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Amending the Constitution: A Letter to a Congressman*

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There was introduced in the Senate, in the 92d Congress, a bill (S.215)[1] *dealing with the procedures to be followed on state applications for a national constitutional convention pursuant to Article V of the Constitution. The bill passed the Senate*[2] *but was still in the House Judiciary Committee when Congress adjourned.*

While it was there, I wrote the following letter to Congressman Emanuel Celler, then Chairman of the Committee, giving my reasons for believing that the passage of a bill such as S.215 would be a national calamity. The letter is reproduced here because I believe the profession ought to be exposed to a full spectrum of opinion on this major question.

There is another reason for its reproduction at this time. The Harvard Law Review, *in a student Note,*[3] *has taken issue with some of the conclusions expressed in the letter. On full reconsideration, I must say that I do not think the authors of this Note have laid a finger on me, but I prefer that the profession be the judge of that, by having access to my own expression of my views, rather than by seeing them through the semi-opaque pane of paraphrase and selective quotation.*

I consider it inappropriate at this time to accompany the letter with specific answers to the Harvard Note; in sum, I feel the

* Ed. Note: The Journal is reproducing this letter not only because we believe it to be a significant constitutional commentary, but also because we believe its contents should be disseminated as widely as possible before a new version of S. 215 (which has been inching ever closer to passage since it was first introduced in 1967) is submitted to the 93d Congress. The letter is reproduced as written and sent, save for the addition of footnotes consisting of citations formerly in the text and the relevant portions of the Bill and Senate reports in question.

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1. S. 215, 92d Cong., 1st Sess. (1971) (Senator Ervin) [hereinafter referred to by section number only]. All citations refer to the version of the Bill which passed the Senate and was before the House Judiciary Committee.

2. 117 CONG. REC. S 16569 (daily ed. Oct. 19, 1971).

3. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612 (1972).

Note's arguments are insufficiently distinct and categorical to be of avail when one is considering the legitimization of constitutional amendments, where, perhaps more than anywhere else, square corners should be cut. I wish to note most emphatically, however, that the Harvard editors flatly and unmistakably concede that, "Of course, legislation governing the calling of a constitutional convention would not bind future Congresses."[4] *This concession may be important to future debate; for the present, I shall be content to let the reader judge whether the Harvard editors, having made this concession, follow it with arguments which justify the unexampled step of passing an act known in advance to have no force as law with regard to its principal subject matter.*

February 28, 1972

The Honorable Emanuel Celler
Chairman, Judiciary Committee
The House of Representatives
Washington, D.C.

My dear Congressman Celler:

I understand that S.215 ("An Act to provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to Article V of the Constitution"), having passed the Senate, has now been referred to your Committee on the Judiciary. It is my distinct opinion, the result of years of reflection on the very subject, that this bill is, for many reasons, both unconstitutional and unwise. It is also, quite obviously, a most important bill, for it would bring into being new and specific means for amending the Constitution of the United States, in a way that has never before been found needful. Because I think it both a supremely important and a very bad bill, I am taking the liberty of communicating to you at some length my reasons for opposition.

You may, of course, make such use of this letter as you like. I would appreciate its being included in the record of any hearings that might be scheduled on the bill, and would make every effort, if you want me to do so, to attend any such hearings and to testify.

It is hard to know where to begin in criticizing such a thoroughly misconceived piece of legislation as this. Let me first take up two pervading defects, and then go on to particulars. Since my discussion

4. *Id.* at 1616.

must, to be thorough, be rather long, I think it would be a good idea to put in headings summarizing each point.

This bill, as to the vote commanded in its crucial Section 6, rests on the constitutionally impossible assumption that this Congress can bind the consciences of successor Congressmen and Senators, on questions of constitutional law and policy.

The most obvious thing that is generally wrong with the bill is that it attempts to bind successor Congresses to vote in a certain way on controverted questions of constitutionality and policy, a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do. The crux of this (and of the bill) is in the language of Section 6(a). The following strange phraseology is used, phraseology which, in form and plain meaning, is a command addressed by the 92d Congress to all its successor Congresses:

> Whenever applications made by two-thirds or more of the States with respect to the same subject have been received, the Secretary and the Clerk shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce on the floor of the House of which he is an officer the substance of such report. *It shall be the duty of such House to determine* that there are in effect valid applications made by two-thirds of the States with respect to the same subject. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, *it shall be the duty of that House* to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject.[5]

Now as I shall show, the question whether there "are in effect," at any such time, *valid* applications, even if the previously set requirements of S.215 have been met, and whether, in consequence, the Congress is, simply because those requirements have been met, under a constitutional duty to call a convention, is a constitutional question of the first magnitude. It is and will remain a genuinely controverted question; there is much reason on the negative side. A Congressman in, let us say, the 97th Congress might be convinced by

5. § 6(a) (emphasis added).

these reasons; he might conscientiously believe that, although everything has happened which S.215 says must happen to bring into being the obligation declared in the language I have quoted from Section 6, in fact the things which have occurred do not, as a matter of sound constitutional interpretation, as he sees it, bring that obligation into being. How can anyone think that the 92d Congress can settle, for a Congressman in the 97th Congress, this absolutely fundamental issue as to his own constitutional obligation? Where did the 92d Congress get this power? The answer is, of course, that no Congress has the power to bind the consciences of its successors, with respect to grave questions of constitutional law, and that the Congressman in the 97th Congress will not be in the least obligated to cast the vote which Section 6 says he must cast. If I am still alive, or if some of the numerous other constitutional lawyers like-minded with me are still alive, attention will at that time forcefully be called to this plain fact, and it will then, I think, clearly be seen that no obligation whatever is created by Section 6. In this absolutely fundamental sense, the bill is a *brutum fulmen,* a mere futility, because the vote which Section 6 tries to coerce or make a matter of obligation cannot be made, by one Congress, a matter of obligation resting on successor Congressmen and Senators in the near or distant future.

