DOES ARTICLE V RESTRICT THE STATES TO CALLING UNLIMITED CONVENTIONS ONLY?—A LETTER TO A COLLEAGUE

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From time to time, various state legislatures have adopted resolutions designed to require Congress to call a limited convention in which one or another possible amendments to the Constitution might be proposed. In 1967, thirty-two states, two short of the requisite two-thirds, filed such resolutions requesting a convention for the purpose of considering an amendment to "overrule" the Supreme Court's principal reapportionment decisions. In 1971, Senator Ervin of North Carolina introduced a bill to provide guidelines to be followed upon a state call for a convention. This year, approximately twenty-eight states have adopted some kind of resolution for the purpose of considering an amendment to impose fiscal restraint upon the federal government—to require a "balanced budget."

Curiously, the convention mode of proposing amendments remains completely untested: no such convention has ever been assembled. Yet the amending convention obviously is contemplated by article V of the Constitution:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .*[1]

Several scholars, including Professors Charles L. Black, Jr.[2] *and Bruce A. Ackerman,*[11] *both of Yale Law School, have argued that unless the state legislative resolution reflects a desire to convoke a constitutional convention having the authority to propose an unlimited variety of fundamental changes in the Constitution, Congress should treat the state resolu-*

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1. U.S. CONST. art. V.
2. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).
3. Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

tion as a nullity. Recently, Professor Ackerman sent Professor Van Alstyne a reprint of his New Republic *editorial and asked Professor Van Alstyne whether he had "any thoughts on this." The following is Professor Van Alstyne's reply. Footnotes have been added by the editors.*

March 9, 1979

Professor Bruce Ackerman
Yale Law School
New Haven, Connecticut

Dear Bruce,

I do have some thoughts, albeit very incomplete ones. By chance, your note and enclosure found me in the midst of reading old and musty material—Farrand, Elliot, Madison's Dairy, *The Federalist*, early congressional discussions, recollections from varieties of inputs into article V. This unglamorous exercise was occasioned by the very subject of the editorial you sent me and, more particularly, by a fresh reading of Charles Black's *Yale Law Journal* Letter on the same point.

I understand that the basic point being urged is this: unless Congress concludes that thirty-four states have submitted resolutions contemplating an unrestricted convention for proposing amendments, Congress should decline to "call a convention." A qualified or limited or restricted state legislative resolution, one which would display an unwillingness to have the convention free to consider and to propose whatever amendments it deems appropriate to be submitted for possible ratification, should be regarded by Congress as falling short of the requisite commitment by that state. A "qualified" application by a state legislature is, in contemplation of article V, no sufficient application at all.

Accordingly, even if, by chance, thirty-four state legislatures were to submit identically phrased qualified applications (*e.g.*, identically worded "single-item amendment agenda"), thus manifesting a concurrence and identical purpose to have that one proposal considered for full discussion and a flat up-or-down vote in convention, Congress should nonetheless, in fidelity to the requirements of article V, decline to call a convention. As each such resolution is incomplete insofar as it is thus qualified, each such resolution is no different than no resolution at all. As Charles puts it: thirty-four times zero is still zero.[4] I gather you agree. Disappointingly, I do not—although I do think a cogent argument can be made (as you and Charles have made it) which, by

4. Black, *supra* note 2, at 198.

being accepted, tends thus to fulfill itself and to pass into the received wisdom.

Before sharing with you my misgivings about this view of article V, however, let me quickly concede in what several respects the argument cannot be easily disposed of and, indeed, has very considerable plausibility. First, it goes without mention that I know of no judicial decisions that offer any resistance. Second, I have found *nothing* in the early materials I have been canvassing that specifically anticipates the argument or that specifically discredits it; a question in the form you and Charles have raised was, so far as I can determine, never raised at all. There is thus no expression of views, favoring it or deriding it. Third, the language of article V assuredly is not inconsistent with the argument and may, without uncommon strain, even be read as mildly implying the rightness of the argument. Fourth, as Charles notes,[5] insofar as a convention is seen as equivalent to Congress in its authority, the requirement of "equivalent" power to propose amendments favors the argument. Let me pause on these last two points before going on.

So far as text is concerned, the argument derives consistency, at the least, merely from noting: "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 . . . ."[6] Congress, of course, has no limited agenda (and no limit*able* agenda) in respect to its proposing authority. Correspondingly, it may (as Charles has done) be nicely observed that a convention summoned in substitution of, or as an alternative or equivalent to, Congress ought not be conceived of as properly subject to constraints of any greater force: the convention cannot be confined in its authority any more than Congress may be so confined. A plausible argument derives from Charles' larger views of "structure and relation"[7]—a convention must relate to the amendment power as Congress is related to the same amendment power; they are but alternative forums in which either must have authority "for an *unconditional* reappraisal of constitutional foundations."[8]

