

# CRS Report for Congress

## Amending the U.S. Constitution: by Congress or by Constitutional Convention

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### AMENDING THE U.S. CONSTITUTION: BY CONGRESS OR BY CONSTITUTIONAL CONVENTION

#### SUMMARY

Under Article V of the U.S. Constitution, amendments to the Constitution may be proposed in two ways, by Congress or by constitutional convention. First, Congress can propose amendments to the Constitution by passing them by two-thirds votes of both houses of Congress. This has been the usual method of proposing constitutional amendments. Second, upon the applications or petitions of two-thirds of the state legislatures (presently 34 states needed), a constitutional convention can be called to propose constitutional amendments. After the amendments are proposed by either method, they have to be ratified by the state legislatures or state conventions in three-fourths of the states (presently 38 states needed). The alternative method of proposing constitutional amendments by the convention method has never been utilized and has raised some constitutional and legal issues which may have to be corrected by appropriate congressional legislation.

Some of the legal and constitutional issues involving state applications or petitions for a constitutional convention to propose constitutional amendments include: (1) whether or not all of the petitions have to be the same; (2) what are the scope and the limitations of such a convention; (3) what is the validity of any rescission of a petition by a state legislature; (4) do the state petitions have to be contemporaneous; and (5) what is the proper procedure for the enactment and submission of such petitions by state legislatures. There have been a number of bills in recent Congresses that have addressed these issues such as, S. 214, titled the "Constitutional Convention Implementation Act," introduced in the 102d Congress, 1st Session (1991) which did not have any legislative activity.

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## AMENDING THE U.S. CONSTITUTION: BY CONGRESS OR BY CONSTITUTIONAL CONVENTION

### I. CONGRESSIONAL METHOD OF AMENDING THE U.S. CONSTITUTION

#### A. BACKGROUND

Article V provides that proposed constitutional amendments can be ratified in one of two ways: (1) by the state legislatures in three-fourths of the states or (2) by special state conventions in three-fourths of the states. Congress has broad power under Article V to set the method of ratification by the states. Under Article V of the U.S. Constitution, amendments to the Constitution can be made in two ways: first, by the Congress proposing amendments and passing them by two-thirds votes of both Houses of Congress and second, by applications of two-thirds of the state legislatures (presently 34 states are required) petitioning Congress to convene a constitutional convention to propose constitutional amendments. After the amendments are proposed by either method, they would have to be ratified by the state legislatures or by state conventions in three-fourths of the states (presently 38 states are required).<sup>1</sup>

At the Constitutional Convention in 1787, there was significant amount of controversy over the method of amending the Constitution. There was a movement to provide that only the states upon application of two-thirds of the state legislatures could propose amendments to the Constitution without any congressional involvement at all.<sup>2</sup> The Convention's Committee of Detail submitted a provision that upon the application of legislatures of two-thirds of the states, Congress was to call a convention to amend the Constitution. This proposal was adopted by the Committee of Detail, but was later reconsidered by the Delegates since it was thought that such a proposal would give too much

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1. 1 U.S. Const., Art. V reads as follows: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of several States, or by Conventions in three-fourths thereof, as the one or other Mode of Ratification may be proposed by the Congress; ...that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

2. 2 1 M. Farrand, *The Records of the Federal Convention of 1787*, (New Haven: rev. ed. 1937) 22, 202-30, 237; 2 *Id.*, 85.

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power to the states in the amending process.<sup>3</sup> James Madison, however, proposed that it should be the Congress which should have the power to propose constitutional amendments either on its own

initiative or on applications by the legislatures of two-thirds of the states. When this provision came back from the Convention's Committee on Style, in addition to the congressional method of amending the Constitution as now provided in Article V, it provided also for a constitutional convention to propose constitutional amendments upon the applications of the legislatures of two-thirds of the states.<sup>4</sup>

All of the proposed amendments to the Constitution and all of the twenty-seven amendments that are now part of the Constitution have originated by the first method, the congressional amendment process--that is, proposed by Congress, passed by both houses of Congress by the requisite two-thirds vote, and ratified by the requisite three-fourths of the state legislatures or state conventions. Thus, no constitutional amendments have originated by the second method, the alternative, convention process, which would be called by Congress upon the petitions or applications of two-thirds of the state legislatures. There has only been one constitutional convention, and that convention was the original Constitutional Convention of 1787 which created the U.S. Constitution.

## **B. PROPOSAL OF CONSTITUTIONAL AMENDMENTS BY THE CONGRESS**

There are essentially four steps in the amendment of process of a constitutional amendment proposed by the Congress: (1) proposal by the Congress by two-thirds vote in each House, (2) transmittal to the states by the Archivist of the National Archives and Records Administration, (3) ratification by the state legislatures, and (4) the certification of the amendment by the Archivist upon ratification by the necessary three-fourths of the states (presently 38 states). The Archivist<sup>5</sup> replaces the Secretary of State and later

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3. W. Edel, *A Constitutional Convention: Threat Or Challenge?* 27 (Praeger Scientific, 1981).

4. *Id.*, 188, 467-68, 557-59, 629-30.

5. See generally, 1 U.S.C. 106b which provides:

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as part of the Constitution of the United States.

Public Law 98-497 (98 Stat. 2291 (1984)) substituted the Archivist of the United States for the Administrator of General Services as the federal official designated to receive the notices of (Cont.)

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the Administrator of the General Services Administration in this administrative role.<sup>6</sup>

First, under the provisions of Article V of the Constitution, a proposed constitutional amendment must be passed by two-thirds vote of each House of Congress. In the *National Prohibition Cases* in 1920, the Supreme Court further clarified the congressional amendment process by finding that "[T]he two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present--assuming the presence of a quorum--and not a vote of two-thirds of the entire membership, present and absent."<sup>7</sup> There are certain procedural and administrative requirements that have evolved through custom and usage over the years during the processes of ratification and certification of proposed constitutional amendments.

Once passed by both Houses, this proposed congressional constitutional amendment does not have to be presented to the President for either signature or veto. This has been the precedent since the Supreme Court decision in 1798 in *Hollingsworth v. Virginia* which held that "[T]he negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution."<sup>8</sup> Thus, when the resolution proposing a constitutional amendment has passed both Houses, the printed copy which is called the "enrolled" resolution is signed by the presiding officers of both Houses. Since the proposed amendment does not require the signature of the President of the United States, the "enrolled" resolution is not presented to the President for his signature but instead is sent directly to the Archivist.

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any adoption by the states of proposed amendments and to proclaim an amendment to the Constitution when the requisite number of the states have ratified the proposed amendment. This function was previously transferred to the Administrator of General Services of the General Services Administration from the Secretary of State and Department of State where many of the customs and precedents followed today were begun by the State Department. (See, the Reorganization Plan 20 of 1950.)

6. In Hinds' *Precedents of the House of Representatives*, it was noted in 1866 that a proposed amendment, having passed both Houses of the Congress by the requisite majorities, was presented to and filed with the Secretary of State (now the Archivist of the United States) who then transmitted to the governors of the various states copies of the proposed constitutional amendment so that the states would then proceed to act on the ratification of the amendment and requested that the governors of the states ratifying a proposed amendment would transmit to the Secretary of State (now Archivist) certified copies of such ratifications. A. Hinds' *Precedents of the House of Representatives* (Washington: 1907), 7041, pp. 1017-18.
7. 253 U.S. 350, 286 (1920). See also, *State of Ohio ex rel. Erkenbrecher v. Cox*, 257 F. 334, 348-49 (D. Ohio 1919), noting that the requirement of Article V of the U.S. Constitution requiring two-thirds of both Houses means two-thirds of a quorum of each House and not two-thirds of the whole membership.
8. 3 Dall. 378, 381. (U.S. 1798).