I think this must be known to the sponsors of the bill; certainly it has been drawn to public attention. Anyone must see that there is no way to make a Congressman or Senator in a successor Congress vote against his conscience and against his honest belief on a point of constitutional interpretation. The aim of the bill, therefore—or its only possible effect—must be to create a specious talking-point for use when the time comes, a ground, untenable on full examination, for convincing those who do not think the matter clear through that this obligation exists, though it cannot possibly have been created by the 92d Congress, for the members of the 97th Congress.

A difficulty generically similar to the foregoing is encountered when one reads on past Section 6 into the rest of the bill. The casting of the commanded Section 6 vote not only must rest on the resolution of a prior constitutional question which the 92d Congress has no right or power to resolve for its successors, but would constitute the resolution of both constitutional and policy questions, with respect to the composition and proceedings of the proposed "constitutional convention," and to proceedings thereafter. These questions, again, are questions which the 92d Congress has no right or power to resolve for its successors. Congress, according to Article

V, is to "call a Convention for proposing Amendments . . . on Application of the Legislatures of two-thirds of the several States."[6] The report of the Senate Judiciary Committee on this bill is eloquent, and undoubtedly right, in saying that this language necessarily commits to Congress the duty and the power of resolving many issues of policy and of constitutional propriety with respect to the structure and procedure of such a convention.[7] But it does not commit this duty and power to the 92d Congress in any special way. The obligation to call the convention, when and if it arises, is what creates the duty and the power to define the specifics of the convention, and it is the Congress then sitting that, in the nature of the case, has this duty and power. It is a constitutional impossibility for the 92d Congress to bind a Congressman or Senator in the 97th Congress to vote for a convention of a form he believes to be unconstitutional or unwise, or to vote for any other proceedings he believes to be unconstitutional or unwise. But the vote sought to be commanded and made a matter of duty by Section 6, as quoted above, might well be just such a vote, since it sets in train a series of proceedings of dubious constitutionality and wisdom. A Congressman in the 97th Congress might, for example, think that, under the now unforeseeable circumstances then prevailing, it would be inviting catastrophe to allow delegates to the "convention" to be "elected . . . in the manner provided by State law."[8] Yet his vote, seemingly commanded by Section 6, would be a vote for that procedure. There is no moral or political ground for the conclusion that the 92d Congress may create an obligation, resting on a future Congressman, to vote for what he thinks is an invitation to catastrophe.

Here again, the bill might be looked on as a mere futility. Nobody can make any Congressman in 1992 vote for what the 92d Congress thinks well of, and the Congressman in 1992 will know that and will be advised, I am sure, that he is under no obligation to vote as Section 6 tells him he must—that he stands just where the Constitution puts him, responsible for a fresh choice in the light of current conditions. But here, again, there is the danger of the use of the bill, if it becomes law, as a specious talking-point supporting the assertion of an obligation which, on reflection, cannot be created, morally or practically, by the 92d Congress.

6. U.S. CONST. art. V.
7. SENATE JUDICIARY COMMITTEE, FEDERAL CONSTITUTIONAL CONVENTION PROCEDURES ACT, S. REP. No. 92-336, 92d Cong., 1st Sess. 7 (1971) [hereinafter cited as SENATE REPORT].
8. § 7(a).

This bill, for the foregoing reasons, might be dismissable as a futility, since it cannot, ethically or in fact, bind a successor Congress. This I believe to be its actual force (or lack thereof) as a matter of law, on the most elementary principles concerning the incapacity of one Congress to bind the consciences or coerce the votes of its successors. I would unhesitatingly advise any Congressman or Senator in the future that Section 6 adds absolutely nothing to his obligation to vote or not to vote for a constitutional convention, as that obligation may be created by Article V, and as determined by his own interpretation of that Article and by his own views on the wisdom of the mode of constituting any convention he might think himself obligated to join in calling. But the bill, for the reason I have given, cannot be regarded as utterly innocuous (because utterly futile) since (unlike a command of the 92d Congress that the wind blow north-northeast on July 2, 1985) the bill might exert a quite unwarranted persuasive influence on some who did not think through the question of the capacity of one Congress to command a later Congress to vote in a certain way, on genuinely controverted constitutional and policy judgments.

Even if (as is not the case) the 92d Congress could bind its successors, it would be foolish to settle great constitutional and prudential questions at a time when public and professional attention are not focused on them, and when (with respect to the prudential questions) the conditions of the future are unknowable.

Now let me make a second and quite separate general point. I believe I have shown that the issues S.215 purports to settle cannot, as a matter of law, be settled in advance for future Congresses. Without for a moment implying any doubt about this, let me say that if *(per impossible)* such advance settlement were possible in law, it would, as a matter of policy, be most unwise to settle these issues for the future at this time. I assert this for two reasons.

First, some of the questions the bill tries to settle are great constitutional questions. It is most unwise to try to settle such questions at a time when national attention is not and cannot be keenly focused upon them, and intense national debate be thus generated. I venture to guess that not one member of the adult public in a thousand has the faintest idea that such a proposal as S.215 exists. Unfortunately, but quite naturally, the only time when public and professional attention can be focused on such a proposal is the time when something substantive is at stake. It is for this reason, *mutatis*

mutandis, that courts do not decide great constitutional questions except when actual present interests are at the bar. True, attitudes toward procedure may be influenced, at such a time, by attitudes toward substance. But to say that Congress would not, when the time came, fairly try to discharge its Article V obligation, is an indictment I refuse to sign (though the authors of the Senate Report are apparently willing to sign it); certainly, I think the risk of that far less than the risk attendant on the impossibility, at a time when nothing is immediately at stake, of focusing public and professional attention sharply on the constitutional and policy questions S.215 tries to settle.

Secondly, the passage now of a bill providing for future proceedings would constitute an attempt to settle for the future a number of prudential questions as to which nothing but knowledge of the conditions of the future can furnish a basis for intelligent action. For example, to take a matter of detail, conditions might arise making one year an unreasonably short time for convening the convention, or, to repeat in this context a far from trivial point made earlier, it might appear from future conditions, quite unknowable now, that the only sound way to select delegates to the convention would be by elections conducted by federal officials, contrary to the requirements of this bill[9]—just as it has been found by Congress that, under some conditions, the only sound way to register voters, even for state elections, is by federal registrars.[10] How can it be thought that 1972 is a good year for deciding what 1995 may require in regard to this or to any other practical question—or, for that matter, what 1974 may require?

