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THE THREAT OF A SECOND CONSTITUTIONAL CONVENTION: PATRICK HENRY'S LASTING LEGACY

I. INTRODUCTION

The Bill of Rights secured the individual freedoms that constitute the mainstay of American liberty.¹ The Framers of the Constitution did not include these vital rights in the original version of the document.² In fact, the first ten amendments were proposed by Congress to secure ratification of the Constitution and, more importantly, to prevent a second constitutional convention.³

Virginians played a vital role in the first constitutional convention: the 1787 Philadelphia meeting started with the introduction of the "Virginia plan" for a federal constitution.⁴ Almost immediately after the close of the convention, another Virginia plan surfaced. This plan called for a second constitutional convention.

When the delegates to the Philadelphia meeting created the document that is now our Constitution, they surpassed their authority. Instead of amending the Articles of Confederation, the delegates proposed a constitution to replace them.⁵ As a result, the Philadelphia document caused an immediate public stir. Federalists and antifederalists mounted fervent campaigns, one in favor of the new Constitution, the other against it.⁶ Two Virginians were at the center of the debate: James Madison and Patrick Henry. Madison promoted the ratification of the document while Henry sought a second constitutional convention to propose a Bill of

1. James Madison viewed the Bill of Rights as a check on a majority rule. A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* 17 (1979).

The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely that which possesses the highest prerogative of power. But this is not found in either the executive or legislative departments of Government, [sic] but in the body of the people, operating by the majority against the minority.

Id.

2. *Id.* at 6.

3. *Id.* at 7.

4. For a discussion of the "Virginia plan," see *infra* note 35 and accompanying text.

5. An immediate criticism of the convention was that it overstepped its boundaries. See *infra* note 94 and accompanying text.

6. C. LEEDHAM, *OUR CHANGING CONSTITUTION* 37 (1964). Emotions during this period ran high, resulting in the following correspondence from Virginian R. H. Lee to fellow Virginian Edmund Randolph: "[T]o say, as many do, that a bad government must be established, for fear of anarchy, is really saying, that we must kill ourselves for fear of dying." W. PETERS, *A MORE PERFECT UNION* 218 (1987).

Rights.⁷ The outcome of this debate is a lesson in constitutional revision.

Henry's threat was immediate after the end of the Virginia ratification convention, Madison notified George Washington of Henry's intentions:

Mr. H—y declared previous to the final question that altho' [sic] he should submit as a quiet citizen, he should seize the first moment that offered for shaking off the yoke in a *constitutional way*. I suspect the plan will be to engage $\frac{2}{3}$ of the Legislatures in the task of undoing the work; or to get a Congress appointed in the first instance that will commit suicide on their own Authority.⁸

While Henry wanted the states to order Congress to call a second constitutional convention,⁹ Madison sought to avoid a second convention because he believed that it would result in disaster.¹⁰ He pressured Congress to propose amendments for the states to ratify, to thus avert the call for a second convention.¹¹ In the end, Congress proposed the first ten amendments to the Constitution.¹² Henry's efforts to call a second constitutional convention had failed.¹³

7. C. LEEDHAM, *supra* note 6, at 38.

Madison being Madison, there was, of course, more to it than that. He was not only a politician but a confirmed democrat. He had seen the increasing strength of popular demand for a Bill of Rights. He greatly admired and respected Thomas Jefferson, and Jefferson had bombarded him from Paris with a stream of letters urging amendments. When he took his seat in Congress, Madison was a Bill of Rights supporter in the full honesty of personal conviction.

It was also apparent to Madison's astute political judgment that the issue was far from dead as a threat to the Constitution. The redoubtable and indefatigable Patrick Henry was still attacking the Constitution, calling for a new convention to write another and better version. Ordinary citizens were already beginning to mutter their suspicions that the new Congress, once it got itself comfortably in power, would let the idea of amendments die of neglect in backroom committees. The antifederalists dearly wished that exactly this might happen, and Henry was slowly building up his forces to demand a second convention.

Id. The Bill of Rights was a heated local political issue for both Henry and Madison. Henry defeated Madison for one of the two positions of Senator from Virginia. *Id.* at 37. Madison was then forced to compete for a seat in the House of Representatives in a highly Anti-Federalist district. He won the election, but only after making concessions to insure that Congress would propose a Bill of Rights. *Id.*

8. D. MATTESON, *THE ORGANIZATIONS OF THE GOVERNMENT UNDER THE CONSTITUTION* 142 (1970) (emphasis in original) (citing Washington Papers 241).

9. *See id.* at 142-45; *see also* LEEDHAM, *supra* note 6, at 38. Actually, Henry rejected appointment to the Philadelphia convention as a Virginia delegate. PETERS, *supra* note 6, at 23. Later Henry responded that he did not desire to go because "I smelt a Rat." *Id.*

10. *See infra* notes 127-131 and accompanying text.

11. *See* Berns, *Comment: The Forms of Article V*, 6 HARV. J.L. & PUB. POL'Y 73, 74 (1982).

12. On September 25, 1789, Congress proposed the Bill of Rights to the states for consideration. GRIMES, *supra* note 1, at 18. Three states did not ratify the Bill of Rights: Massachusetts, Connecticut, and Georgia. *Id.* North Carolina and Rhode Island had not ratified the Constitution. *Id.* Vermont had not yet been admitted as a state. *Id.*

13. For a survey of the reaction to Henry's plan see D. MATTESON, *supra* note 8, at 145-49.

Public debate over the possibility of a second constitutional convention continues to this day, however, Madison's procedure for amending the Constitution has been the only effective method thus far.¹⁴ While, there has not been a single successful attempt to gather another constitutional convention since 1787,¹⁵ this lack of success has not prevented states from continuing to petition Congress to call another convention.¹⁶

This note will discuss the prospect of a second constitutional convention. Part II examines the creation and content of the provisions for revising the Constitution¹⁷ and gives an overview of amendments to the Constitution. Part III assesses the constitutional convention process. Finally, Part IV discusses how Congressional inaction affects the possibility of a second constitutional convention.

II. ARTICLE V: CONSTITUTIONAL AMENDMENTS

A. *The Creation of Article V*

1. Failure of the Articles of Confederation

A constitutional document which contains a provision for amending its provisions is "peculiarly American."¹⁸ The Framers, having witnessed the

New York had initially issued a call of its own and thus supported Virginia's call. *Id.* at 145. North Carolina, not yet a state, appointed five antifederalist representatives to the convention should it be called. *Id.* Rhode Island put the question before the local towns and the response was negative. *Id.* The Connecticut legislature refused the Virginia call. *Id.* In Pennsylvania, the Virginia call was laid aside. *Id.* Lawmakers in Massachusetts said no. (They were, however, very anxious about "evidencing their great friendship and sincere regard of these important members of the union [Virginia and New York]" *Id.* at 146-47.) Maryland procedurally killed the Virginia measure. *Id.* at 147.

14. Those amendments which have not been successful in securing sufficient state ratification include: the Child Labor Amendment, an amendment providing for Congressional representation for the District of Columbia, and the Equal Rights Amendment. *See, e.g., A. GRIMES, supra* note 1, at 101-04, 147-54.

15. *See infra* notes 135-48 and accompanying text. *But see According to Them It's Time. Should a Constitutional Convention Be Called?* Nat'l L.J., Nov. 19, 1990, at 1, col. 1 [hereinafter *According to Them*].

