestion has found support in a few state court decisions and in the action of Congress declaring the ratification of the Fourteenth Amendment valid despite ratification rejections in two of the states making up the three-fourths.

On the other hand, Article V gives Congress the power to select the method of ratification and the Supreme Court has made clear that this power carries with it the power to adopt reasonable regulations with respect to the ratification process. We do not regard past precedent as controlling but rather feel that the principle of seeking an agreement of public support espoused in *Dillon v. Gloss* and the importance and comparatively permanent nature of an amendment more cogently argue in support of a rule permitting a state to change its position either way until three-fourths of the states have finally ratified.

CONCLUSION

Much of the past discussion on the convention method of initiating amendments has taken place concurrently with a lively discussion of the particular issue sought to be brought before a convention. As a result, the method itself has become clouded by uncertainty and controversy and attempted utilization of it has been viewed by some as not only an assault on the congressional method of initiating amendments but as unleashing a dangerous and radical force in our system. Our two-year study of the subject has led us to conclude that a national constitutional convention can be

channeled so as not to be a force of that kind but rather an orderly mechanism of effecting constitutional change when circumstances require its use. The charge of radicalism does a disservice to the ability of the states and people to act responsibly when dealing with the Constitution.

We do not mean to suggest in any way that the congressional method of initiating amendments has not been satisfactory or, for that matter, that it is not to be preferred. We do mean to suggest that so long as the convention method of proposing amendments is a part of our Constitution, it is proper to establish procedures for its implementation and improper to place unnecessary and unintended obstacles in the way of its use. As was stated by the Senate Judiciary Committee, with which we agree:

"The committee believes that the responsibility of Congress under the Constitution is to enact legislation which makes article V meaningful. This responsibility dictates that legislation implementing the article should not be formulated with the objective of making the Convention route a dead letter by placing insurmountable procedural obstacles in its way. Nor on the other hand should Congress, in the guise of implementing legislation, create procedures designed to facilitate the adoption of any particular constitutional change."

The integrity of our system requires that when the convention method is properly resorted to, it be allowed to function as intended.