(Let me here anticipate and answer the point that the advance setting of procedures for handling controversy is normal. True, for normal, run-of-the-mill procedures. But amendment of the Constitution (let us hope!) will remain a highly unusual thing. If not, then this bill quite plainly greases the path too much. If so, then each occasion will be a separate solemn event, with its own special conditions and problems. These problems can and should be solved when they arise, by the Congress empowered to solve them, and on the basis of all the factors now unknowable and then existing.)

The two general reasons already canvassed—legal and factual—the incapacity of any Congress to bind the consciences of future Congressmen and Senators on judgments of law and policy, and the unwisdom of even trying to settle these questions at a time when public

9. *Id.*
10. *See, e.g.,* 42 U.S.C. 1973(a) (1965).

and professional attention is not and cannot be focused on them, and when the conditions one needs to know about before resolving them wisely are unknowable—quite generally vitiate this bill. Strictly speaking, it ought to be unnecessary to examine its particulars. I shall do so, nevertheless, very largely because such examination copiously illustrates the assertion that important and genuinely debatable issues of constitutional law and of policy are resolved by this bill in at least a questionable manner on the merits. This will give substance to and make more than academic the two general points I have made. It also, I think, will show that the bill, even if it were not a futility, even if it did succeed in imposing an obligation on the Congressmen and Senators of the future, and even if it were necessary or wise to decide all these questions now, would still be a bad bill, because it not only resolves but wrongly resolves a good many issues of constitutional law and policy.

With this framework in view, let me go through the bill point by point.

Section 2 (and therefore the whole bill) rests on the erroneous assumption that the Article V phrase, "a Convention for proposing Amendments," means a convention limited as to the "nature" of the amendments the convention may propose.

Section 2 embodies what is in my view a clear and crucial error in constitutional interpretation, an error which of course carries through the rest of the bill. It requires that a State requesting a convention pass a resolution "stating the *nature* of the amendment or amendments to be proposed."[11] It is my contention that Article V, properly construed, refers, in the phrase "a Convention for proposing Amendments," to a convention for proposing such amendments as to that convention seem suitable for being proposed.

There is authority tending to support something generally like this view—authority developed in connection with an earlier controversy of somewhat different form. Aside from my own statement of something very like it in the Yale Law Journal,[12] that statement was distinctly approved by a committee of the Association of the Bar of the City of New York[13] and was seemingly approved by Professor

11. § 2 (emphasis added).
12. Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).
13. COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK CONCERNED WITH FEDERAL LEGISLATION, THREE AMENDMENTS TO UNITED STATES CONSTITUTION PROPOSED BY THE COUNCIL OF STATE GOVERNMENTS 33 n.2 (1963).

Arthur Bonfield[14] and perhaps others. The Report of the Senate Committee on the Judiciary refers to none of this authority, but instead ignores outside studies and constructs its own argument.[15] It will be well to examine that argument.

First, there are two quotations from the Federalist. On anything like careful reading, neither of them turns out to have any bearing whatever on the question whether a convention called under the second alternative of Article V may be limited in its scope. The one from Madison[16] simply points out that amendment may be set in train by the State Legislatures as well as by Congress—and so it may, whether the convention they may petition for be limited or not. The one from Hamilton[17] restates the obvious meaning of Article V—that the recommendations from such a convention could (and perhaps must) take the form of specific proposals. Both assertions are clearly true. Neither of them has any tendency to establish that the convention could be or was expected to be limited to making proposals only on a certain subject or subjects. Each proposal, Hamilton says, must go through the ratification process separately, and hence, as he says, is "brought forward singly."[18] If Hamilton's quotation were to be taken (as it certainly need not be taken) to prove any more than that, it would have been shown to prove too much, for it would then prove that the Article V convention not only *may* but *must* be limited as to subject matter, a patent absurdity in the interpretation of the phrase "a Convention for proposing Amendments to this Constitution."

The Report next asserts that the theory of the unlimited Con-

14. Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAWYER 659, 662 (1964).

15. SENATE REPORT, *supra* note 7, at 8-10.

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

THE FEDERALIST No. 43 (J. Madison) as quoted in SENATE REPORT, *supra* note 7, at 8.

17. Every amendment to the Constitution, if one established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise in relation to any other point—no giving or taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather 10 States, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment and that of establishing, in the first instance, a complete Constitution.

THE FEDERALIST No. 85 (A. Hamilton) as quoted in SENATE REPORT, *supra* note 7, at 8.

18. *Id.*

vention is "*inconsistent* with the *language*"[19] of Article V. What in the world is meant by this? I have just quoted that language. It seems to me that that language most aptly describes a general convention, for proposing such amendments as the convention sees fit. But, at the least, how can it be said that such a meaning is *inconsistent* with the constitutional language? No explanation of this extraordinary statement is tendered.

The next argument is evidently fallacious:

> The argument that the convention must have general power is also unsound from another point of view. If the convention were to be general, then it would seem that appropriate applications for a limited convention deriving in some States from a dissatisfaction with the school desegregation cases, in others from the school prayer cases, and in still others by reason of objections to the Miranda rule, or because of a desire for reapportionment, revenue sharing by the States, tax relief, or for other reasons, should all be combined to make up the requisite two-thirds of the States needed to meet the requirements of article V. The committee does not believe that this is the type of consensus among the States that the Founders thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date—and there are a large number of them—should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the States have made demands for a constitutional convention to propose amendments, no matter the cause for applications or the specifications contained in them. Indeed, under this theory a convention is long overdue. Since the committee believes that State applications should not be treated as a call for a convention unless they deal with the same subject—a conclusion supported by two centuries of practice—it is unreasonable to suggest that the convention resulting from 34 applications on a single subject is nonetheless free to roam at will in offering changes to the Constitution.[20]

The fallacy is clear. If the view that the convention is illimitable is right, as I and others contend, if that is the kind of convention Article V refers to, then in the case stated, *none* of the applications which the Report puts on parade would have called for the thing the Constitution names, properly construed. None, therefore, would be effective; none would create any congressional obligation. Thirty-four times zero is zero. The argument tendered thus begs the ques-

19. SENATE REPORT, *supra* note 7, at 8.
20. *Id.* at 9.

tion. It *assumes* that, when a state asks for a limited convention, it has asked for the thing meant in Article V, for unless this were true, the State's action would be without any juristic effect. Thus the argument quoted leaves the question of the limitability of the convention entirely open.