16. The most recent effort to secure the call for another constitutional convention involved a balanced budget amendment. *See Comment, "The Monster Approaching the Capital: The Effort to Write Economic Policy Into the United States Constitution,* 15 AKRON L. REV. 733, 744-48 (1982).

17. For a review of the Articles of Confederation and events leading up to the 1787 convention see Rakove, *The Road to Philadelphia 1781-1787*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 98 (L. Levy & D. Mahoney 1987).

18. 2 D. WATSON, *THE CONSTITUTION OF THE UNITED STATES ITS HISTORY, APPLICATION, AND CONSTRUCTION* 1303 (1910); *see also Note, The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 48 (1950).

Conceptually, the amendment process has its roots in the colonial and state charters of early American colonial history. Stasny, *The Constitutional Convention Provision of Article V: Historical Perspective*, 1 COOLEY L. REV. 73, 75 (1982). For example, the Georgia Constitution of 1777 had a provision which allowed a majority of the voters of a majority of the

failure of the Articles of Confederation, anticipated that amendments to the new Constitution would inevitably be necessary.¹⁹ As one commentator has stated: "Constitutions can only be changed by consent or force. Unless there be some method in the instrument itself by which the Constitution can be enlarged when the necessity arises it must meet the fate of revolution."²⁰

This country's first constitution, the Articles of Confederation, proved that the road to federal democracy would not be easy: unforeseen problems created regional strife.²¹ The constraints imposed on the national economy by competing local interests and the inability of Congress to react to such problems demonstrated the weaknesses of the confederation.²² Existing federal government structures provided no effective means of addressing issues of national importance such as commerce and trade.²³ Moreover, Congress seemed unwilling, or unable, to confront these essential issues.²⁴ The Articles of Confederation did not provide the states with any means sufficient to address the issues themselves. Although, the Articles of Confederation provided that: "[No] alteration [should] at any time hereafter be made in any of [the Articles,] unless such alteration be agreed to in a Congress of the United State, and be afterwards confirmed by the Legislatures of every State,"²⁵ the requirement that every state approve proposed changes made this provision an

counties to petition the assembly to order a convention to alter the constitution for a specific purpose. *Id.* (citing S. FISHER, *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES* 179 (1897)).

19. G. ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 179 (1989).

20. D. WATSON, *supra* note 18, at 1312.

21. See McLaughlin, *The Articles of Confederation*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION*, 44, 56 (Levy 2d ed. 1987).

22. Stasny, *supra* note 18, at 76 (citing M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 4-5 (1913)).

23. *Cf. id.* Benjamin Franklin proposed an addition to the Articles of Confederation which would have allowed the majority of the colony assemblies to approve amendments. *Id.* (citing S. FISHER, *supra* note 18, at 178). Franklin's proposal stated:

As all new institutions may have imperfections which only time and experience can discover, it is agreed that the general congress, from time to time, shall propose such amendments of this constitution as may be found necessary, which, being approved by a majority of the colony assemblies, shall be equally binding with the rest of the articles of this confederation.

Id.

24. D. WATSON, *supra* note 18, at 1303.

Notwithstanding the weakness of the Articles and their evident insufficiency no amendment was made to them. This was doubtless due to the belief that it would be impossible to secure the two requisites, the agreement in Congress to the alteration and the confirmation of such alteration by the legislature of every State of the Union.

Id. (emphasis in original); see also Brennan, *Return To Philadelphia*, 1 COOLEY L. REV. 1, 66 (citing M. FARRAND, *THE FRAMING OF THE CONSTITUTION* Cu.3 (1978)).

25. U.S. ARTICLES OF CONFEDERATION art. XIII (emphasis added).

unrealistic alternative.²⁶ In 1784, New York requested that Congress call a convention to amend the Articles, and Massachusetts soon followed. Both requests went unaddressed.²⁷

The lack of a comprehensive plan for dealing with American trade and commerce created severe problems for the states.²⁸ The inability of Congress to address these and other problems became a key issue when representatives of Virginia and Maryland met in 1784 to discuss disputes involving the Potomac River.²⁹ As a result of these discussions, the Virginia General Assembly called for a joint meeting of all the states "to consider and recommend a federal plan for regulating commerce."³⁰ Five states participated at the meeting Virginia arranged in Annapolis, Maryland in 1786. Though commerce issues were addressed, the state representatives also addressed defects in the Articles of Confederation as a whole.³¹ In

26. George Washington, in contemplating the situation facing the nation, recognized that the current situation needed change:

Among men of reflection, few will be found, I believe, who are not *beginning* to think that our system is better in theory than practice; and that, notwithstanding the boasted virtue of America, it is more than probable we shall exhibit the last melancholy proof that mankind are [sic] not competent to their own government, without the means of coercion, in the sovereign. Yet I would try what the wisdom of the proposed Conventions will suggest, and what can be effected by their counsels. It may be the last peaceable mode of assaying the practicability of the present form, without a great lapse of time than the exigency of our affairs will admit.

D. WATSON, *supra* note 18, at 50-51 (citing 3 Jay's Correspondence 239).

27. Stasny, *supra* note 18, at 76 (citing Lunt, *The Eighteenth Amendment Can Be Amended*, World's Work, Sept. 1929, at 61, 63).

28. These problems impacted on the convention. See Brown, *The Miracle of 1787: Could it? Would it? Happen Again?*, 33 *LOV. L. REV.* 903, 909-11 (discussing problems which lead to the adoption of the secrecy rule at the convention)(citing *Washington and the Evolution of the U.S. Congress*, 10-11 *CONG. DIG.*, Feb. 1932, at 37-38).

29. *Id.*

30. *Id.* at 77 (citing DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong. 1st Sess. 38 (1927)). The Virginia resolution read:

Resolved, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for same.

Id.

31. *Id.* (citing M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 9-10 (1978)). The five participating states were Virginia, Delaware, New York, New Jersey, and Pennsylvania. Brennan, *supra* note 24, at 66 (citing *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 115 (1784-1846 photo. reprint 1974)). North Carolina, Massachusetts, Rhode Island, and New Hampshire appointed delegates to the convention but they did not show up. *Id.* Also,

the end, the delegates issued a report stating that "a Convention of Deputies from the different States, for the special and sole purpose of entering into [an] investigation [of the defects in the federal government]" ought to be called.³² Congress, meeting five months later, agreed³³ and directed the states to appoint delegates to gather in Philadelphia for the "sole and express purpose of revising the Articles of Confederation"³⁴

2. The Virginia Plan

In the summer of 1787, Edmund Randolph of Virginia began the proceedings in Philadelphia with the introduction of what became known as the Virginia constitutional plan.³⁵ On May 29, Randolph introduced fifteen resolutions, the thirteenth of which stated that "provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary, and that the assent of the National Legislature ought not be required thereto."³⁶ Discussion proceeded on each resolution and, on June 5, when the debate turned to proposal thirteen, Charles Cotesworth

Georgia, South Carolina, Connecticut and Maryland choose not to participate. *Id.*

32. Stasny, *supra* note 18, at 77 (citing M. FARRAND, *THE FRAMING OF THE CONSTITUTION* 10 (1978)).

33. *Id.* at 77-78. At the Congressional session, New York offered the first resolution for a convention and it was defeated. *Id.* at 77. The New York resolution simply called for a convention to propose remedies to "render [the Articles] adequate to the preservation and support of the Union." *Id.* at 77 n. 19. Madison, in the preface to his record of the Philadelphia convention, noted that an earlier call to convention came on the floor of Congress. J. MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON* 11 (Ohio Univ. Press 1966).