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Upon receipt of the "enrolled" resolution, the Archivist<sup>9</sup> publishes the proposed constitutional amendment in the Statutes at Large and prepares certified copies of the original to be sent to the States. The Archivist sends by registered mail to the Governor of each state identical original transmittal letters, a certified copy of the original "enrolled" Joint Resolution as well as slip copies of the Resolution, and a copy of 1 U.S.C. 106b (Amendments to Constitution). The transmittal letter usually requests that the Governor submit the Joint Resolution proposing a constitutional amendment to the state legislature for action and that a certified copy of the action be sent to the Archivist. The Office of Federal Register maintains the files and records of the state ratifications.<sup>10</sup>

### C. RATIFICATIONS BY STATE CONVENTIONS

Congress has only chosen the special convention method once for the ratification of Twenty-first Amendment (repeal of the Eighteenth Amendment prohibiting intoxicating liquors) which was proposed by Congress on February 20, 1933, with ratification swiftly completed by the required three-fourths of the conventions of the states on December 5, 1933 when it was also certified by the Secretary of State<sup>11</sup> as the Twenty-first Amendment to the U.S. Constitution.<sup>12</sup> When the Amendment was referred to the states on February 21, 1933, 43 of the then 48 states, had passed legislation providing for procedures for the state conventions. In 25 states, statewide at-large elections were held for the selection of delegates to the conventions; in fourteen states, elections of delegates were held in the congressional districts; and a combination of the two methods for the election of delegates was held in four states.

The number of delegates to the state conventions varied from state to state from a high in Indiana of 329 to 3 in New Mexico, and in only 6 states did the number of delegates to the state conventions exceed 100. In 25 states, nominating petitions were used to select candidates for delegate while other states used nominating conventions, nominating committees, designations by

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9. Previously this was the role of the Secretary of State and later the Administrator of the General Services Administration until it was transferred to the Archivist of the United States in 1984 by Pub. L. 98-497.

10. 1 U.S.C. § 106b.

11. 48 Stat. 1749 (1933).

12. The only constitutional amendment that was ratified by the use of state conventions was the Twenty-first Amendment which repealed the Eighteenth Amendment, prohibiting intoxicating liquors. Congress, in proposing the Twenty-first Amendment in 1933, provided that it had to be ratified as an amendment to the Constitution by state conventions rather by state legislatures within seven years of its submission to the states by the Congress.

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political party executive committees, nominations by the Governor<sup>13</sup> to select candidates for delegate to be elected either in a statewide or in district elections. In most of the states, delegates ran on slates whereby they pledged for or against the repeal of the prohibition of intoxicating liquors. Generally, the delegates favoring repeal were overwhelmingly elected and were in the majority when the conventions met. Most of the conventions were brief and pro forma only. Convention procedure was specified by legislation in some states while in other states it was left to the conventions to determine. Compensation of the delegates varied among the states from nothing to mileage and expenses.<sup>14</sup> Congress, however, would have the power to pass legislation providing for the nomination, selection, convening, and the procedures for state convention ratifications, but it has not done so and has left it up to the states to determine.<sup>15</sup>

### D. RATIFICATION PROCEDURES BY STATE LEGISLATURES

Generally, it is the practice and custom of the governors of the states, that, once the registered letters are received containing the certified copies of the enrolled Joint Resolution proposing a

constitutional amendment, to forward it to the state legislatures for ratification or rejection.<sup>16</sup> Since Article V of the Federal Constitution is silent as to the procedure of ratification of proposed constitutional amendments by state legislatures and since there are no federal statutes providing for ratification procedures, what is known about the state ratification process is little more than an outline and often has been derived from custom and practice.<sup>17</sup> Most state ratifications by state legislatures occur by means of a joint resolution voted on and passed usually by a simple majority

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13. Colorado was the only State which allowed the Governor to nominate delegates to the state convention which ratified the Twenty-first Amendment.
14. See generally, E. Brown, *Ratification of the Twenty-first Amendment to the Constitution of the United States--State Convention Records and Laws*, pp. 515-19 (1938). And see, Brown, *The Ratification of the Twenty-first Amendment*, 29 AMERICAN POLITICAL SCIENCE REVIEW 1005 (1935).
15. In 1933, Congressman LaGuardia on the day that Congress passed the Eighteenth Amendment introduced H.R. 14728, 72d Cong., 2d Sess. (1933) which would have provided for the number of delegates, the basis of representation for electing them (similar to the manner required for appointing presidential electors), details of the election processes for the selection of the delegates, times and places of the state conventions, procedures for the state conventions, and a federal appropriation to the states to cover the costs of the conventions. No action was taken on the bill.
16. In *State of Ohio ex rel. Erkenbrecher v. Cox*, 257 F. 334, 340 (D. Ohio 1919), relating to the prohibition of intoxicating liquors (now the Eighteenth Amendment), a federal District in Ohio found that neither the U.S. Constitution and federal statutes nor the Ohio Constitution and Ohio statutes impose any duty on the Governor to transmit the certified copy of the Joint Resolution proposing the Amendment to the General Assembly of Ohio.
17. Dennis J. Mahoney, *Ratification Of Constitutional Amendments*, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, pp. 1510-12 (1986).

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in the state legislatures. However, the size of the majority needed for passage to effect ratification is determined by the state constitutions, statutes, and legislative rules of each state.<sup>18</sup>

There seem to be two requirements that are indispensable for valid ratifications of proposed federal constitutional amendments by the states. First, the joint resolution of ratification to be voted on by the state legislature must have the complete and exact text of every provision of the proposed constitutional amendment as it appears in the Enrolled Joint Resolution sent by the Archivist. This requirement is based on the impropriety of states attaching any conditions, amendments, or reservations to their ratifications of the proposed constitutional amendment.<sup>19</sup> Second, the joint resolution voted upon by the states must have a clear and unequivocal ratification clause. Failure to adhere to these two basic requirements in passing the joint resolutions by the states, may result in the rejection by the Archivist of state ratifications when they are certified and sent by the governors.<sup>20</sup>

In ratifying a proposed amendment to the U.S. Constitution, the Supreme Court has stated in [Leser v. \[G\]Arnett](#)<sup>21</sup> that the function of a state legislature is a federal process and not a state process which is derived from the U.S. Constitution and which transcends any limitations sought to be imposed by a state. Likewise, in 1939, the Supreme Court in [Coleman v. Miller](#)<sup>22</sup> found that questions concerning state ratifications of proposed constitutional amendments are often political questions which Congress would have to decide in its promulgation of the adoption of the amendment. The Supreme Court has generally ruled against any state impediments to the amending processes by the states. For example, in 1919 the Court in [Hawke v. Smith](#)<sup>23</sup> invalidated an Ohio constitutional provision requiring the submission of a proposed constitutional amendment to a referendum by the people since Article V of the U.S. Constitution requires that the ratification be exclusively by three-fourths of the state legislatures or by three-fourths of state conventions without any approval by the people through a referendum. Also, in 1973, a Florida federal district court held that a provision in the Florida Constitution was unconstitutional which provided that the state legislature should not take any action on any proposed federal constitutional amendment unless a majority of

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18. *Id.*, p. 1511.

19. See, L. Orfield, *The Amending of the Federal Constitution*, at p. 68 (Ann Arbor: 1942).

20. See generally, Michael V. Seitzinger, *Amending The Federal Constitution--Procedures of The General Services Administration And Of State Legislatures*, U.S. Library of Congress, Congressional Research Service, CRS Rept No. 80-89 A, p. 8, April 18, 1980.

21. 258 U.S. 130, 137 (1922); see also *National Prohibition Cases*, 252 U.S. 350, 386 (1920).

22. 307 U.S. 433, 447 (1939).