We touch here on a misunderstanding which so generally pervades discussion of this subject that it is worth spelling the matter out, even at the risk of prolixity and of underlining the obvious. I believe that, in Article V, the words "a Convention for proposing Amendments" mean "a convention for proposing such amendments as that convention decides to propose." This is, to say the least, not a very forced construction, but leave aside for a moment the question whether it is right. Let us consider, rather, what it *implies,* if it is right—for *that* is the thing that seems so widely misunderstood.

It does *not* imply that a convention summoned for the purpose of dealing with electoral malapportionment may kick over the traces and emit proposals dealing with other subjects. It implies something much more fundamental than that; it implies that Congress cannot be obligated, no matter how many States ask for it, to summon a convention for the limited purpose of dealing with electoral apportionment alone, and that such a convention would have no constitutional standing at all. Let us take this step by step.

First, if the quoted words in Article V refer, as I contend, to a convention with power to propose such amendments as it thinks wise, then a State application for a convention limited to one or more proposals or subjects is *not* an application for the "Convention" denoted by the words in Article V. Few conclusions in constitutional law are compelled by pure logic, with no escape possible, but this one seems to be.

Secondly, if a state applies, or if thirty-four states apply, for something *other than what Article V language denotes,* then Article V imposes no obligation on Congress to grant the request, or to do anything. This, too, seems a plainly compelled logical step. If thirty-four States may put Congress under a certain obligation by, and only by, requesting X, and thirty-four States request Y instead, then no congressional obligation arises.

Thus, the position that Article V means "a convention for proposing such amendments as to it seem wise" does not imply that a "runaway" convention is possible, for, if the stated position is right, no convention can be called that has anything to run away from. It implies, instead, that State requests for a limited convention create

no obligation under Article V, since they are not applications for the thing which, and only which, the States may oblige Congress to call, by requesting it.

The only possible escape from this is sometimes sought in the confused idea, which evaporates on clear statement, that a State's request for a *limited* convention ought to be looked on and treated as an application for an *unlimited* convention, if the convention cannot in law be limited.[21] But this paradoxical idea would have to rest on the assumption that a State legislature, by expressing its desire for consideration of amendment with respect to bussing, is expressing its desire for a convention where any amendments, on any subject, may be considered. That is absurd, both logically and politically. The State that asks for a convention on bussing alone is not expressing anything about its views on the desirability of an unlimited convention. The Senate Report seems, obliquely but clearly, to recognize this.[22] If, as I contend, the latter is what Article V means, then the State has taken no action at all under Article V, and has put Congress under no obligation.

The rest of the argument brought forward on this point in the Senate Report is merely conclusory, except that the assertion is made that the construction of Article V to mean "limited convention" is "more desirable and practical than the alternative construction."[23] This passage, very properly, puts desirability and practicality in issue. Where literalism and history are not productive of a conclusive answer, these factors are fitting for consideration; indeed, they are technically legitimate aids to construction, for the users of constitutional language ought to be presumed to have intended the desirable and practical.

I would strongly contend that there is nothing either desirable or practical about building up the power of state legislatures with respect to the initiation of particular amendments to the Constitution, and that there is therefore no validity in attributing such "intent" to the Framers on grounds of desirability and wisdom. The notion that there is always turns out to rest on the absurd mythology of *opposition* between "the States" and "the federal government." In fact, the people are just the same people. They are represented in Congress just as they are represented in the Legislatures. The first-

21. See the passage in the Senate Report apparently resting in part on this notion, *id.*
22. "To suggest that the States could not propose specific amendments without risking a general constitutional convention is, in fact, in the committee's view, to destroy the desire and therefore the power of the States to initiate specific amendments by the convention process." *Id.* at 8-9.
23. *Id.* at 9.

named and hitherto always used method of amendment—passage by two-thirds of each House of Congress and ratification by three-fourths of the States—would seem prima facie adequate to every real need, and entirely likely to be responsive to that clearly predominant popular will which ought to exist before a Constitution be amended. History has confirmed to the hilt this prima facie impression; the American Constitution has proven to be the most successful political instrument ever devised in all history, and piecemeal amendment by the first method named in Article V has proved, as one might easily have predicted, to be entirely adequate to every real need. What catastrophe, what misfortune—what seriously undesirable condition even—has ever resulted from difficulties about amending the Constitution?

In the very earliest days, before it was known that the new government would be so successful, it may have seemed "desirable and practical" for the States, unused to union and uncertain of its benefits, to have some means of compelling a thorough reconsideration of the new plan. That method would be provided by the second of the alternatives of Article V, if one interprets it to denote a general convention. Indeed, one persuasive authority, Professor Swindler, thinks that that was the principal if not the only reason for the inclusion of this alternative, and that the provision has spent its force and is no longer of effect at all.[24] Though Professor Swindler's careful historical arguments are quite persuasive, and should be thoroughly considered by this Committee, I would not go as far as he does; I would not predict now that no crisis could ever arise which would call for the use of this method. But if we are talking about what is "desirable and practical" (and that is what the Senate Report invites), there is not a shred of support for the notion that it ever was or now is more "desirable and practical" to use this alternative machinery for the piecemeal amendment of the Constitution. On the contrary, the hitherto used and time-proven method is quite desirable and practical, responsive enough when one is dealing with so successful a Constitution, and just as obedient to the will of the people, fully represented as they are, State by State, in Congress and in the ratifying legislatures, as any system can be without destroying stability. Nothing "desirable or practical" is to be served by the alternate route, except a possible need, which now seems likely never to arise, to take care of a *general* dissatisfaction with the national government, or a breakdown thereof.