34. Stasny, *supra* note 18, at 78 (emphasis added). Of the seventy-four men appointed by their respective states, only fifty-five went to Philadelphia and only thirty-nine signed the Constitution. *Id.* (citing Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions*, 51 MINN. L. REV. 1053, 1073-74 (1967)).

35. See J. MADISON, *supra* note 33, at 28. Madison records that Randolph: expressed his regret, that it should fall to him, rather than those, who were of longer standing in life and political experience, to open the great subject of their mission. But, as the convention had originated from Virginia, and his colleagues supposed that some proposition was expected from them, they had imposed this task upon him.

Id.

36. Stasny, *supra* note 18, at 79 (citing C. BRICKFIELD, *STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., PROBLEMS RELATING TO A FEDERAL CONSTITUTIONAL CONVENTION* 4 (Comm. Print 1957)). The second major proposal presented at the convention by Charles Cotesworth Pinkney of South Carolina contained a provision calling for amendment to the Constitution by both the Congress and the States:

If two-thirds of the legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

Id. at 78 (citing Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46, 50 (1950)).

Pinkney, a delegate from South Carolina, doubted “the propriety or necessity of [the proposal].”³⁷ However, Elbridge Gerry of Massachusetts supported the proposal because the “novelty & difficulty of the experiment requires periodical revisions. The prospect of such revision would also give intermediate stability to the Govt.”³⁸ On this first reading, however, the proposal was eventually postponed.³⁹

When debate on this provision renewed on June 11, several members of the convention again questioned the necessity of proposal thirteen, especially the provision making consent of the federal legislature unnecessary.⁴⁰ George Mason of Virginia reasoned that because this plan would be defective in some aspects, just as the Articles had been, amendments would be necessary.⁴¹ Further, he argued that “it would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account.”⁴² Despite the arguments on its behalf, the provision for amendment “[w]ithout requiring the consent of the National Legislature” had to be removed and postponed before the measure could pass without objection.⁴³ Thus, on June 13, the Committee of Whole reported: “Resolved that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary.”⁴⁴ The shortened provision was agreed upon⁴⁵ and then referred to the Committee of Detail.⁴⁶ On August 6, the committee released it in the following form: “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.”⁴⁷ Under this draft, Congress was given little more than a procedural role.⁴⁸ Seemingly, the delegates believed that the states would al-

37. J. MADISON, *supra* note 33, at 69.

38. *Id.*

39. *Id.* Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maine, and North Carolina favored postponement. *Id.* Virginia, South Carolina, and Georgia opposed postponement. *Id.*

40. *Id.* at 104.

41. *Id.*

42. *Id.* at 104-05. Randolph supported Mason's arguments. *Id.*

43. *Id.* at 105.

44. *Id.* at 117. This provision was number seventeen of the nineteen provisions reported from the committee. *Id.*

45. *Id.* at 347. Madison documents the passage of each provision of the initial report. See *id.* at 379-85.

46. D. WATSON, *supra* note 18, at 1304.

47. J. MADISON, *supra* note 33, at 395 (article 19 of 33).

48. See *id.*; cf. Stasny, *supra* note 18, at 83 (stating that once the two-thirds states concerted as one to call for a convention, it would “constitute a mandate which the Constitution gives Congress no warrant but to heed” (quoting Haynes, *Popular Control of Senatorial Elections*, 20 POL. SCI. Q. 577, 591 (1905) (referring to various state legislatures calling for a constitutional convention under Article V to amend the Constitution to provide for the direct election of senators)).

ways control the federal government structure. However, on August 30, when this draft came before the full convention, Governor Robert Morris of Pennsylvania suggested an additional provision allowing the national legislature to call for a convention.⁴⁹ Morris did not, however, make a motion on his proposal and the clause was agreed to, as written, by unanimous vote.⁵⁰ On September 10, Elbridge Gerry moved to reconsider the provision that was to become Article V, and the debate over federal and state rights began.⁵¹

Gerry argued that the federal constitution should be paramount to the states; however, under the proposed article, two-thirds of the states could still call a convention and bind the federal government to their will, thus subverting the constitutions of the other states altogether.⁵² Although Alexander Hamilton of Virginia seconded the motion to reconsider the provision, he did so for reasons different from Gerry's. Hamilton thought that the national legislature would be best situated to respond to the need for amendments and that states might call a convention to increase their power.⁵³ Additionally, James Madison questioned the vagueness of the convention process as sufficient reason to reconsider the article.⁵⁴ These arguments prevailed and the article was brought up for reconsideration.⁵⁵

During the subsequent debate over the article, the first suggested alteration was the addition of a provision enabling the national legislature to propose amendments to the states for their ultimate approval.⁵⁶ James

49. *Id.* at 560.

50. *Id.*

51. *Id.* at 609.

52. *Id.*

53. *Id.* According to Madison's account of Hamilton's reasons, Hamilton argued:

There was no greater evil in subjecting the people of the U.S. to the major voice than the people of a particular State. It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the New System. The mode proposed was not adequate. The State Legislatures will not apply for alterations but with a view to increase their own powers. The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two thirds of each branch should concur to call a Convention. There should be no danger in giving this power, as the people would finally decide in the case.

Id.

54. *Id.* Madison questioned the "vagueness of the term, '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?" *Id.*

55. *Id.* at 609-10.

56. *Id.* at 610. Sherman moved to add "or the Legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States." *Id.*

Wilson, of Pennsylvania, moved to require approval of two-thirds of all the states in order to call for a convention; however this motion failed five to six.⁵⁷ Instead, a subsequent amendment requiring three-fourths of the states was approved.⁵⁸

Madison then offered a substitute version of the proposal, seconded by Hamilton, which stated:

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.⁵⁹

After the addition of stipulations protecting certain states' rights,⁶⁰ the provision was adopted.⁶¹ It appeared that debate on this provision had ended. On September 15, however, Connecticut delegate Roger Sherman expressed his fear that three-fourths of the states might gather and abolish the representation in the Senate of the other states or attempt to control internal matters.⁶² It was at this point that George Mason of Virginia also objected to article V as "exceptional and dangerous."⁶³ During this debate, motions were made concerning the percentages of states required to call a convention and the method the convention would use to ratify proposals.⁶⁴ At one point, Sherman moved to strike article V altogether.⁶⁵ This provoked Governor Morris, voicing the concerns of the smaller states, to move to add a provision protecting representation in the Senate.⁶⁶

During this final debate on article V, Edmund Randolph, who had initially introduced the provision for amending the Constitution, suggested

57. *Id.* New Hampshire, Pennsylvania, Delaware, Maryland, Virginia favored the motion; Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, and Georgia voted against the motion.

58. *Id.*

59. *Id.*

60. In the final debate on article V, delegates inserted provisions regarding slavery and state representation in the Senate. *See id.* at 610-11.

61. The proposal is finally listed as article V in the report of the Committee of style on Wednesday, September 12, 1787. *Id.* at 616, 626.

62. *Id.* at 648.

63. *Id.* at 649. Mason's record states: "As the proposing of amendments is in both modes to depend, in the first immediately, in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case."

64. *Id.* at 649.