23. 253 U.S. 221, 225, 230 (1920).

its members had been elected after the amendment had been submitted for ratification.<sup>24</sup>

## E. CONTEMPORANEOUSNESS OF STATE RATIFICATIONS

When Congress proposes a constitutional amendment, it may provide for a reasonable time deadline for its ratification by three-fourths of the states. For example, in recent times a seven-year period for ratification has been the norm. Some proposed constitutional amendments have failed to be adopted since they were not ratified during the requisite time period.<sup>25</sup> Congress provided for seven-year time periods in the proposals for the Eighteenth, Twentieth, Twenty-first, and Twenty-second Amendments as well as the proposals for the Equal Rights Amendment and the Representation In Congress of the District of Columbia. In *Dillon v. Gloss*,<sup>26</sup> the Supreme Court found that ratification by the states must be within some reasonable time period after congressional proposal and that Congress has the power to set a definite time periods for ratification. However, in *Coleman v. Miller*,<sup>27</sup> the Supreme Court refused to rule on the contemporaneous question concerning the proposed child labor amendment but held it to be a political question which would have to be resolved by the Congress when it promulgated the adoption of the amendment by the states.

The contemporaneous issue concerning states' ratifications of proposed constitutional amendments arose once again in 1992 with the 1789 Madison Congressional Pay Constitutional Amendment<sup>28</sup> which was eventually ratified by three-fourths of the states as the Twenty-seventh Amendment.<sup>29</sup> After a

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24. *Trombetta v. State of Florida*, 353 F. Supp. 675, 578 (M.D. Fla. 1973)

25. For example, on June 30, 1982 the Equal Rights Amendment failed of ratification even though Congress had extended its original seven-year period for ratification.

26. 266 U.S. 368, 375-76.

27. 307 U.S. 433, 451-54 (1939).

28. In 1789, when James Madison submitted the Bill of Rights, there were twelve proposed amendments submitted to the states; Articles III-XII were ratified by the states and became the first ten amendments to the Constitution; Articles I and II were not ratified at that time. Article II of the Bill of Rights was the Madison Pay Amendment which was certified on May 18, 1992 by the Archivist as the Twenty-seventh Amendment to the U. S. Constitution. That Amendment states: "No law varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. See, *The Constitution of the United States of America: Analysis and Interpretation*, Sen. Doc. No. 92-82, 92d Cong., 2d Sess., Congressional Research Service, Library of Congress, Washington, U.S. Govt. Print. Off., 1982, p. 51.

29. See generally, David C. Huckabee, Analyst in American National Government and Thomas M. Durbin, Legislative Attorney, *The Congressional Pay Constitutional Amendment: Issues Pertaining to Ratification*, Library of Congress, Congressional Research Service, CRS Rept No. 92-422 GOV, May 7, 1992.

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period of 203 years from its proposal by James Madison in 1789 as part of the original Bill of Rights, it was not ratified by three-quarters of the states until May 7, 1992. While the Archivist noted that the requisite three-fourths of the states had ratified the "Madison Amendment" on May 7, 1992, the contemporaneous issue rested with the Congress to determine whether the Amendment was valid.<sup>30</sup> However, lacking congressional guidance, the Archivist on May 18, 1992, officially certified the Amendment as the 27th Amendment to the U. S. Constitution.<sup>31</sup> Rather than questioning the validity of the Madison pay amendment, Members of Congress of both Houses passed resolutions on May 19 and 20, 1992 recognizing the 27th Amendment.<sup>32</sup>

## F. RESCISSION OF STATE RATIFICATIONS

The issue of whether states can rescind their ratifications of proposed constitutional amendments has not yet been decided and probably will not be resolved until the promulgation of the adoption of a proposed amendment after three-fourths of the states ratify it, including those that may have later rescinded their ratifications. Since this would likely be held to be a political question better left to the legislative branch rather than the judicial branch to decide, Congress would then have the ultimate responsibility to determine whether the rescinded ratifications should be counted or not.<sup>33</sup> This question arose in the Senate Judiciary Committee Hearings in 1978 on the Equal Rights Amendment extension when it considered whether Congress can extend the time limitations of a proposed constitutional amendment previously agreed upon and whether a state can rescind a previous ratification of a proposed amendment.<sup>34</sup>

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30. See, *James Madison Gets His Way As Congress Ducks Issue*, Congressional Quarterly, Vol. 50, No. 20, May 16, 1992, p. 1323.

31. Certification of the Twenty-seventh Amendment, 67 Fed. Reg. 21187 (1992).
32. On the Senate side, two proposals (S. Con. Res. 120 and S. Res. 298, 102d Cong., 2d Sess. (1992)) to recognize the 27th Amendment were approved by a vote of 99-0 on May 20, 1992; while on the House side on May 19, 1992, a similar resolution (H. Con. Res. 320, 102d Cong., 2d Sess. (1992)) was passed by a vote of 413-3. See generally, L. Michaelis, *Both Chambers Rush To Accept 27th Amendment on Salaries*, Congressional Quarterly, Vol. 50, No. 21, May 23, 1992, p. 1423.
33. In *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court noted:  
We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment. *Id.*, 460.
34. Testifying at the Senate Judiciary Subcommittee Hearings on the Equal Rights Amendment Extension was John M. Harmon, Assistant Attorney General, Office of General Counsel, who testified: We think that the whole thrust of history is that Article V, as interpreted, does not permit states to rescind or place conditions upon their ratifications. If we are correct in this view, we think it follows that such a power can be granted only by an amendment to Article (cont.)

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Congress decided that it was constitutionally permissible to extend the original seven-year time period for ratification of the Equal Rights Amendments.<sup>35</sup> In 1978 Congress passed H.J. Res. 638, (95th Cong., 2d Sess., 1978) extending the time period to June 30, 1982 at which time the Amendment failed to be ratified by the states and thus died. The courts did not invalidate this extension of the time for the ratification of the Amendment.

#### G. CERTIFICATION OF RATIFICATION AND PROMULGATION BY THE ARCHIVIST

The Office of Federal Register maintains the files of the state ratifications as they are received. Once the requisite three-fourths of the ratifications from the states have been received, the Archivist prepares a certificate of the ratification of the amendment which is then published in the Federal Register.<sup>36</sup> After three-fourths of the states (currently 38 states) have ratified a proposed constitutional amendment, it supposedly goes into effect on the day on which the last state of the requisite number ratified at which time the Archivist supposedly issues a certificate noting that the states that have ratified the amendment. Even though a certificate of the Archivist could be signed as soon as the thirty-eighth state ratified a proposed amendment, it has been the custom to delay the certification promulgating the amendment in order to prepare for a ceremony of the promulgation and to allow time for certain dignitaries to attend. Sometimes the President attends the promulgation ceremony even though there is no constitutional or legal need for the President's signature. When the Twenty-fifth Amendment on presidential vacancy, disability, and inability was promulgated in 1967, President Johnson signed an attestation providing: "The foregoing was signed in my presence on the 23rd day of February, 1967." This provision indicated that the President was only a spectator to the formalities of the promulgation of the Amendment and merely recorded his presence by his signature.<sup>37</sup>

When the Archivist is faced with an apparent ratification of a proposed constitutional amendment, he could take one of three actions: (1) issue a certificate proclaiming that the proposed amendment has been ratified by the

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V itself. See, Equal Rights Amendment Extension: *Hearings on S.J. Res. 134 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. P. 99 (1978).

35. The Equal Rights Amendment (H.J. Res. 208) was proposed in the Ninety-second Congress, First Session (1971), passed the House on October 12, 1971 and then the Senate on March 22, 1972, and was forwarded to the states for ratification.
36. See generally, 1 U.S.C. 106b, Amendments to Constitution.
37. David C. Huckabee and Thomas M. Durbin, *The Congressional Pay Constitutional Amendment: Issues Pertaining to Ratification*, *supra*, CRS Rept No. 92-422 GOV, pp. 5-6, May 7, 1992.