The Senate Report says that "history" supports its conclusion as to

24. Swindler, *The Current Challenge to Federalism*, 52 GEO. L.J. 1 (1963).

the meaning of Article V, but fails so much as to cite any relevant history. This was inevitable, for there is no relevant history to support the Report's conclusion. Congress, the body charged with responsibility in the premises, has never had to decide the question of "limited" as against "unlimited" convention. The hundred years following the adoption of the Constitution show little attempted use of this device by the State legislatures.

However, Brickfield's tabulation[25] of the few applications filed before the closing years of the nineteenth century puts to rout the Senate Report's reliance on history, as fully as fragmentary history can. As far as I can make out from Brickfield's table, the record *up to the Civil War,* is that three states around 1790 submitted applications for a *general* convention, five states submitted applications for a *general* convention in 1861, one state submitted an application for a *general* convention in 1832, and *one state,* Alabama, submitted an application for a convention on the protective tariff, in 1833.[26] This record in overwhelming predominance supports the view that, for about a hundred years after the adoption of the Constitution, the Legislatures themselves thought that Article V required them to ask for the thing, and only the thing, named in Article V—"a Convention for proposing Amendments"—with no limitations unsupported by the text. In the light of these facts, one is stunned by the Senate Report's statement, in the quoted passage, that its conclusion as to the limitability of the convention is "supported by two centuries of practice." The manner in which this assertion got to be made in an official document should, with respect, be looked into.

Even the Alabama resolution does not unambiguously constitute a State claim of *right* to limit the convention, or a State's belief that Congress may do so. The following is the Senate Journal entry in full:

> Mr. King presented proceedings of the Legislature of the State of Alabama, recommending to Congress a speedy modification of the tariff laws so as to equalize their burdens and reduce the revenue to the economical expenditures of the Government, *and the call of a Federal Convention to propose such amendments to the constitution as may be proper to restrain Congress from exerting the taxing power for the substantive protection of domestic manufactures,* and recommending to the State of South Carolina to suspend the operation of her late ordinance,

25. C.F. BRICKFIELD, STATE APPLICATIONS ASKING CONGRESS TO CALL A FEDERAL CONSTITUTIONAL CONVENTION 11-16 (87th Cong., 1st Sess., Comm. Print 1961).

26. There were three other applications, all in the 1890's. One was for a general convention. *Id.*

> and to abstain from the use of military power in enforcing her ordinance, or in resisting the execution of the revenue laws of the United States, and recommending to the General Government to exercise moderation, and to employ only such means as are peaceful and usual to execute the laws of the Union; and
> *Ordered,* That they be laid on the table, and printed.[27]

The underscored words are not in the form of an application under Article V, but in terms of a "recommendation," just as certain actions are "recommended" to South Carolina; they may therefore rest merely on a misapprehension of the general powers of Congress to act in its own right. But, in any case, the understanding of the Alabama legislature is not of noticeable weight, as against the other examples given.

As the most cursory glance at Brickfield's tables[28] will show, the fullblown theory of the convention limited by the tenor of the state petitions is nothing but a child of the *twentieth century,* and carries no prestige of construction contemporary or anywhere near contemporary with the adoption of Article V. Indeed, what early history there is is strongly to the contrary, as I have just shown. The twentieth-century petitions, embodying this theory, are (on the point of law implicitly resolved by them) nothing but self-serving declarations, assertions of their own power by the state legislatures.

Aside from the history available, which all points away from the S.215 theory, there is nothing but text and common sense to resolve the present question. It seems to me that the most natural meaning of the words "a Convention for proposing Amendments" is "a convention for proposing such amendments it decides to propose"—that is, a general convention—and that the importation of a limitation not in the text is quite unwarranted. Common sense would advise me that where one method is entirely satisfactory, has always been used, and fully registers the requisite consensus of the people of the States, the alternative method ought to be construed to cover extraordinary occasions, which may have been feared at first, but which now are quite unlikely to arise—occasions where, by some unforeseeable mischance, there may be urgently needed the very thing the text seems most certainly to refer to—the general convention. The Senate Report contains exactly no cogent argument to the contrary.

I think that, without arguing the point fully, I have said enough to show that the weight of argument and history is on the "unlimited

27. S. JOUR. 194-95 (Feb. 19, 1833) (emphasis added).
28. BRICKFIELD, *supra* note 25, at 11-16.

convention" side. If I am right, the whole bill rests on a false assumption as to the meaning of Article V. The question is at the very least an open one. It will remain an open one, whether S.215 passes or not, because the 92d Congress cannot bind its successors. Let me pass on to another point about this bill.

Quite without warrant, the bill gives maximum control over the whole process to the state legislatures.

Initiation of the convention call is to come from the state legislatures.[29] They are to prescribe the mode of election of the delegates.[30] Then (unless someone wins, in a short time, the uphill fight of passing a concurrent resolution to the contrary—a process easily blocked by an unfriendly Committee in either House) the *legislatures* are to ratify.[31] Why should this latter-named method of ratification be presumptively chosen now, for all future contingencies? It is like taking two opinions on a medical case, but taking them from the same doctor. It would seem quite obvious that, if what you want is broadly expressed consensus from differently structured constituencies, the normal method of ratification should be by *conventions,* selected by means *other than* control by the Legislatures, since the Legislatures will have commenced the process. A broadly based consensus—of Senate, House and State Legislatures or conventions—is achieved by the first of the methods in Article V, the one always hitherto used. In the bill, the aim seems to be to turn as much as possible of the process over to the State Legislatures.

The bill's plan of representation at the convention is wholly indefensible. Generally, this bill fails to provide for that preponderant consensus which ought to precede amendment.

Section 7(a) provides:

> A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress.[32]

This provision results, of course, in over-representation of the less populous States. Such over-representation, one is tempted to say, is grotesque in the context, because the less populated States are

29. § 3(a).
30. § 7(a).
31. § 12(c).
32. § 7(a).

already grossly over-represented in both other phases of the total process contemplated by the bill. Apparently what is wanted is not a balance but a systematic and pervading over-weighting of the influence of the less populous States.