65. *Id.* at 650. Only Connecticut, New Jersey, and Delaware voted for the motion. *Id.*

66. *Id.* ("that no State, without its consent shall be deprived of its equal suffrage in the Senate").

another provision for a second convention after the states ratified the Constitution. This convention would consider state proposals for amendments which might arise during the ratification process.⁶⁷ At this point, Mason noted that: "[T]his constitution had been formed without the knowledge or idea of the people. A second Convention will know more of the sense of the people, and be able to provide a system more consonant to it."⁶⁸ However, other convention delegates debated whether a second gathering could ever come to a consensus.⁶⁹ The Randolph convention amendment was rejected unanimously.⁷⁰ Thus, a process of amending the Constitution, which initially provoked little debate, passed in the final contentious hours of the convention.⁷¹

Later during debate on the ratification of the Constitution, Madison argued for article V noting:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against the 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 state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.⁷²

With Madison's guidance, the Constitution survived the ratification process; however, Patrick Henry quickly prepared to utilize article V to mount a direct challenge to the Constitution.⁷³

B. *Amending the Constitution*

1. Amendments Under Article V

"We the people" may change our minds. The Founders knew this well. They emphasized the ability of the people to change their form of government or, in the alternative, to recommit themselves to that government. A periodic constitutional convention was therefore supported by many of the founders as a "recurrence to fundamental principles."⁷⁴ However, this

67. *Id.* at 650-51.

68. *Id.* at 651.

69. *Id.*

70. *Id.* at 652.

71. According to Madison's record, article V was the last article debated before the plan was engrossed. *Id.*

72. THE FEDERALIST No. 43, at 296 (J. Madison) (J. Cooke ed. 1961). For another paper by Madison on the amendment process, see THE FEDERALIST, No. 49, at 340 (J. Madison) (J. Cooke ed. 1961).

73. See *supra* notes 8-9.

74. Berns, *supra* note 11, at 74.

view was not unanimous, as others felt that amendment of the Constitution should be allowed only to correct earlier mistakes.⁷⁵ Further, although the delegates recognized the need to alter the document, they also sought permanency in the federal government structure.⁷⁶

Democracy's basis is representation. Under article V citizens have no direct way of amending the Constitution. Amendments can only be proposed by Congress or a convention and can only be ratified or rejected by representatives of the people in convention or at the state legislature.⁷⁷ Under article V, citizens never have a direct vote on constitutional revisions. There is no provision, for example, placing proposed changes to the Constitution before the public electorate. While the Founders desired some limits on citizen action, they continued to place great hope in the efforts of citizens to govern.⁷⁸ One commentator has stated that "[t]he provision of a workable amendment process presupposes . . . both that the American people retain their ultimate authority and that standards exist by which they may judge and modify Constitutional arrangements as the need arises."⁷⁹

Article V, as finally adopted, provides two methods for amending the Constitution of the United States. Under the first method Congress proposes amendments to the Constitution and the states ratify these amendments either by state legislature or state convention called for that purpose.⁸⁰ Thus, the second method involves a presentation to Congress of a

75. *Id.*

76. Comment, *supra* note 16, at 736. It was for this reason that, for example, delegates favored ratification by three-fourths of the states rather than two-thirds. *Id.*

77. D. WATSON, *supra* note 18, at 1310.

78. See THE FEDERALIST No. 49 (J. Madison) (J.Cooke ed. 1961). Madison believed:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Id. at 339.

79. G. ANASTAPLO, *supra* note 19, at 187. For example, a balanced budget amendment would be similar to an amendment which states that people shall not commit crimes. *Id.*

80. U.S. CONST. art. V.

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the applications of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and no state, without its consent, shall be deprived of its equal suffrage in the Senate.

call to convention by three-fourths of the legislatures of the states.⁸¹ Thus, the people are represented in the process at the federal level and the state level. However, neither the federal government, nor the state government has complete control over the process under either method.

2. Congressional Control of Constitutional Amendments

While not able to directly amend the constitution, Congress has the ability to preempt the convention process, and thus control the amendment process. The states must wait for Congress to propose amendments or to call a convention.⁸² The Constitution sets forth a distinct division of labor—Congress proposes, the states ratify.⁸³ Congress, by itself, may not call a convention.⁸⁴ To achieve a successful constitutional revision, either by amendment or convention, each body must carry forth its task deliberately and in cooperation with the other. Congress, however, has the ability to start the process and dictate the scope of debate.

Congress has proposed thirty-three amendments to the Constitution.⁸⁵ Of the twenty-six proposals that have become amendments to the federal Constitution, all but one were ratified by the state legislatures.⁸⁶ These

81. U.S. CONST. art. V.

82. G. ANASTAPLO, *supra* note 19, at 181 ("No provision is made for the States to propose amendments of their own, since they are the ones to decide whether to ratify proposed amendments."). The Congress, however, must call the convention as "[n]othing . . . is left to the discretion of that body." THE FEDERALIST, No. 85 at 593 (A. Hamilton) (Cooke ed. 1961). *But see* Stevens, *Governor's Split Heatedly on Amendment Proposal*, N.Y. Times, Aug. 10, 1988, at A14, col. 1. The National Governors' Conference adopted a proposal at its August 1988 meeting which would require Congress to consider any amendment which was proposed by two-thirds of the state legislatures. To override the provision, "Congress would have to vote it down by at least a two-thirds vote in its next session." Amendments not rejected would go back to the states for consideration. *Id.* As of June 1990, fifteen states had approved the proposal. Tolchin, *Fifteen States Rally Behind Calls for a Constitutional Amendment to Add to Their Power*, N.Y. Times, June 25, 1990, at A17, col. 2.

83. G. ANASTAPLO, *supra* note 19, at 181-82.

84. *But see id.* at 182 (by considering proposed amendments, Congress effectively sits as a continuing convention).

85. *Id.* at 181; see AMERICAN ENTERPRISE INSTITUTE, PROPOSALS FOR A CONSTITUTIONAL CONVENTION TO REQUIRE A BALANCED FEDERAL BUDGET 1 (1979). Sixteen of the amendments are devoted to providing or extending the rights of citizens while only six directly impact on the "mechanics of government." C. LEEDHAM, *supra* note 6, at 1. One commentator has arranged the amendments into the following groups: the southern amendments (1-12), the northern amendments (13-15), the western amendments (17-19), the transition amendments (20-22), and the urban amendments (23-26). *See generally* A. GRIMES, *supra* note 1.

In 1810, a proposal to remove the citizenship of anyone accepting a title of nobility without the consent of Congress fell one state short of ratification. *Id.* at 25 n.56. Virginia did not consider the amendment. *Id.* In 1861, shortly before the Lincoln inauguration, a noninterference with slavery amendment was proposed; however, only Ohio and Maryland ratified it. *Id.* For a discussion of the failed Child Labor Amendment, see *id.* at 101-04. For a discussion of the failed Equal Rights Amendment see *id.* at 147-54.

86. *Article V and the Proposed Federal Constitutional Convention Procedure Bills. Re-*

twenty-six amendments reflect the growth and development of our nation, and yet, they are but a fraction of the proposed amendments Congress has been asked to consider.⁸⁷ Further, many of the thirty-three proposed amendments were presented by Congress only after a substantial number of states had called for a convention to bring about such amendments.⁸⁸ While the states may not have been successful at forcing a convention, they have often been successful at forcing resolution of the issue by the other method. As Congress watches state after state call a convention, action is taken to avoid the convention.

III. THE CONVENTION PROCESS

What rules control a constitutional convention when the document creating the convention is at issue? Article V's provision allowing states to force Congress to call a constitutional convention is "an unchartered and volatile course shrouded in legal, political, and procedural difficulties."⁸⁹ Congress, no matter how it tries, will not be able to control the outcome of a national amendment convention—unless it acts, as Madison did in securing the Bill of Rights, to prevent the need for such a convention.