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necessary number of states; (2) issue a conditional certificate of ratification; and (3) delay issuing the certificate of ratification pending guidance from Congress. Options 2 and 3 would put any legal or constitutional problems of the proposed amendment directly before the Congress to determine whether a certificate of ratification should be promulgated.<sup>38</sup> This scenario is what happened on May 7, 1992 when the Twenty-seventh Amendment (the Congressional Pay Amendment) was ratified by the necessary number of states after 203 years from the time of its proposal in 1789 thus causing the Archivist and a number of Members of Congress to question the contemporaneousness of the Amendment. When congressional guidance was not forthcoming, the Archivist certified the Amendment as the Twenty-seventh Amendment to the U.S. Constitution on May 18, 1992 and Congress followed suit on May 19 and 20, 1992 passing congressional resolutions recognizing the Amendment.<sup>39</sup>

38. *Ibid.*, pp. 6-7.

39. See generally, footnote Number 32 *supra*. See also, Both Chambers Rush To Accept 27th Amendment on Salaries, Congressional Quarterly, Vol. 60, No. 21, May 23 1992, p. 1423.

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### II. THE ALTERNATIVE CONVENTION METHOD OF AMENDING THE U.S. CONSTITUTION

#### A. BACKGROUND

As noted, Article V of the Constitution provides that upon application of the legislatures of two-thirds of the states (presently thirty-four states) a convention shall be called for proposing amendments. This method of amending the Constitution has never been utilized although there have been some petition drives by the states that have come close to the requisite two-thirds of the states. For example, presently, 32 of the necessary 34 state legislatures have passed resolutions petitioning Congress to call a constitutional convention to propose and send to the states for ratification a constitutional amendment to require a balanced federal budget.<sup>40</sup>

Over four-hundred various state applications have requested a constitutional convention for the purpose of proposing certain constitutional amendments.<sup>41</sup> From 1789 to 1963, Congress received about 250 petitions from the states requesting Congress to call a convention; from 1963 to the present, there have been more than 150 applications received.<sup>42</sup> The earliest state applications were submitted during the debate over ratification of the Constitution after the Constitutional Convention of 1787. The proposal by Congress of a joint congressional resolution which contained the so-called Bill of Rights made the second convention unnecessary.<sup>43</sup> And the next major attempt to call a constitutional convention pursuant to Article V of the Constitution began in 1893 when the State of Nebraska petitioned Congress for a convention that would propose an amendment to the Constitution that would provide for the direct election of United States Senators; the states submitting the petitions lacked one state before having enough petitions to have a convention called.<sup>44</sup> The Senate and the House offset the petition drive when

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40. D. Huckabee, "Constitutional Conventions: Political and Legal Questions," CRS Issue Brief No. 80062, Congressional Research Service, The Library of Congress at 1, 5, Dec. 17, 1990. See also, J. Saturn, A Balanced Budget Constitutional Amendment: Background and Congressional Options, Library of Congress, Congressional Research Service, CRS Rept No. 95-48 GOV, pp. 21-22, Dec. 28, 1994.

41. 126 Cong. Rec. S. 3229 (daily ed., Mar. 22, 1979). From 1787 to 1974, there have been approximately two hundred and sixty-nine resolutions submitted to Congress, according to the Senate Subcommittee on Separation of Powers of the Committee on the Judiciary; Comment, Amendment By Convention: Our Next Constitutional Crisis, 53 N. Car. L. Rev. 491 (1976).

42. See, D. Huckabee, "Constitutional Conventions: Political and Legal Questions," *supra* at p. 2.

43. 1 Stat. 21, 22, 97, 98 (1789); see also, House Journal, 1st Cong. 1st Sess., 29-36 (1789).

44. Thirty-one state legislatures submitted seventy-three various petitions between 1893 and 1911. C. Brickfield, Problems Relating To A Federal Constitutional Convention, 85th Cong., 1st Sess. (Comm. Print, House Judiciary Committee 1957) at 7, 89,

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it passed a joint resolution in 1912 proposing an amendment to the Constitution that would provide for the direct election of Senators, which later became the Seventeenth Amendment.<sup>45</sup> Another petition drive beginning in 1939 which concerned the federal power over the taxation of incomes lacked two petitions from the state legislatures of the necessary two-thirds before a constitutional convention could have been called by Congress.<sup>46</sup> And a petition drive by the states for an amendment to limit the Supreme Court's legislative apportionment decisions was only one state shy of the requisite two-thirds of the states that were needed for a convention to be called.<sup>47</sup>

Since petition drives by the states for a constitutional convention have had a prodding affect on Congress because of the fears that a constitutional convention may be unlimited and a runaway convention and that the convention may make proposals that may significantly alter the present form of government. Four constitutional amendments have occurred because of this prodding affect of the petition applications from the legislatures of various states, namely, the direct election of Senators (Seventeenth Amendment), the repeal of prohibition (Eighteenth Amendment), the limitation of presidential terms (Twenty-second Amendment), and the presidential succession provisions (Twenty-fifth Amendment).<sup>48</sup> Moreover, the prodding affect on Congress of the petitions from the thirty-two



states requesting a constitutional convention to propose an amendment to balance the federal budget seems to have spurred recent Congresses to actively consider the balanced budget issue as well as propose constitutional amendments to balance the budget.<sup>49</sup>

Thirty-two states have petitioned Congress to call a constitutional convention to approve an amendment that would require a balanced federal

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45. The Seventeenth Amendment passed the Senate on June 12, 1911 and passed the House on May 13, 1912 (47 Cong. Rec. 1926, 48 Cong. Rec. 6397, 62d Cong.). The amendment was ratified on April 8, 1913 when the thirty-sixth State (Connecticut) approved it; there were then only forty-eight States. 38 Stat. 2049.
46. See, C. Brickfield, Problems. *Relating To A Federal Constitutional Convention*, *supra* at pp. 8-9, 89. Twenty-seven States submitted thirty-two various petitions requesting a constitutional convention to propose an amendment to limit the federal taxing power on incomes.
47. R. Dixon, *Democratic Representation—Reappointment In Law and Politics* (N.Y. 1968), at pp. 426-32.
48. C. Hucker, "Constitutional Convention Poses Questions," *Congressional Quarterly*, Feb. 17, 1979, vol. 37, no. 7 at p. 273.
49. In the 97th Congress, the Senate Judiciary Committee reported S. J. Res. 58 on July 10, 1981, which would provide that Congress adopt a balanced budget before the start of each fiscal year. S. Rep. No. 97-161, 97th Cong., 1st Sess. (1981). Cf., H.J. Res. 350 97th Cong., 1st Sess. (1971). See generally, C. Nadine, "Drive For Balanced Budget Amendment Gaining Ground," *Congressional Quarterly*, March 27, 1981, vol. 40, no. 13 at p. 669.