Nevada, with about one-seventieth of New York's population, counts evenly with New York in applying for the convention. Nevada counts evenly with New York in ratification. Under 7(a), this advantage is not balanced but rather enhanced, for the population of Nevada will once again be grossly over-represented, *per capita,* at the convention. There is no use looking for a reason for this: a good reason is impossible. Apparently the authors of the Senate Report realized this, for no explanation is tendered.

What seems to be in mind is a parallel with the Electoral College. I am on record as strongly disapproving all fundamental alterations in the Electoral College method of electing the President, but the Electoral College functions in its own context, and the simulacrum of it constructed in this bill would function in a crucially different context. The Electoral College contributes to the balance of government in two ways. At one end of the scale, because the electors of each state are chosen statewide and cast their votes as a block, it gives some edge to the inhabitants of the more populous states, doubtless to compensate for their under-representation in the Senate. Neither condition exists in S.215. At the other end of the scale, by some over-representation of the thinly populated States, the Electoral College system prevents *their* almost entire obliteration in the process of presidential selection. No such danger exists in the "convention" amendment process; the danger that exists is just the opposite danger.

The rule of representation in Section 7(a) is therefore without any possible defense. It simply loads a little heavier the already loaded dice.

This seems a good place to refer to the Senate Report's presentation of itself as a sort of compromise between making amendment by state-legislature action very easy and making it very difficult.[33] This presentation is emphatically not warranted by the facts.

Here we have a good yardstick of comparison, for we have successfully used another method for almost two centuries. Under the first-named and hitherto used method of amendment, there is required a two-thirds vote of *each* of the national Houses, wherein the States as such and the people as such are respectively represented in pro-

33. *See* SENATE REPORT, *supra* note 7, at 2.

portion to their respective numbers. Then three-quarters of the States must ratify.[34] This is a process of some difficulty. It ought to be, for only thus is genuine and stable consensus assured, for change in a highly successful Constitution.

Under S.215, all that is required is the concurrence of the same three-quarters of the State Legislatures (for, if three-quarters of them would ratify, two-thirds could be brought to petition) and a two-thirds majority of a convention weighted so as not even to provide accurate *per capita* representation of the American people.[35] This is beyond doubt a substantially easier mode of amendment than the other. How can a mode of amendment substantially easier than the one that has worked be presented as a sound compromise?

Actually, this bill would make amendment far too easy. Amendment would easily be possible without that kind of dominant and stable majority which ought to be required for amendment.

The exclusion of the President from the process of calling a convention is flatly and obviously unconstitutional under Article I, Section 7, and the only question about this is how "strict constructionists" could espouse such a position.

The bill excludes the President from participation in the convention call.[36] This is, of course, in absolutely clear contravention of the entirely plain language of Article I, Section 7:

> 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 of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.[37]

The Senate Report's explanation of this disregard of an unmistakably clear constitutional command is tendered with a confidence that is inversely related to its adequacy:

> Moreover, article I, section 7, is not authorized for Presidential assent to the concurrent resolution calling for a convention or for the congressional action of transmitting a proposed amendment to the States for ratification. The short but suffi-

34. U.S. CONST. art. V.
35. § 12.
36. § 6(a).
37. U.S. CONST. art. I, § 7.

cient answer is to be found in Professor Corwin's annotation of article I, section 7:

> The sweeping nature of this obviously ill-considered provision is emphasized by the single exception specified to its operation. Actually, it was impossible from the first to give it any such scope. Otherwise the intermediate stages of the legislative process would have been bogged down hopelessly, not to mention other highly undesirable results. In a report rendered by the Senate Judiciary Committee in 1897 it was shown that the word "necessary" in the clause had come in practice to refer "to the necessity occasioned by the requirement of other provisions of the Constitution, whereby every exercise of 'legislative powers' involves the concurrence of the two Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the House concurrently with a view to expressing an opinion or to devising a common program of action (*e.g.*, the concurrent resolutions by which during the fight over Reconstruction the Southern States were excluded from representation in the House and Senate, the Joint Committee on Reconstruction containing members from both Houses was created, etc.), or to directing the expenditure of money appropriated to the use of the two Houses. Within recent years the concurrent resolution has been put to a new use—the termination of powers delegated to the Chief Executive, or the disapproval of particular exercises of power by him. Most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect. Similarly, measures authorizing the President to reorganize executive agencies have provided that a reorganization plan promulgated by him should be reported to Congress and should not become effective if one or both Houses adopted a resolution disapproving it. Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course. (The Constitution of the United States of America: Analysis and Interpretation) 135-36 (S. Doc. No. 39, 88th Cong., first sess., 1964 ed.) Citations omitted.

> The Constitution made the amendment process difficult. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to attribute to the Founders the concept that amendments originating in the States should have much more difficulty in passage than those proposed by Congress. That issue was fought out in the 1789 Convention and resolved in favor of two originating sources, not one.
>
> Therefore, the committee has concluded that Presidential participation in the operation of article V is not required by the Constitution. Indeed, a strong case is made out that the Constitution, as construed throughout our history, precludes such participation by the Executive in the amendment process.[38]

The murky quotation from Corwin, gruff though it be, offers no instance of congressional action *having juristic force,* and taken without presidential approval; indeed, Corwin concedes that anything having the force of law *must* go to the President. Of course preliminary votes do not have to go to the President; they do not even fall within the literal terms of Article I, Section 7, because, as to them, the concurrence of both Houses is not "necessary." Of course expressions of opinion cannot be vetoed, whether emanating from the House and Senate or from you and me. And so on. But a convention call would have the force of law—significant, vital law, comparable to a law establishing any other body with power to act. (As a contrasting example, S. J. Res. 197,[39] setting up an arbitration board for the dock strike, went to the President in routine obedience to Article I, Section 7. What possible reason could there be for not following this procedure as to the setting up of a constitutional convention, more important by several orders of magnitude than an arbitration board?) Can it be thought that Article I, Section 7, can be evaded by mere *nomenclature*—by merely calling something a "Concurrent" rather than a "Joint" Resolution? How can people put themselves forward as "strict constructionists" and then simply disregard the plain command of Article I, Section 7, on such scarcely even specious grounds as those given in the Senate Report?