A. *The Uncontrollable First Convention*

The precedent set by the first convention is clear: when the convention delegates meet, there is no way to control the proposals that will be produced. Delegates to the Philadelphia gathering were directed to amend the Articles of Confederation. They were not given authority to rewrite the document. Yet, reacting to what they perceived as the overwhelming problems of the day, the delegates thought it best to present the people with an entirely new constitution. As Edmund Randolph of Virginia urged: "[t]here are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it."⁹⁰

port and Recommendations to the New York State Bar Association by the Committee on Federal Constitution, 3 CARDOZO L. REV. 529, 530 (1982) [hereinafter *New York State Bar*] (twenty-first amendment, which repealed prohibition, was proposed by Congress and ratified by state conventions).

87. Records indicate that Congress has received over 10,000 proposed amendments to the Constitution since 1787. See *According to Them*, *supra* note 15, at 27. From 1789 to 1963, Congress considered 5720 individual proposals. C. LEEDHAM, *supra* note 6, at 263. In the period from 1789 to 1896, only 1736 proposals were considered. *Id.* at 265.

88. *New York State Bar*, *supra* note 86, at 532. Examples include the seventeenth amendment (for the direct election of Senators) and the twenty-first amendment (repealing prohibition).

89. Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2 (1983).

90. *Letting 'We the People' Speak; Having a Second Constitutional Convention*, *The New Leader*, Jul. 13, 1987 at 8.

Congress gave little guidance when it recommended the first convention.⁹¹ Delegates were commanded to "do such things adequate to the exigencies of the government and the preservation of the Union."⁹² From the beginning, however, some delegates recognized that amendments to the Articles would not be sufficient to remedy the problems of the national government.⁹³ Other delegates adopted the position taken by Patrick Henry at the Virginia Convention: "The Federal Convention ought to have amended the old system; for this purposes they were solely delegated; the object of their mission extended to no other consideration."⁹⁴

Along with the questionable scope of the first convention, the authority of the individual delegates has also sparked debate.⁹⁵ Each state conferred different authority on their delegates. Some delegates were permitted to vote only on amendments, while others were given broader, more general authority.⁹⁶ Today, state calls for convention continue to limit the subject and scope of delegates' authority.⁹⁷

B. *Problems Presented By a Second Convention*

A second convention would result in a direct confrontation between the states and the Congress. Further, a second convention would proceed through unchartered waters of constitutional procedure and power.⁹⁸ The questions posed by a potential convention have produced legislation and debate—but no answers.⁹⁹

91. D. WATSON, *supra* note 18, at 48.

92. 1787 DRAFTING THE U.S. CONSTITUTION 47 (W. Benton ed. 1986).

93. *Id.* at 51.

94. *Id.* at 54.

95. 1787 DRAFTING THE U.S. CONSTITUTION, *supra* note 92, at 19-38; D. WATSON, *supra* note 18, at 49.

96. D. WATSON, *supra* note 18, at 49.

Some states conferred greater power upon their representatives than others, but none conferred the power to reject the Articles of Confederation, or adopt a new Constitution, unless such authority could be *implied* from the instructions of those States which directed their delegates to do such things as would "render the federal Constitution adequate to the exigencies of government and the preservation of the Union."

Id.

97. Goldberg, *supra* note 89, at 1.

98. One commentator has divided the questions presented concerning a constitutional convention into three sets of issues: whether the states may call such a convention and whether they may limit its subject, how such a convention would be run; and what response Congress and the States would give the work of such a convention. G. ANASTAPLO, *supra* note 19, at 182-83. For a more thorough discussion of the issues involved in designing a second constitutional convention see W. MEAD, *THE UNITED STATES CONSTITUTION PERSONALITIES, PRINCIPLES, AND ISSUES* 210-14 (1987).

99. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563 (1982); Rees, *Constitutional Conventions and Constitutional Arguments: Some Thoughts About Limits*, 6 HARV. J. L. & PUB. POL. 79 (1982).

For example, one issue is whether state legislatures requesting the convention may limit its authority by limiting its scope. Today, applications to Congress to call a convention are based on the presumption that a convention's subject matter can be limited.¹⁰⁰ This practice appears to have begun in 1893.¹⁰¹ Practically every call to convention comes with a limit in some form or the other.¹⁰² It is debatable whether these limits actually mean anything. As Justice Frankfurter has noted: "[t]here is no way to put a muzzle on a constitutional convention."¹⁰³

Another issue to consider is whether a state may rescind its call to convention, or ratification of an amendment, after putting such a resolution forward to Congress.¹⁰⁴ Madison believed, at least with regard to adopting the Constitution, that once the legislature acted it could not rescind its action.¹⁰⁵ At least one Supreme Court case, *Coleman v. Miller*, seems to support the assertion that a state cannot rescind its ratification of an amendment.¹⁰⁶ In *Coleman*, the Court discussed the efficacy of Kansas' 1937 ratification of the Child Labor Amendment considering that the Kansas legislature had rejected the proposed amendment in 1925 and notified Congress of its rejection.¹⁰⁷ In the end, the Supreme Court determined that it was a political question and left the determination to Congress.¹⁰⁸ However, many states either openly disagree with this assertion of Congressional control or choose to ignore it.¹⁰⁹

100. Comment, *supra* note 16, at 736.

101. *New York State Bar*, *supra* note 86, at 536 (Nebraska was the first state to submit an application to Congress for a limited convention). An 1887 treatise on a constitutional convention seems to have stirred the passions of state legislatures nationwide. *See id.* at 537 (citing J. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTION: THEIR HISTORY, POWERS, AND MODES OF PROCEEDINGS (4th ed. 1887)).

102. For a discussion of the recently proposed budget amendment see "*The Monster Approaching the Capital: The Effort to Write Economic Policy into the United States Constitution*," 15 AKRON L. REV. 733, 735 (1982) (states assume convention may be limited in scope).

103. Schlafly, *A Constitutional Convention Could Run Amok*, *Newsday*, Jan. 5, 1988, at 46.

104. *See, e.g.*, D. WATSON, *supra* note 18, at 1313-18 (arguing forcefully that ratification cannot be rescinded).

105. *Id.* at 1317.

106. *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (holding that the issue is a political question over which Congress has authority).

107. *Id.* at 435.

108. *Id.* at 456.

109. The Ohio legislature ratified the 14th amendment in 1867, but on January 15, 1868, the next legislature passed this joint resolution:

Whereas, no amendment to the Constitution of the United States is valid until duly ratified by three-fourths of all the States composing the United States, and until such ratification is completed, any State has a right to withdraw her assent to any proposed amendment.

Resolved, by the General Assembly of the State of Ohio, That the above recited resolution be, and the same is, hereby rescinded, and the ratification on behalf of the

Despite the inherent problems confronting a second constitutional convention, the amending process contains a certain level of built-in control. The results of a constitutional convention will not be law, only proposals.¹¹⁰ However, unless the output of the convention is extremely outlandish, the convention's agenda and subsequent proposals could frame national debate and capture public support. Congress, at this point, would be as inconsequential to the national debate as the Congress sitting when the Constitution was proposed. Decision-making power would be in the hands of the people through state legislatures or state conventions. The federal legislature, having failed to demonstrate leadership, would be subjected to the will of the people. For example the convention could propose solutions to current issues Congress has failed to address such as: proposing limits on the terms of Senators and Representatives, requiring a balanced federal budget, or developing new branches of government to handle issues such as commerce.