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budget.<sup>50</sup> On January 31, 1982, Alaska became the thirty-first state to pass a resolution calling for such a convention,<sup>51</sup> and Missouri, on May 26, 1983, became the thirty-second state when it passed a resolution to petition Congress for such a convention.<sup>52</sup> Only two more petitions by states are needed before Congress would have to consider the validity of the petitions and decide whether to call a constitutional convention upon a determination of their validity. While it appeared that this effort to call a constitutional convention peaked in the early 1980's, there are indications that this movement may have new life since certain state legislatures in the 1990's in Minnesota, New Jersey, Ohio, and Wisconsin have considered resolutions on this matter.<sup>53</sup>

Should the legislatures of two-thirds of the states (34 states) petition Congress to call a constitutional convention to propose an amendment to provide for a balanced federal budget, certain constitutional and legal issues relating to the petitions or applications from the state legislatures would probably have to be resolved before such a convention would be called by Congress. Such issues would include: (1) the identicalness of the petitions, (2)

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50. The thirty-two states that have submitted applications to Congress to call a constitutional convention that would propose amendments providing for a balanced federal budget are as follows: Alabama, applications enacted on August 14, 1975 and September 18, 1976, [the 1976 application was rescinded on April 28, 1988, and the 1975 application was rescinded on September 22, 1988]; Alaska, application enacted on Feb. 3, 1982; Arizona, applications enacted on May 19, 1977 and March 9, 1979; Arkansas, application enacted on Jan. 22, 1979; Colorado, application enacted on March 29, 1978; Delaware, application enacted on June 11, 1975; Florida, applications enacted on May 13, 1976 and June 10, 1976 [both applications rescinded on May 5, 1988]; Georgia, application enacted on Jan. 19, 1976; Idaho, application enacted on Feb. 21, 1979; Indiana, applications enacted on March 7, 1957 and March 28, 1979; Iowa, application enacted on Feb. 22, 1979; Kansas, application enacted on April 26, 1978; Louisiana, applications enacted on July 12, 1975, June 29, 1978, and July 9, 1979; Maryland, application enacted on April 3, 1975; Mississippi, application enacted on March 20, 1975; Missouri, application enacted on May 26, 1983; Nebraska, application enacted on Feb. 23, 1976; Nevada, application enacted on March 12, 1979; New Hampshire, application enacted on April 26, 1979; New Mexico, application enacted on Feb. 16, 1978; North Carolina, application enacted on Jan. 26, 1979; North Dakota, application enacted on March 12, 1975; Oklahoma, application enacted on April 15, 1976; Oregon, application enacted on July 11, 1977; Pennsylvania, application enacted on Nov. 9, 1978; South Carolina, applications enacted on Feb. 12, 1976, Feb. 25, 1976 and May 16, 1978; South Dakota, application enacted on Jan. 31, 1979; Tennessee, application enacted on March 30, 1977; Texas, application enacted May 31, 1977; Utah, application enacted Feb. 1, 1979; Virginia, application enacted on March 10, 1976; and Wyoming, application enacted on Feb. 17, 1977. Note that the States of Alabama, Florida, and Louisiana, have rescinded their applications. See generally, D. Huckabee, D380062 *supra* at 5. See also, James V. Saturn, *A Balanced Budget Constitutional Amendment: Background and Congressional Options*, *supra*, CRS Rept No. 95-48 GOV, p. 22.
51. See generally, *Congressional Quarterly*, vol. 40, no. 13, March 27, 1982, at 659; see also N. Y. Times, Jan. 19, 1982 at A18; and see 125 Cong. Rec. H. 200 (daily ed., Feb. 3, 1982).
52. D. Huckabee, IB80062, *supra*, p. 5.
53. P. Nyhan, *The Drive To Convene A Convention*, *Congressional Quarterly*, May 9, 1992, at 1236. See also, S. Res. 82, 104th Cong., 1st Sess. (1995) to petition the States to convene a Conference of the States to draft an amendment to the Constitution requiring a balanced budget and prohibiting the importation of unfunded mandates to the States; no legislative action has been taken.

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the scope and limitations of a constitutional convention, (3) validity of any rescission of petitions by state legislatures, (4) the contemporaneousness of the petitions, and (5) the proper enactment and submission of the petitions by the state legislatures.

## B. IDENTICALNESS OF THE PETITIONS

One of the problems relating to the applications or petitions from the state legislatures which request that Congress call a constitutional convention for an amendment or amendments to the Constitution, is whether the petitions or applications must be same and, if not, how similar or closely worded must they be in order to be valid and countable by Congress for the purpose of calling such a convention. Article V of the United States Constitution is silent about the subject matter of state petitions or applications and about whether they should be identical or at least relate to a single specific subject matter in order to be counted.<sup>54</sup>

For example, the petitions from the state legislatures that request a constitutional convention for a balanced budget amendment have not generally been the same.<sup>55</sup> These petitions may be classified into four distinct groups: (1) petitions which propose that appropriations shall not exceed revenues; (2) petitions that would require a balanced federal budget; (3) petitions that would prohibit deficit spending; and (4) petitions that would require that expenditures do not exceed receipts.<sup>56</sup> Thirty-two state legislatures have adopted petitions requesting a constitutional convention relating to federal spending that may be classified in one of these four categories; however, even though some petitions can be grouped in the same category, the specific language of the petitions in that category may differ in that many of them are conditional and give differing reasons for the adoption of the resolutions.<sup>57</sup>

Certain bills introduced in recent Congresses provide for procedures for calling such constitutional conventions. They would require that Congress consider the calling of a constitutional convention upon the receipt of applications from two-thirds or more of the states with respect to the "same

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54. C. Brickfield, *Problems Relating To A Federal Constitutional Convention*, *supra* at vii.

55. J. Lieberman, *What Makes A Constitutional Convention Unlikely*, *Business Week*, March 26, 1979, No. 2578, at 84.

56. D. Huckabee, *Constitutional Convention Applications of States Relating To Federal Spending*, Library of Congress, Congressional Research Service Report, April 22, 1980, at 2. And see, generally *Constitutional Conventions: Political and Legal Questions supra*, Dec. 17, 1990.

57. Many applications are conditional since they request Congress to propose an amendment relating to a balanced budget and since, only, in the absence of such congressional action, do they petition Congress to call a constitutional convention for such purpose.

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subject"<sup>58</sup> or the "same general subject."<sup>59</sup> While it seems that petitions do not have to be the same or identical to be valid, a related issue is whether a convention would then be limited in scope to that single issue and unable to consider other issues.

## C. THE SCOPE AND LIMITATIONS OF A CONSTITUTIONAL CONVENTION

There are three schools of thought about whether a convention could be limited to a single question or be unlimited in scope. One school holds that only unlimited conventions may be called; a second school maintains that only limited conventions may be called; and a third school asserts that both limited and unlimited constitutional conventions can be called and are proper subjects of a state constitutional convention application.<sup>60</sup>

First, the school that holds that only unlimited conventions may be called finds some support in the language of Article V which uses the phrase "...convention for proposing amendments...." The use of the plural, it is argued, means that a convention once-called, despite any limitation of the applications would be able to propose any amendments it deems necessary and that Congress would be unable to restrict and limit the scope of the convention.<sup>61</sup> The delegates to the Constitutional Convention of 1787 set a precedent for an unlimited or general convention when they went beyond their mandate which was limited to proposing amendments to the Articles of Confederation<sup>62</sup> and wrote a whole new constitution for governing the Country.<sup>63</sup>

The rationale behind an unlimited convention is based on the concept that a convention once assembled has the attributes of a sovereign, and it has been called a fourth branch of government which would be coequal with the legislative,

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58. See, for example, S. 800, 97th Cong., 1st Sess. 6 (1981); H.R. 353, 97th Cong., 1st Seas., 6 (1981); H.R. 2964, 100th Cong., 1st Sess. (1987).

59. S. 817, 97th Cong., 1st Sess. § 6(a) (1981).

60. Connelly, *Amending the Constitution: Is This Any Way To Call A Constitutional Convention?* 22 *Ariz. L. Rev.* 1011, 1020-1024 (1980).
61. Forkosch, *The Alternative Amending Clause in Article V: Reflections and Suggestions.* 51 *Minn. L. Rev.* 1053, 1075 (1967).
62. The mandate of the Philadelphia Convention of 1787 was Limited to proposing amendments to the Constitution. See 1 J. Elliot, *The Debates In The Several State Conventions on the Adoption of the Federal Constitution*, at p. 120 (2d ed. 1836).
63. See, *Amendment by Convention: Our Next Constitutional Crisis?* 53 *N. Car. L. Rev.* 491, 505 (1975); Martig, *Amending the Constitution Article V: The Keystone of the Arch*, 35 *Mich. L. Rev.* 1253, 1257 (1937).