There is one matter wherefrom the President is traditionally excluded, and that is the *two-thirds* passage of amendments in House and Senate, under the first and hitherto invariably used method of amendment. The reasons given in the early case upholding this procedure, *Hollingsworth v. Va.,*[40] were merely assertive, but the prac-

38. SENATE REPORT, *supra* note 7, at 12-13.
39. 92d Cong., 2d Sess. (1972).
40. 3 U.S. 378 (1798).

tice is now well established. The only even semirational ground for this is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose. This is not a good ground, because it denigrates the process of reason by disregarding the possibility that some members of Congress might be convinced by the reasons in the President's veto message; why else should he be required to send it? But, good or bad, it has no application to the convention call vote in Section 6 of this bill, which would be by simple majority. The short obvious truth is that the convention call vote of Section 6 of the bill falls squarely under Article I, Section 7, and that the exclusion of the President, and of the possibility of veto, is flatly and indubitably unconstitutional. "Strict constructionists" should be the first to agree to this, but the loosest constructionist can hardly deny it.

Since Article I, Section 7 speaks so plainly, and since the power it confers on the President obviously cannot be waived for future Presidents by this Congress or by this President, the omission of the President from his plainly mandated role would cast a permanent shadow of illegitimacy over every amendment originating in any convention called without the command of Article I, Section 7, having been followed. To avoid that shadow, well-justified as it will certainly be, ought to be an absolutely prime aim of those who are devising procedures for change in the fundamental law. Fundamental law should be not merely of arguable, but of clear legitimacy. This exclusion of the President, *per contra,* is not even arguably right.

In view of the plain unconstitutionality of the bill at this point, it seems almost supererogatory to add that the provision is also unwise. The President would normally veto a convention call only when he saw something seriously wrong about it; where there is that much presidential doubt, would it not be well to make assurance doubly sure by requiring that at least two-thirds of each House think him wrong? To put the matter another way, why should this bill treat the calling of a constitutional convention as though it were a less serious matter than building a lighthouse? But these policy arguments ought not be allowed to obscure the central point here: the exclusion of the President is plainly unconstitutional.

The exclusion of state governors has no rational basis.

Generically similar is the exclusion of the Governors of the States from the application process. The Senate Report uses some pretty

strong (if not strikingly fresh) rhetoric to justify this, but the authority it cites, *Hawke v. Smith No. 1*,[41] had, with respect, nothing whatever to do with the question, as anyone who reads that opinion can see. The policy reason given—that gubernatorial veto is just too high a hurdle—is more than unconvincing; the amendment process should not be made easy, and the inclusion in it of the governors of the states, popularly elected statewide, would be a desirable further check. We have here, again, an excellent yardstick of comparison. What possible reason can there be for ordaining that so solemn a step as a State's applying for a national constitutional convention is to go through an *easier* process than a state law changing the speed limit? It would seem that the very least that ought to be required is that a state express its desire for constitutional change through procedures as protective as those it uses for ordinary and sometimes quite trivial law.

But the paradoxical thing here is that the sponsors of this bill are, by and large, "States' rights" people. Why not, then, *at least* leave this matter to the States? As it stands, even if Texas very strongly desires that no application be submitted in her name without gubernatorial approval, S.215 says she cannot be indulged in that desire. Why should Congress, now or in the future, tell the States what they are to do to express their own will?

The bill's withdrawal of questions of law from the judiciary is unwarranted, dangerous, impractical, and inconsonant with our system of government.

Another major and, to me, rather sinister defect in the bill should be noted. It withdraws from the state and federal judiciaries all questions concerning applications, rescissions, convention procedures, and ratification.[42] Now the judiciary often does exclude itself from such questions. But insofar as they are not "political questions" (now as always a term of most uncertain meaning) they may arise legitimately in lawsuits, under any branch of state or federal jurisdiction. It seems to me clear beyond doubt, on the most fundamental principles of *Marbury v. Madison,* that no court, state or federal, can be coerced by Congress into acting on the basis of an amendment which that

41. 253 U.S. 221 (1920).
42. Questions concerning the adoption of a State resolution cognizable under this act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.
§ 3(b). *See also* §§ 5(c), 10(b), and 13(c) for other preclusions of judicial review.

court believes has not the force of law, where that court conscientiously concludes, as a matter of law, that the tendered issue is justiciable. One cannot foresee what cases will arise, or what issues will be tendered. But this withdrawal of all such issues from judicial cognizance is, in the class of cases I have designated, plainly unconstitutional. As a matter of policy, moreover, why should it be desired?

Since these exclusions of the judiciary rest on quite rudimentarily erroneous constitutional views, I am driven to rehearse the rudiments. Congress has a very wide power over the *jurisdiction* of the federal courts. It has some (presumably lesser) power over the jurisdiction of the state courts, though I am not aware that Congress has ever attempted to deprive state courts of any jurisdiction without creating a corresponding federal jurisdiction.

But the issue here is not one of jurisdiction. This issue is whether Congress may tell the courts, state or federal, that they may not inquire into certain issues of law, in cases where they *do* have jurisdiction. Unless the whole theory of *Marbury v. Madison* is wrong, it is inconceivable that Congress has such power.

Let us take a simple example. The federal district courts have diversity-of-citizenship jurisdiction. Congress could, of course, abolish the jurisdiction. But suppose Congress does not do so; there is no reason to think it will, and even if it did there are other headings of jurisdiction.

Now in a diversity case, one litigant may rely on what purports to be an amendment, and the other litigant may contend that, as a matter of law, the purported amendment is not really such. In many such cases the court itself will, as a matter of law, hold this question "non-justiciable," finding something in the history of purported passage of the amendment which is "conclusive" of its validity. But there is no assurance that this will always be so, or ought always to be so. Where it is not so, can Congress tell the courts that they must decide cases in violation of what they, the courts, find to be right law under the Constitution? If so, then let us rethink the whole foundation of American constitutionalism.