C. *Congress and a Constitutional Convention*

While Congress has considered, on several occasions, whether it can control the convention amending process,¹¹¹ the discussions always resulted in debate rather than action.¹¹² Overall Congress considers itself to

State of Ohio of the above recited proposed amendment to the Constitution of the United States is hereby withdrawn and refused.

D. WATSON, *supra* note 18, at 1313. Ohio's attempt at rescision was ignored. *Id.* Similar action was taken by the New Jersey legislature in 1866 and 1868. *Id.* The New York legislature ratified and the revoked ratification of the 15th amendment in 1869 and 1870. *Id.* at 1313-14. Congress later directed the Secretary of State, on receiving official notice from a state, to deem such state as having ratified the amendment. Thus, Congress forced Ohio and New Jersey to abide by their earlier actions. Congress declared by resolution once a State ratified an amendment, it could not revoke it. *Id.* at 1315.

110. U.S. CONST. art. V. Article V provides:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the applications of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Id. (emphasis added).

111. See *New York State Bar, supra* note 86, at 532-33; see also Sorauf, *The Political Potential of an Amending Convention*, in *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* 113 (Hall, Hyman, & Sigal, eds. 1979).

112. "Such a bill [(to establish procedures for a convention)] has been floundering in Congress for the last 20 years, but has never passed because there is no congressional consensus on essential decisions pertaining to the election and functioning of a constitutional convention." Schlafly, *supra* note 103, at 46. For a review of the several Congressional bills offered

have the authority to act, but many commentators, including at least two Supreme Court Justices, contend it does not.¹¹³ Many authorities agree that Congress has no authority to control a national convention of the people and any opinion to the contrary is “pure speculation.”¹¹⁴

to provide procedures for a constitutional convention see Stasny, *supra* note 18, at 101-07. According to Stasny, from 1967 to 1981, members of Congress introduced at least seventeen pieces of legislation providing procedures for a convention. *Id.*

113. Justice Antonin Scalia, while a professor at the University of Chicago, participated in a round table discussion on constitutional conventions. During that discussion he made several comments on a proposed constitutional convention including:

[I]t really comes down to whether we think a constitutional convention is necessary. I think it is necessary for some purposes, and I am willing to accept what seems to me a minimal risk of intemperate action. The founders inserted this alternative method of obtaining constitutional amendments because they knew the Congress would be unwilling to give attention to many issues the people are concerned with, particularly those involving restrictions on the federal government's own power. The founders foresaw that and they provided the convention as a remedy. If the only way to get that convention is to take this minimal risk, then it is a reasonable one.

AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK? 5-6 (1979); *see also id.* at 20-21 (discussing the potential of having a convention with the likes of Madison and Jefferson).

During his confirmation hearings, Justice Souter was asked about the prospects of another constitutional convention. The following exchange occurred between Senator Howell Heflin of Alabama and Justice Souter:

SEN HEFLIN: There have been efforts, particularly in the field of legislatures to file resolutions calling for Congress to call a constitutional convention, particularly pertaining to a balanced budget. There's a lot of debate going on relative to whether a constitutional convention, if called, would be limited to the resolutions in which three-fourths of the legislatures of the—three-fourths of the states—would have to petition Congress to call such a constitutional convention, to the specific grounds and reason for calling the constitutional convention.

On the other hand, there are those that feel that a constitutional convention, if called, would not be limited and would not—it could be wide open, could do whatever it might choose to do, and whatever the—was done through the ratification process could become our constitution. Do you have any general thoughts pertaining to whether or not a—such a constitutional convention, if called, would be limited, or is it wide open?

JUDGE SOUTER: Well, I—Senator, I've never done—done any research on the question of whether it could be limited. I have tended to assume it would not be, if it was called. And I—I would not, in my present position, give advice to Congress, or to the nation, about what they should do. But it's instructive to remember, on the assumption that I've made, that when the Convention of 1787 was called, its charge was to revise the Articles of Confederation. And we all know what happened. And—and that was—that was a magnificent departure from the intent of the Convention. Whether we could expect such happy results another time is—is a question I think everybody better face (Laughter).

FEDERAL NEWS SERVICE, HEARING OF THE SENATE JUDICIARY COMMITTEE: CONFIRMATION OF JUDGE DAVID SOUTER TO THE SUPREME COURT—SEPTEMBER 17, 1990 2:27 P.M. SESSION 14-15 (LEXIS-NEXIS).

114. Goldberg, *supra* note 89, at 3; *see also* Berns, *supra* note 11, at 77 (“[W]hom would the convention delegates represent? Not the American people in Congress assembled. Congress, therefore, has no right to limit the convention. Whether, in calling the convention, the

In the early 1970s, a committee of the American Bar Association ("ABA") studied the ability of Congress to control the amendment process.¹¹⁵ This group concluded that Congress could and should pass legislation setting procedures for a constitutional convention.¹¹⁶ However, as one commentator noted "[m]any thorny issues are raised by the prospect of a new constitutional convention. Congressional duties and limitations when acting on the state applications are unclear."¹¹⁷ Nevertheless, the ABA concluded that Congress has the authority to set such guidelines to bind a national convention of the people.¹¹⁸

All of the arguments for Congressional control presuppose that the convention would operate under the guidelines of the existing constitution. History demonstrates the possibility of a contrary result; the Articles of Confederation were barely acknowledged in the first convention. This is not to suggest Congress cannot have some control of the amendment process. As Madison demonstrated, Congress does have the authority to control the process if it will take action.¹¹⁹ As mentioned earlier, article V dictates a distinct division of responsibilities.¹²⁰ Under the normal amendment procedure, Congress controls the amendment process by proposing amendments to the states in whatever wording it chooses. Thus,

a prudent Congress, supported by a sensible people, is not likely to permit either a Federal Convention, even if "runaway," or the State Legislatures to do anything that would wreck the Constitutional system we now have, a

states may do the limiting, remains a question.").

History has established that the Philadelphia Convention was a success, but it cannot be denied that the convention exceeded the limits of its expressed purpose. Logic therefore compels one conclusion: Any claim that Congress could, by statute, limit a convention's agenda is pure speculation, and contrary to a history precedent. Such "procedures legislation" might well be unconstitutional and would almost certain be unenforceable.

Goldberg, *supra* note 97, at 3; see also Labaton, *Limited-Convention Vote Questioned; Congress Can't Set Constitutional Session Agenda*, *Hill Panel Told*, *Washington Post*, Aug. 1, 1985, at A6, col. 3. Stanford Law Professor Gerald Gunther and Duke Law Professor Walter Dellinger told a House subcommittee studying the issue that Congress cannot control the agenda of a convention called by the states to propose a balanced-budget amendment. *Id.*

115. See A.B.A. SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974), *cited in New York State Bar*, *supra* note 86, at 533-35.

116. *New York State Bar*, *supra* note 86, at 534; see also Stasny, *supra* note 18, at 101-07.

117. See Comment, *supra* note 16, at 735.

118. *New York State Bar*, *supra* note 86, at 534. Other arguments in support of Congress' authority to control the process have been founded on the supremacy clause, *id.* at 538, and the necessary and proper clause. Parker & Ainsworth, *A 1986 Constitutional Convention?*, 48 *Tex. B.J.* 900 (1985) (citing M. McCoy & D. Huckabee, *Constitutional Conventions: Political and Legal Issues The Unanswered Questions*, Report No. 81-135, 2 (June 2, 1981) (available through the Library of Congress Congressional Research Service)).