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executive, and judicial branches of the government.<sup>64</sup> Some constitutional scholars deny that Congress has the power to bind a convention under the doctrine of "conventional sovereignty."<sup>65</sup> And it is argued that neither the states nor the Congress can limit the scope of the convention. Thus, the states would not be able to limit the scope of the convention by their applications since, it is argued, the power of the states under Article V is confined only to the submission of petitions requesting that the Congress call the convention.<sup>66</sup>

The second school of thought on the scope of constitutional conventions accepts the premise that Congress in calling a convention would have the power to limit the subject matter of such convention.<sup>67</sup> The argument is made that Congress has the power to restrict the convention to those amendments that deal with a specific subject matter which has induced the legislatures of two-thirds of the states to make applications for a convention.<sup>68</sup> Within the general subject matter area of the applications, the convention could propose any amendments to resolve the problems, but in regard to other amendments not related to the subject matter of the applications, Congress might justifiably refuse to submit them to the states since they would be *ultra vires* proposals.<sup>69</sup>

Of more than four-hundred applications from the states requesting a constitutional convention, only about twenty-nine applications have been received from the states requesting a general revision of the Constitution while the remaining several hundred applications concern a specific and limited subject matter.<sup>70</sup> There may be a precedent for a limited constitutional convention from the experience of the states since twelve of the twenty-seven

64. L. Orfield, *The Amending of the Federal Constitution*, at pp. 47-48 (Ann Arbor: 1942).

65. C. Brickfield, *supra*.

66. C. Black, *Amending the Constitution: A Letter To A Congressman*, 82 *Yale L. J.* 189, 196-199 (1972). See, also, W. Dellinger, *The Recurring Question Of The "Limited Constitutional Convention,"* 88 *Yale L. J.* 1623 (1979).

67. The argument for a limited convention notes: (1) that Congress is not free to call a constitutional convention, (2) that Congress is to call a convention only on the applications from the legislatures of two-thirds of the states, (3) Congress cannot go beyond the purpose of the specific subject matter of the applications from the states, and (4) if the requisite number of the legislatures from the states apply for a convention on a specific subject matter, such as a balanced federal budget, Congress must call a convention for that matter only and cannot enlarge the topics. J. Noonan, *The Convention Method Of Conventional Amendment--Its Meaning, Usefulness, And Wisdom*, 10 *Pac. L. Rev.* 641, 642 (1979).

68. Staff of House Comm. on The Judiciary, 82d Cong., 2d Sess., *Problems Relating To State Applications For A Convention To Propose Constitutional Limitations On Federal Tax Rates*, at 16 (Comm. Print 1952). [Hereinafter referred to as *Problems Relating To State Applications*.]

69. *Ibid.*; "If the delegates wander, Congress need not transmit their wandering. If irrelevancies are appended by a Convention, the states need not ratify them." J. Noonan, *supra*, at p. 644.

70. C. Brickfield, *supra* at p. 90.

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state conventions meeting to amend state constitutions held between 1938 and 1968 were limited to a particular subject or subjects.<sup>71</sup> The constitutional convention procedures bills which have been introduced in recent Congresses accept the concept of a limited constitutional convention since certain provisions require: (1) that a state specify in its application the nature of amendments that the convention may propose, (2) that the convention be limited to the subject matter specified in the applications, (3) that the delegates take an oath that they will not propose amendments outside the scope of the subject matter" of the petitions, and (4) that Congress may disapprove and refuse to submit to the states for ratification any proposed amendments that are different in nature from the petitions from the state legislatures and concurrent resolutions calling the convention.<sup>72</sup>

The third school of thought accepts the proposition that both limited and unlimited conventions would be allowed under Article V of the Constitution. The proposition is based upon an interpretation of Article V that a convention can only be called by Congress when there is an agreement among the states on the subject matter of a convention. Thus, if the agreement, or consensus among two-thirds of

the states (presently thirty-four states) is for a general revision of the Constitution, then Congress would call a general constitutional convention, or, if the consensus among the requisite number of states is for a convention on a specific subject matter, then a limited convention would be called by the Congress. The Framers of the Article V constitutional amendment process, moreover, considered a constitutional convention would be one that would not only correct abuse of power by the Federal Government but also propose amendments relating to other specific matters of concern.<sup>73</sup>

#### D. VALIDITY OF A RESCISSION OF A PETITION BY A STATE

The language of Article V gives little guidance whether a state could withdraw or rescind its application or petition for a constitutional convention once it has been passed by its legislature and submitted to Congress. There have been three rescissions of the applications for the calling of a constitutional

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71. Albert L. Sturm, *Thirty Years Of State Constitution Marking: 1938-1968* (1970 National Municipal Leagues Study), p. 65.
  72. See, S. 600, 97th Cong., 1st Sess. (1981); S. 817, 97th Cong., 1st Sess. (1981); H.R. 353, (97th Cong., 1st Sess. (1981); S. 119, 98th Cong., 1st Sess. (1983); S. 2812, 98th Cong., 2d Sess. (1984); S. 40, 99th Cong., 1st Sess. (1985); H.R. 351, 99th Cong., 1st Sess. (1985); S. 589, 100th Cong., 1st Sess. (1987); S. 204, 101st Cong., 1st Sess. (1989); and S. 214, 102d Cong., 1st Sess. (1991). See generally, Proposed Bill to Provide Constitutional Convention Procedures: Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967).
  73. In the convention in Annapolis to discuss problems of the Articles of Confederation, delegates suggested that a convention be called to consider problems of commercial regulation "and each other purposes as the situation of public affairs may be found to require." J. Elliott, *Debates In The Several State Conventions On The Adoption Of The Federal Constitution*, vol. 1, 3.16-120 (Washington, 1836). See also, the Federalist No. 43 (J. Madison).

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convention to propose a balanced budget amendment.<sup>74</sup> Whether these rescissions are valid or not, it apparently is up to Congress to determine, and Congress has been reluctant to enact legislation clarifying the rescission issue. There are differing opinions about whether such a withdrawal or rescission would be valid. One viewpoint asserts that once a state legislature has passed an application for a convention and submitted it to Congress, it is irreversible since it is an exercise of the power to initiate amendments. It is argued that, since Congress may not withdraw an amendment once it submits it to the states for ratification, likewise a state should not be allowed to withdraw its application after the power to initiate an amendment by convention was exercised.<sup>75</sup>

Other viewpoints reject this argument against rescission of petitions by the states noting that a congressionally proposed amendment to the Constitution is not analogous to a state application for a constitutional convention since under the former scenario, the Congress has already completed the first stage of the amendment process under Article V upon approval of two-thirds of the Members of both Houses of Congress, while under the latter scenario, a state would still need the support from two-thirds of the other states before a convention could be called to propose an amendment. The proper analogy to a state's application for a constitutional convention is the introduction of a joint resolution by a Member of Congress proposing an amendment to the Constitution, which would need the votes of two-thirds of the Members of both Houses, and which could be withdrawn in either House prior to the passage, but not after such passage and the submission of the proposed amendment to the states for approval.<sup>76</sup> Thus, an analogy to the congressional procedure process in amending the Constitution under Article V would not per se prohibit a state from rescinding an application for a constitutional convention.

The Supreme Court has not decided such an issue even though some states have adopted resolutions rescinding their applications. However, in *Coleman v. Miller*<sup>77</sup> the Court considered whether state could withdraw or rescind its prior rejection of a proposed amendment to the Constitution and held that-the matter was a political question over which Congress had the ultimate authority to decide.<sup>78</sup> Certain legislation in recent Congresses, providing for procedures for calling constitutional conventions, would allow states to rescind their

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74. Alabama rescinded on April 28, 1988; Florida rescinded on May 5, 1988; and Louisiana rescinded on July 6, 1990. See, D. Huckabee, "Constitutional Conventions: Political and Legal Questions," CRS Issue Brief No. IB80062, *supra*, at p. 5. And see, J. Saturno, *A Balanced Constitutional Amendment: Background and Congressional Options*, *supra*, at p. 22.