Questions, moreover, may arise at some earlier stage, say the stage of application. In *Hawke v. Smith*[43] (actually cited by the Senate Report), the Supreme Court clearly treated as justiciable a question involving ratification. In *Coleman v. Miller*,[44] the Court divided

43. *See* p. 210 *supra*.
44. 307 U.S. 433, 446 (1939).

equally on whether the question of the propriety of the Lieutenant-Governor's participating in the ratification process was justiciable. Suppose a question were to arise as to the right of a Lieutenant-Governor to break a tie in the State Senate in a vote on an application for a convention. And suppose this question is, in the view of the Supreme Court, a justiciable one—a holding clearly possible in view of the equal division in *Coleman v. Miller*. Having found the question justiciable, can the Court be forbidden to resolve it, one way or another? Has Congress the power to forbid the courts to look into all the law applicable to cases within their jurisdiction? If it does not (and it is shocking to think that it does) then Section 3(b) is unconstitutional, as are all the other sections withdrawing questions of law from the courts of law.

There are other difficulties about this withdrawal. Suppose a *state* court (taking that view of its duty which I think to be right) disregards these "withdrawal" sections as unconstitutional, and utters a judgment based in part on its resolution of some question concerning, say, application, which it regards as justiciable. Let us say that a certiorari petition is filed in the Supreme Court. Should that Court deny certiorari, citing Section 3(b)? Or should it summarily reverse, citing Section 3(b)? If it does the former, then the state judgment stands, Section 3(b) has had no effect, and there has been no federal review. If it does the latter, or even remands with directions to dismiss for want of jurisdiction (a procedure not always practical) the petitioner for certiorari, in effect, prevails on the merits, in every practical sense, though his position may be wrong as a matter of law.

There is another difficulty about these Sections. Congress may not, in rapidly developing political situations, get around to deciding every question concerning, say, the validity of applications, multifarious as these questions may be, and with up to fifty states involved. Indeed, this is likely—perhaps one ought to say certain. If the Sections mean "*exclusively* determinable by Congress," then all the difficulties I have already been through will in such cases arise. If the Sections mean "determinable by Congress, and, if Congress determines them, then that determination binds the courts, but until then judicial business shall be done in a normal manner," then equally great difficulties arise. What are the courts to do if a question about an application or a ratification arises in a lawsuit, and Congress has not determined it? If they determine it, then Congress may soon or much later reach, in the same or in some other case, an opposite conclusion. Meanwhile, the court case will have become res judicata,

and (more important) may have been acted on irreversibly. If they do not determine it, what is the assurance that Congress ever will?

There is not much use in going on with this. The withdrawal of questions of law from the courts of law is absolutely unconformable to the American system and to the Constitution. Of course it will create multiple and in part unforeseeable difficulties, besides being shocking. What is the motive behind the introduction of this exotic provision into the orderly set of relations among the courts, the Congress, and the law of the Constitution? Astoundingly, the Senate Report tenders no reason—I repeat, for it seems incredible, *no* reason—but blandly designates the congressional committees to which law questions withdrawn from the law courts are to go.[45]

The provision for virtually automatic submission of amendments is reckless.

This bill has a good many other defects, but I am going to mention just one more—itself thoroughly unwise and dangerous. Section 11(b)(1) reads as follows:

> Whenever a constitutional convention called under this Act has transmitted to the Congress a proposed amendment to the Constitution, the President of the Senate and the Speaker of the House of Representatives, acting jointly, *shall transmit such amendment to the Administrator of General Services upon the expiration of the first period of ninety days of continuous session of the Congress following the date of receipt of such amendment unless within that period both Houses of the Congress have agreed to* (A) a concurrent resolution directing the earlier transmission of such amendment to the Administrator of General Services and specifying in accordance with article V of the Constitution the manner in which such amendment shall be ratified, or *(B) a concurrent resolution stating that the Congress disapproves the submission of such proposed amendment to the States because such proposed amendment relates to or includes a subject which differs from or was not included among the subjects named or described in the concurrent resolution of the Congress by which the convention was called, or because the procedures followed by the convention in proposing the amendment were not in substantial conformity with the provisions of this Act.* No measure agreed to by the Congress which expresses disapproval of any such proposed amendment for any other reason,

45. SENATE REPORT, *supra* note 7, at 14.

> or without a statement of any reason, shall relieve the President of the Senate and the Speaker of the House of Representatives of the obligation imposed upon them by the first sentence of this paragraph.[46]

Now let us consider what this means. It means that, however grossly defective or corrupt the proceedings of the convention may have been, or even however fraudulent the certification of the convention's presiding officer may be, and however catastrophic the possible consequences, the proposed amendment nevertheless goes out to the States in ninety days, unless Congress, *in that time,* affirmatively passes a forbidding concurrent resolution. I am writing to and for Members of Congress, and they know perfectly well that such a resolution could sometimes be blocked for ninety days by a small minority strategically placed, even though a large majority in both Houses, when the matter came to a vote, would take note of and act upon the defect. This provision is so clearly reckless that further comment is needless.

SUMMARY

This is a bad bill in so many ways as to boggle the mind. It rests on radical disregard of the fundamental principle that no Congress can bind its successors to vote against their own consciences on issues of constitutional law or of high policy. It proceeds to try to settle such issues of law and policy at a time when public and professional attention cannot be concentrated on them, and when the factors that must affect their wise settlement cannot be known. It proceeds on a strained and unhistoric view of what Article V means in referring to "a Convention for proposing Amendments." It unwisely commits to the State Legislatures the superintendence of election of delegates to the Convention. It sets up a distortive scheme of representation at the convention. In a flatly unconstitutional provision, it excludes the President from the role unmistakably given him by Article I, Section 7 of the Constitution. It excludes State Governors from exercising, in this supremely important matter, as much function as they exercise in regard to every state law, however trivial. Unexplainedly and inexplicably, it makes Congress into a court of law, and forbids the real courts of law to decide legal questions arising

46. § 11(b)(1) (emphasis added).

under the Constitution. It provides for what, practically speaking, could and sometimes undoubtedly would amount to automatic submission of amendments proposed, or certified as having been proposed, by the "convention," however gross and palpable the defects in the convention procedures.

There are other things wrong with this bill, but I believe I have identified its chief defects. I hope your Committee will do everything possible to see that it not become law.

Respectfully,
Charles L. Black, Jr. /s/
Luce Professor of Jurisprudence