119. See Parker & Ainsworth, *supra* note 118, at 899.

120. See *supra* notes 82-84 and accompanying text.

system that has long been regarded with favor by the people of this Country.¹²¹

Congress also can determine the amount of time an amendment will be open for ratification¹²² and can grant an extension to that process.¹²³ Yet, this control refers to Congress' ability to offer amendments as directed under the first provision of article V. It does not derive from the states' ability to call for convention. Because the Founders sought an amendment process that would allow both Congress and the States to propose constitutional change,¹²⁴ they obviously did not intend for Congress to control both amendment procedures.¹²⁵ Presumably, Congress' lack of ability to control the convention process prompted one Senator to refer to that process as the "darker side" of the amendment procedure.¹²⁶

D. *An Uncontrollable Second Convention*

Opponents of a second constitutional convention cite fears of an uncontrollable delegation as a major reason to avoid a second convention. Those in favor of a second convention claim that a constitutional convention is the legitimate exercise of the states' sovereign power and thus should not be avoided.¹²⁷ These arguments are not new. Two hundred years ago Madison cautioned: "Having witnessed the difficulties and dangers experienced by the first convention which assembled under every propitious circumstance, I would tremble for the result of the Second."¹²⁸ Many share Madison's view of a second constitutional convention.¹²⁹ Today, a commentator has reframed the argument:

121. G. ANASTAPLO, *supra* note 19, at 184.

122. *Id.* at 190; *see also* Dillon v. Gloss, 256 U.S. 368, 376 (1921) (for the eighteenth amendment, seven years was reasonable).

123. Congress granted an extension to the Equal Rights Amendment. *See* Rees, *supra* note 99, at 79.

124. *See supra* note 83 and accompanying text.

125. Brennan, *supra* note 24, at 5 (citing Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968)); Voegler, *Amending the Constitution by the Article V Convention Method*, 55 NOTRE DAME L. REV. 355, 365-366 (1979).

126. Rees, *supra* note 99, at 79 (Senator Ted Kennedy).

127. *See* Madden, *A Balanced U.S. Budget Debated in Connecticut*, N.Y. Times, Mar. 19, 1985, at B4, col. 1 (covering the debate regarding whether Connecticut should pass a resolution requesting Congress to call a convention to propose a balanced budget amendment). For a survey of the various arguments for and against a constitutional convention see Kay, *Letting 'We the People' Speak; Having a Second Constitutional Convention*, 70 The New Leader 8 (1987); Rotunda, *Giving President a Line-Item Veto Could Push Congress to Adopt Leader Budgets*, Manhattan Lawyer, April 4-10, 1989, at 12; Berry, *Amending the Constitution; How Hard it is to Change*, N.Y. Times, Sept. 13, 1987 (Magazine) at 93.

128. Goldberg, *supra* note 97, at 4 (citing Letter from James Madison to George Lee Turberville (Nov. 2, 1788) printed in 11 PAPERS OF JAMES MADISON 331 (1978)).

129. *See* Parker & Ainsworth, *supra* note 118, at 900 (citing Dybdahl, *Is There a Constitutional Convention in Your Future?* LIBERTY (July/Aug. 1980)).

There is nothing in Article V that prevents a convention from making wholesale changes to our Constitution and Bill of Rights. Moreover, the absence of any mechanism ensuring representative selection of delegates could put a "runaway convention" in the hands of single-issue groups where self-interest may be contrary to our national well-being.¹³⁰

However, while some predict an uncontrollable convention, others suggest that the convention delegates could do no worse than has the Congress.¹³¹ Nevertheless, the prospect of wholesale changes to our basis of government, regardless of whether those changes are the result of a complacent Congress or an unruly constitutional convention, seems quite probable.

IV. FORCING A CONSTITUTIONAL CONVENTION: CONGRESSIONAL INACTION

While article V provides Congress with the ability to propose amendments to the states thus circumventing the need for a constitutional convention, it also provides the states with the ability to call for a convention to propose such amendments if Congress should fail to do so. If Congress becomes bogged down in its own internal politics and fails to act on issues considered important by the people, the people, through their state legislative bodies, may act via a constitutional convention. Additionally, if the people perceive that the Supreme Court has overstepped its boundaries, they may, through their state legislatures, call for a convention to propose amendments which will override these decisions.¹³²

130. Goldberg, *supra* note 89, at 2.

131. Berns, *supra* note 11, at 76.

132. The Supreme Court is "a constitutional convention in continuous session." G. ANASTAPLO, *supra* note 19, at 190 (citing PELTASON, COSWIN AND PELATSON'S UNDERSTANDING THE CONSTITUTION 129 (10th ed. 1985)). Consequently, some of these Supreme Court "amendments" to the Constitution have resulted in attempts to call for a convention. For example, in *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court determined that it was possible for a district to be drawn so that equal voting power was denied. The immediate reaction among many states was to call for a second constitutional convention. For a discussion of the response to *Baker*, see Stasny, *supra* note 18, at 84-89. A similar result occurred when the Supreme Court, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), held that busing was a legitimate method of ending segregation. *Id.* at 30. States immediately reacted by attempting to call a convention. See Stasny, *supra* note 18, at 89-91. Michigan, Tennessee, Mississippi, Nevada, Oklahoma, Texas, and Virginia were among the states which sought a convention on the busing issue. *Id.* 89-91. While the Supreme Court is not mentioned as a participant in the amendment process, the expansion of judicial review has created what some refer to as the "third method of amendments." Noonan, *Calling for a Constitutional Convention*, THE NATIONAL REVIEW, July 26, 1985, at 25. Some commentators argue that this expansion of Supreme Court activity is warranted to meet the needs of a changing society. See G. ANASTAPLO, *supra* note 19, at 191.

Justice Marshall characterized constitution-amending machinery as "unwieldy and cumbersome." Undoubtedly it is, and that fact has had an important influence upon our institutions. Especially has it favored the growth of judicial review, since it has forced us to rely on the Court to keep the Constitution adapted to changing conditions.

Id. (citing E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 221 (1973)).

A constitutional convention is the last bastion of public sovereignty. It is perhaps the sole remaining device by which the people of the states can act together as the people of the United States; not as citizens or subjects of a supreme national government, but as the sovereign ultimate political authority from which springs the consent of the governed and the constitutional legitimacy of all public institutions and officers.¹³³

Discussions of a second constitutional convention are not unique to the late twentieth century.¹³⁴ Since the adoption of the Constitution, 450 calls to convention have been sent from the states to Congress.¹³⁵ Every state has sent at least one such resolution to Washington.¹³⁶ Since the turn of the century, there have been five instances where a majority of the states requested that Congress call a convention on a particular issue.¹³⁷ Often,