75. F. Packard, *Rescinding Memorialization Resolutions*, 30 Chi-Kent L. Rev. 339-40 (1952).

76. D. Connelly, *Amending the Constitution....*, *supra* at 1033-34.

77. 307 U.S. 433 (1939).

78. *Id.*, 447-449.

ratifications of a proposed amendment of a constitutional convention by the same process by which they ratified the proposed amendment up and until the time when valid ratifications by three-fourths of the states would occur.<sup>79</sup>

In light of the fact that many states submit applications to Congress for a constitutional convention to prod Congress into taking action on a proposed constitutional amendment regarding a particular issue, such as a balanced Federal budget, it may not be realistic to bind the states to their applications before the requisite number is reached.<sup>80</sup> And, since the applications from the states for a constitutional convention are also supposed to be contemporaneous, such a requirement may not exist when one or more of the states attempt to withdraw or rescind their applications because the general consensus for a convention from the requisite two-thirds of the States would not exist.<sup>81</sup>

## E. CONTEMPORANEOUSNESS OF THE APPLICATIONS

Another issue relating to applications for a constitutional convention is whether such applications have to be sufficiently contemporaneous to be valid and countable by Congress. Article V is silent about whether an application from a state is to be valid for all time even though there may be a significant time gap between it and the other state applications.<sup>82</sup> Arguments have been made that constitutional conventions can only be called by Congress when the requisite number of applications from the state legislatures are made within a reasonable amount of time which would demonstrate significant contemporaneous support.<sup>83</sup>

The ratification of the Twenty-Seventh Amendment to the Constitution on May 7, 1992, concerning congressional pay, also raised the contemporaneous issue. The Amendment authored by James Madison and proposed by Congress in 1789 without a time limit for ratification took almost 203 years for it to be ratified by the requisite number of states. While there was some controversy in Congress whether the Amendment should be accepted by Congress as valid because of the lengthy lapse of time between proposal and ratification, Congress eventually recognized on May 19 and 20, 1992, the ratification of the

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79. See S. 600, 97th Cong., 1st Sess. (1981); S. 817, 97th Cong., 1st Sess. (1981); H.R. 353, 97th Cong., 1st Sess. (1981); S. 119, 98th Cong., 1st Sess. (1983); S. 2812, 98th Cong., 2d Sess. (1984); H.R. 3373, 98th Cong., 1st Sess. (1983); S. 40, 99th Cong., 1st Sess. (1985); H.R., 351, 99th Cong., 1st Sess. (1985); S. 689, 100th Cong., 1st Sess. (1987); H.R. 2964, 100th Cong., 1st Sess. (1987); S. 204, 101st Cong., 1st Sess. (1989); and S. 214, 102d Cong., 1st Sess. (1991).

80. C. Brickfield, *supra* at 46.

81. *Ibid.*

82. *Id.*, 39.

83. Bonfield, *Proposing Constitutional Amendments By Convention; Some Problems*, 39 Notre Dame Law. 659, 670-71 (1964).

Amendment after the Archivist of the United States on May 18, 1992, officially certified it.<sup>84</sup>

*The Supreme Court in Dillon v. Gloss*<sup>85</sup> found that Congress had the power to set a time limit on a ratification of a constitutional amendment on the ground that Article V implies that ratification must be sufficiently contemporaneous when ratified by three-fourths of the states so that the will of the people is reflected in all sections of the country at relatively the same time.<sup>86</sup> In recent years, congressional proposal of amendments usually have specified a time limit. When a time period is not specified, Congress, in its review of the ratification process by the states over the entire course of the consideration of the proposed amendment by the states, is in the best position to determine the proper time period for ratification. According to the Supreme Court in *Coleman v. Miller*, any questions concerning the time period for ratification is a political question which Congress should decide when the promulgation of the proposed amendment is under consideration.<sup>87</sup>

The contemporaneous support arguments regarding applications from the states for a constitutional convention are based on the holdings of the *Dillon* and *Coleman* decisions which provided that Congress has the power to set time limits for ratification of a proposed amendment.<sup>88</sup> It would seem logical, to apply these same contemporaneous support arguments to state applications for constitutional conventions.<sup>89</sup> The language of Article V is silent about and in no way suggests that an application for a constitutional convention once made is valid forever or that the application of one state may be separated from those of other states and still be effective.<sup>90</sup> An application or petition by a

state for a constitutional convention should have effect for a reasonable time only, and

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84. The Senate recognized the Twenty-seventh Amendment on May 20, 1992 by passing two proposals S. Con. Res. 120 and S. Res. 298 by a vote of 99-0. The House recognized the ratification of the Madison Amendment by passing H. Con. Res. 320 on May 20, 1992 by a vote of 414-3. Rep. Don Edwards of the House Judiciary Committee noted that the long delay between proposal and ratification of the Amendment should be considered "an exception, not a precedent." See, L. Michaelis, "Both Chambers Rush To Accept 27th Amendment On Salaries," *Congressional Quarterly*, *supra* at p. 1423.
85. 256 U.S. 368 (1921).
86. *Id.*, 376.
87. See *Coleman v. Miller*, 307 U.S. 433, 461-54, 453-54 (1939). In *Coleman*, the Supreme Court considered whether the proposed Child Labor Amendment which had been under consideration by the States for thirteen years was still valid. Congress failed to set a time limit for the ratification of the proposed amendment. The Supreme Court found that the issue of a reasonable time limit for ratification was a political question which was one that Congress should decide when the time for promulgation of the adoption of the amendment arrives. *Id.*, 447, 464.
88. *The Process of Constitutional Amendment*, 79 Colum. L. Rev. 106, 127 (1979).
89. C. Brickfield, *supra* at 39.
90. *Ibid.*

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the determination of what is a reasonable time is matter which only Congress should determine.<sup>91</sup>

The constitutional convention procedures legislation in past Congresses provide that applications for a constitutional convention are to remain effective for a period of seven calendar years after they are received by Congress.<sup>92</sup> The seven-year limitation proposal for applications was apparently adopted from the seven-year ratification limitation for proposed constitutional amendments initiated in the 1920's which has been the practice ever since.<sup>93</sup>

#### F. THE PROPER ENACTMENT AND SUBMISSION OF THE PETITIONS BY STATE LEGISLATURES

Article V which states that "...on the application of the legislatures of two- thirds of several States [Congress] shall call a convention for proposing amendments." In states with bicameral legislatures,<sup>94</sup> it would seem that an application from a state for a constitutional convention would have to be approved by both houses of the legislature. Some states have inadvertently sent applications to Congress requesting a convention to balance the federal budget that have passed only one house of a bicameral legislature,<sup>95</sup> such applications would not be valid until they are passed by both houses of the state legislatures. Since Article V would appear to require action by both houses of the legislature. Action by only one house would not be a proper application by the legislature

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91. *Ibid.* One constitutional convention scholar suggests that a reasonable amount of time for a constitutional convention application should be no more than a generation. See L. Orfield, *supra* at 42.
92. See S. 600, 97th Cong., 1st Sess. (1981); S. 817, 97th Cong., 1st Sess. (1981); H.R. 353, 97th Cong., 1st Sess. (1981); S. 119, 98th Cong., 1st Sess. (1983); S. 40, 99th Cong., 1st Sess. (1985); S. 589, 100th Cong., 1st Seas. (1987); H.R. 2964, 100th Cong., 1st Sess. (1987); S. 204, 101st Cong., 1st Seas. (1989); S. 214, 102d Cong., 1st Sess. (1991).
93. See, *State Applications Asking Congress To Call A Federal Constitutional Convention*, House Comm. on the Judiciary, (Comm. Print.), 87th Cong., 1st Sess., 4 (1981).
94. Nebraska is the only State that has a unicameral legislature rather than a bicameral one.
95. In 1979, the State of Arkansas inadvertently sent to Congress an application for a constitutional convention that was passed by only one house of the legislature; however, later in 1979, Arkansas renewed its application for a constitutional convention with the approval of both houses of the legislature. Also a 1979 application from Indiana for a constitutional convention to balance the budget was passed by only one house of the legislature and was inadvertently sent to Congress, however, in March of 1979, both houses enacted the application, even though a 1957 application for such a constitutional convention was still pending. 125 *Cong. Rec. S. 3231* (daily ed. March 22, 1979). See D. Huckabee, *Constitutional Convention Applications: Addressing The Controversy Of Counting State Applications Relating To A Deficit Spending Amendment*, Library of Congress, *Congressional Research Service Report*, April 27, 1979 at 5, 7, and 8.

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as a whole.<sup>96</sup> Also, it would seem that both houses of a state legislature would have to approve the same application; otherwise, the application would be invalid.<sup>97</sup> The current congressional proposals to regulate the procedures of a constitutional convention appear to require that the applications pass both houses of a state legislature in the same language or wording. The bills refer to the adoption of a single resolution and require the presiding officer of each house of the state legislature to sign the exact text of the resolution that calls for a constitutional convention.<sup>98</sup>

Article V does not address state voting requirements in approving resolutions calling for a convention. In some states a majority vote is sufficient to pass a resolution relating to an application for

a constitutional convention, while other states require the approval of sixty-five percent of those voting.<sup>99</sup> There is an argument that, since amending the Constitution is a national and federal function that relates to every state, there should be some uniformity with regard to the vote by the state legislatures on the resolutions concerning the applications for a constitutional convention.<sup>100</sup> However, this matter of whether there should be a majority or a super-majority vote is not part of the recent congressional proposals providing for constitutional convention procedures since there is an underlying presumption that legislative bodies should control their own proceedings and establish the percentage of votes required for passage of such a resolution.<sup>101</sup>

Once a state legislature has passed a resolution petitioning Congress to call a constitutional convention, the state must make application to Congress for such a convention by sending the petition or application to Congress. Presently, the transmission of state applications for a constitutional convention is a confusing process. They have been addressed to a number of congressional

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96. D. Connelly, *supra* at 1024. See also, Festerwald, *Constitutional Law: The States and The Amending Forces--A Reply*, 46 American Bar Association Journal 717, 718 (1960) in which it was concluded that Maryland's application for a federal income tax limitation convention was invalid since it passed only one house of the legislature.

97. *Problems Relating To State Applications* (Comm. Print 1952), *supra*, at 6.

98. See, e.g., S. 600, 97th Cong., 1st Sess. (1981); S. 817, 97th Cong., 1st Sess. (1981); and H. R. 353, 97th Cong., 1st Sess. (1981); S. 589, 100th Cong., 1st Sess. (1987); S. 204, 101st Cong., 1st Sess. (1989); and S. 214, 102d Cong., 1st Sess. (1991).

99. Buckwalter, *Constitutional Convention And State Legislators*, 20 J. Pub. L. 543, 548, 51 (1971).

100. D. Connelly, *supra* at 1026.

101. See, *Proposed Bill to Provide Constitutional Convention Procedures: Hearings on S. 2307 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., 47 (1967). See remarks of Senator Ervin who states that he doubts that Congress has the power to impose voting requirements on the states and that to specify the majority needed for a state to adopt a petition for a constitutional convention would itself require a constitutional amendment.

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officers, such as the Speaker of the House, the President of the Senate, or the President pro tempore of the Senate, and even the clerks of the House and Senate. Some states have even sent copies of the applications to the chairmen of the Senate and House Judiciary Committees which would have jurisdiction over the applications for a constitutional convention.<sup>102</sup>

It has been the custom of the House of Representatives to print a short statement summarizing the application in the *Congressional Record* which is listed under the terms "memorials" and "petitions." The applications are then forwarded to the Senate and House Judiciary Committees which would have jurisdiction over such petitions.<sup>103</sup> Publication in the *Congressional Record* serves as a type of official notice to the Congress, the states, and the public that an application has been received by Congress, but the process is confusing because there are no guidelines under Article V as to where and to whom in Congress such state applications are to be sent.<sup>104</sup>

The constitutional convention procedure bills in recent Congresses would remedy such a situation by requiring certain procedures such as, (1) requiring a state to address two copies of the application calling for a constitutional convention to the President of the Senate and the Speaker of the House of Representatives; (2) requiring applications to be sent within thirty days after the adoption by the legislature of the resolution; and (3) requiring that the copies bear the date on which the legislature adopted the resolution and be certified by the Secretary of State or some other official that the application accurately sets forth the text of the resolution.<sup>105</sup> The necessity for such legislation arises from the fact that the states are not in the best position to regulate the process by which they adopt and pass resolutions to petition Congress for a constitutional convention since, for example, a state may not judge the validity of its own application.<sup>106</sup> And uniformity in the procedures among the states in the way they adopt applications and transmit them to Congress could best be accomplished by a federal statute since the states are powerless to impose convention application requirements on each other.<sup>107</sup>

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102. See D. Huckabee, *supra* at 3, 4. Applications for a balanced budget convention have been sent to: the President, Vice President, President of the Senate, Secretary of the Senate, Speaker of the House, House Clerk, "presiding officers of the Senate and House of Representatives," "Senate and House of Representatives," and simply to Congress. And see, D. Connelly, *supra* at 1031.

103. *Id.*, 4.

104. D. Connelly, *supra*, at 1031.

105. See generally, S. 600, 97th Cong., 1st Sess. (1981); S. 817, 97th Cong., 1st Sess. (1981); and H.R. 353, 97th Cong., 1st Sess. (1981); S. 589, 100th Cong., 1st Sess. (1987); H.R., 2964, 100th Cong., 1st Sess. (1987); S. 204 101st Cong., 1st Sess.

(1989); and S. 214 102 d Cong. 1st Sess. (1991).

106. S. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, The Article V Convention Process at 39, 43, 46 (L. Lery ed. 1971).

107. *Id.*, 43-44.

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However, they could each possibly adopt some type of a uniform constitutional convention procedures legislation patterned after the proposed congressional legislation to remedy some of these problems in the absence of any federal statute.

The "federal function" doctrine which was articulated in the Supreme Court decision of *Leser v. Garnett*<sup>108</sup> would provide the basis for the constitutionality of some form of constitutional convention procedure legislation that would resolve some of the issues that relate to such state applications calling for a constitutional convention. The Court in *Leser* found that "...the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."<sup>109</sup> And, when a state legislature decides to ratify a constitutional amendment, that decision, under the federal function doctrine, would transcend any limitations that the people of the state would seek to impose.<sup>110</sup>

Since the *Leser* decision, the so-called federal function doctrine has been used to justify any role that Congress had and would have under some form of the proposed constitutional convention procedures legislation. Under this doctrine, Congress would have those functions which are not specifically assigned to the states under Article V for the following reasons: (1) since Article V functions are federal, (2) since the necessary and proper clause of Article I, Section 8, Clause 13 would seem to enable Congress to pass legislation regarding the various aspects of the amending process, including the calling of a constitutional convention and, (3) since the Supremacy Clause of Article VI would determine that federal legislative provisions would supersede inconsistent state acts.<sup>111</sup> While the states, the courts, and the convention itself would appear to be unable to regulate the application and convention processes, Congress, it would seem, would be the appropriate governmental branch to specify the procedures of a constitutional convention that were left unresolved by Article V.<sup>112</sup>

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108. 258 U.S. 130, 137 (1922). See also, *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920); *Hawke v. Smith*, No. 2, 253 U.S. 231 (1920).

109. 258 U.S. at 137 (1922).

110. *Ibid.*

111. See Hearings on S. 2307, *supra* at 26-27 in which the federal function argument is discussed.

112. D. Connely, *supra* at 1018.

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