For a review of Supreme Court action on the article V process see W. EDEL, *A CONSTITUTIONAL CONVENTION: THREAT OR CHALLENGE?* 43-57 (1981). The President has no authority to veto a Congressional resolution proposing an amendment. Molloy, *Confusion and a Constitutional Convention*, 12 W. ST. U. L. REV. 793, 797 (citing Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798)). Likewise, state governors have no such veto power over a constitutional call. *Id.* (citing Mitchell v. Hopper, 153 Ark. 515, 241 S.W. 10 (1922); People ex rel Stewart v. Ramer, 62 Colo. 128, 160 P. 1032 (1916); State ex rel Morris v. Mason, 43 La. Ann. 590, 9 So. 776 (1891); Warfield v. Vandiver, 101 Md. 78, 60 A. 538 (1905); Murphy Chair Co. v. Attorney General, 148 Mich. 563, 112 N.W. 127 (1907); *In re* Senate File No. 31, 25 Neb. 864, 41 N.W. 981 (1889); State v. Dahl, 6 N.D. 81, 68 N.W. 418 (1896); Commonwealth ex rel Attorney General v. Friest, 196 Pa. 396, 46 A. 505 (1900); State ex rel Mullen v. Howell, 107 Wash. 167, 181 P.920 (1919). Congress, however, has not always acted consistently. For example, when adopting the eleventh and twelfth amendments, the Senate voted not to send the amendment to the President for his signature; however, the thirteenth amendment was submitted to the President for his signature. D. WATSON, *supra* note 18, at 1318-19 (citing Senate Journal, Second Session, 36th Congress 397) (President Buchanan)). When the thirteenth amendment was presented to the President, however, the Senate immediately considered a resolution announcing that the presentation was inadvertent and did not create precedent. The Senate's later action purported to rescind the presentation of the amendment to the President. *Id.* Presidents have sought, unsuccessfully, to participate in the process and to veto Congress' amendment proposals. *Id.* at 1320. "Even in ordinary times any question of amending the Constitution must be justly regarded as of paramount importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted by the two Houses for the approval of the President." *Id.* at 1320 n.65 (citing Message of President Andrew Johnson to the Senate and the House of Representatives (June 22, 1866)); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

133. Brennan, *supra* note 24, at 10.

134. See Stasny, *supra* note 18, at 74.

135. Brennan, *supra* note 24, at 2 (citing AMERICAN BAR ASSOCIATION SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, *AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V*, app. B, at 59-61 (1974)). There were only ten calls in the first one hundred years. *Id.*

136. *Id.* (citing Brickfield, *Problems Relating to a Federal Constitutional Convention*, COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. (Comm. Print 1957)).

137. *Id.* (citing AMERICAN BAR ASSOCIATION, SPECIAL CONSTITUTIONAL CONVENTION STUDY COMMITTEE, *AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V*, 60-61 (1974)); Gattuso, *Amending the Constitution by the Convention Method*, Heritage Foundation Reports 1, 5 (1988).

the requests have been a sufficient threat to generate Congressional action.¹³⁸

When Congress fails to adequately address public concerns, or the Supreme Court takes an especially active role in developing no law, the result is often a state drive for a second constitutional convention. The most effective of these "threats" was the call for convention to provide for the direct election of Senators.¹³⁹ Not until faced with the prospect of a constitutional convention did Congress move on the issue of the direct senatorial elections.¹⁴⁰ Between 1893 and 1911, thirty of the required thirty-one states passed resolutions requesting Congress to call a convention.¹⁴¹ Early in 1912, Congress reacted and sent the seventeenth amendment to the states for ratification.¹⁴² According to one commentator, although "no convention took place, Article V had served its purpose by removing the congressional roadblock."¹⁴³

During the 1980's, the most recent call for a constitutional convention was provoked by Congressional budget practices.¹⁴⁴ Public demand for fiscal responsibility resulted in an unveiled threat to Congressional power as thirty-two state legislatures requested Congress to call a constitutional convention.¹⁴⁵ This group was only two states short of the number required to bring about a convention.¹⁴⁶ Many felt that Congress would not act unless the states threatened to take control of the situation. For example, while the Connecticut Assembly debated passage of a resolution requesting a call to convention, Pierre S. du Pont IV, the Governor of Delaware, warned the Connecticut legislators that a call to convention "is the only way to move the Congress of the United States to restrain spending."¹⁴⁷ The threat produced results, at least temporarily, as according to one supporter, passage of the "Gramm-Rudman [Act] took the steam out of the [convention] movement."¹⁴⁸ Thus, Congress once again

138. See *infra* notes 139-43 and accompanying text.

139. Stasny, *supra* note 18, at 81-84.

140. *Id.* Direct action on the issue by the Senate did not occur until they were threatened with the prospect of "having change forced upon them." *Id.* at 84.

141. Gattuso, *supra* note 137. There is some discussion over whether 30 or 31 states actually called for a convention. See Rotunda, *supra* note 127, at 12.

142. Gattuso *supra* note 137, at 5 (citing Weber, *The Constitutional Convention: A Safe Political Option*, 3 J. LAW & POL. 51, 57-58 (1986)).

143. *Id.*

144. Stasny, *supra* note 18, at 91.

145. Gattuso, *supra* note 137, at 5.

146. *Id.*

147. Madden, *supra* note 127, at B4.

148. Lacayo, *Is it Broke? Should We Fix it? Changing the Constitution is not Easy, but Plenty of People Keep Trying*, TIME, July 6, 1987, at 54 (quoting former State Senator Norman Gaar who introduced the Kansas call to convention). President Reagan reminded Congress that even after Gramm-Rudman, a convention was still possible. Los Angeles Times, May 24, 1987, at 4, col. 3 (a report on the President's weekly radio address).

successfully followed Madison's plan of preempting a call to convention by Congressional action.

Whether the public will accept the stopgap measure Congress produced remains to be seen. Spending on the federal level continues at unprecedented rates, while many of the states are experiencing fiscal crises of enormous proportions. Issues of trade and commerce, such as the regulation of interstate commerce, are as vibrant today as they were when Virginia and Maryland met two hundred and fifteen years ago. In the spirit of Madison, Congress appears to be attempting to address these issues. If it does not, the states, heeding Henry's constitutional convention threat, stand ready to force Congress to act.

V. CONCLUSION

At the close of the first convention, many delegates were not entirely pleased with the document they had created.¹⁴⁹ Some not only spoke against it, they promised to campaign against its ratification.¹⁵⁰ In the end, a second constitutional convention was averted only when Congress acted to propose the first ten amendments.

Much has occurred in the United States since the close of that first gathering in Philadelphia.¹⁵¹ Perhaps the most drastic change is that the states, which exercised great autonomy in creating the federal republic, are now dominated by the federal government they created. Congress has bridled the states with massive federal bureaucracy while at the same time, the Supreme Court has dictated hundreds of rulings affecting the state's ability to govern as a sovereign entity.

If a second constitutional convention is called, it will be the result of a resurgence of state's rights. Today, states are forced to formulate policy on a wide range of issues and as a result are developing a workable format for national debate. This is not to suggest that Congress could not do the same. The problems of the Constitution are not the government it creates, but its reliance on the people who implement that government.¹⁵² Madison recognized that Congress could avert the call to convention by demonstrating leadership. Unfortunately, given the continual wave of

149. See Rutland, *Framing and Ratifying the First 10 Amendments*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 305-16 (Levy & Mahoney ed. 1987); Parker & Ainsworth, *supra* note 118, at 902.

150. See generally D. MATTESON, *supra* note 8, at 140.

151. The 1787 convention addressed itself to an agrarian society of three million people and thirteen original, Atlantic Coast states. Brennan, *supra* note 24, at 8. The House of Representatives has grown from 45 to 435, the Senate from 26 to 100. *Id.* The Congressional staff is now larger than Washington's entire Continental army. *Id.* at 45.

152. "Government can only function steadily and smoothly, and with the mark of legitimacy if the several officeholders who carry on its work perform their respective duties." *Id.* at 42.

states requesting Congress to call a convention, Henry's plan may yet succeed. If Congress continues to forestall the tough decisions necessary for the continuance of a vibrant democracy, thus forsaking Madison's trust, the result may well be Henry's final victory—a second constitutional convention.

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