Fifth, the nearest thing we have to "early practice" on the use of this mode to secure amendments is in no respect inconsistent with the argument; to the contrary, it is wholly consistent with the argument. The early practice I have in mind consists of such possibly interesting

5. *See id.*

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

7. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

8. Ackerman, *supra* note 3, at 8 (emphasis added).

shards of history as these:

(a) Despite grumbling and protest that the Philadelphia Convention of 1787 had no authority to propose a wholly new Constitution or to propose it under terms of ratification plainly disallowed as an authorized mode for altering the Articles of Confederation, once assembled that Convention presumed to reach its own conclusion that something more than the subjects proposed for revision by the various state legislatures was called for. States nonetheless ratifying the resulting product have reason to understand, therefore, that since the Convention they sent delegates to in 1787 did not deem itself constrained by whatever particular or limited items that may have been of exclusive or particular interest to some of them, they are on historical notice (as it were) of the uncabinable discretion of such conventions. More to the point, insofar as ratifying conventions within those same states elected to ratify that Constitution despite the extent to which its proposals greatly exceeded the originally limited purposes for which delegates from some states were sent to that Convention, the states must correspondingly concede that, evidently, such conventions cannot properly be subject to limited-agenda constraints.

(b) Among the states ratifying the Constitution, a good number did so very reluctantly—principally, although not exclusively, because of the absence of any kind of Bill of Rights. Concurrent with unconditional ratification, however, several of these state conventions accompanied their resolutions of ratification with a call for amendments, either by proposal by Congress or by a convention to be summoned for the purpose (presumably as contemplated by article V). Different state conventions had different amendments they wished to have considered: some dealt with identical subjects, but dealt with them in various degrees; some dealt with subjects not dealt with by others at all. There did appear to be a tacit assumption that insofar as Congress might respond by calling a convention rather than, as it did, by itself proposing twelve amendments, the convention to be called in keeping with article V would not (could not?) be constrained by the particular and limited amendment-interests of the calling states. In short, the mention of particular amendments to be considered did not imply an intention that no others could be considered or that, if any other amendments were to be considered then, in that event, the petitioning state convention would rather have no amending convention at all.

Sixth, the view of the matter that you and Charles take may claim additional strength from a sense of article V as a whole. What is that sense? Arguably, it is that amending the Constitution is a *serious* business. Alterations in the fundamental law should be possible, but *not*

easy. You yourself make the point well in your *New Republic* editorial. It could be expanded. Supermajorities are required; a special mix of different constituencies is demanded. Short of virtual impossibility of change, which was regarded to be the problem under the Articles of Confederation where *unanimous* approval by all the states was required, the dominant function of article V (as Brandeis opined to be true with respect to the dominant function of separate powers[9]) is not to facilitate, but to clog; not to make haste in the furor of *ad hoc* dissatisfactions, but to require a more profound dissatisfaction—then to assemble in convention, to give pause to the felt necessity for changes, *et cetera*.

The argument has obvious application, in support of your view, as an article V "price tag." Amendments are a serious business, especially in the less-structured auspices of a convention. The notion that state legislatures may precipitate such events to blow off steam, a notion encouraged if single-item resolutions are deemed sufficient to mandate a convention, should be discouraged. It may best be discouraged by having state legislatures understand that just as there is no such thing as a "qualified" ratification of an amendment and just as it was uniformly understood in 1787 that there was no such thing as a "qualified" ratification of the Constitution, neither is there such a thing as a "qualified" call for an amending convention.

Seventh, your view is also helpful, were it adopted, in two eminently *practical* and important ways. First, it eliminates the plain and arbitrary difficulty of expecting a reasonable Congress to decide whether, given different forms in which these state resolutions are submitted (the current example of the "budget-balancers" is itself a fine example), a sufficient "consensus" has in fact been expressed for a given kind of limited convention. It avoids, too, the plain and related problem (supposing Congress agrees that a sufficient, albeit limited-agenda, consensus has been expressed), of what Congress is expected to do in describing the agenda for the convention thus called. Endless (and endlessly intractable) administrative and political questions at once arise in both respects. *Neither kind of question arises, however, when only one kind of convention is deemed proper*—the kind you argue for. Perhaps a better way of expressing this concern is as follows: as between two constructions of article V, one of which will necessarily generate an entire series of *additional* questions for which there are no objective criteria to resolve, and the other of which wholly eliminates any need to consider such questions, other things being roughly equal,

9. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

is it not far better to prefer the latter construction?

Complementary to this preceding argument, your view is equally helpful as these same practical issues identically must confront the convention to be assembled. How shall such a convention reasonably determine whether one or another proposal is within its mandate? Suppose a "budget-balancing" single-item agenda is supplanted with a substitute offered from the floor to cap the national debt—or, instead, to adopt the monetarist view of the problem, by restricting the volume of paper money (and of government credit) to be allowed in circulation, etc., etc. Additionally, is there not a belittling of such a convention insofar as its agenda is authoritatively (whether by itself or by Congress) deemed to be tightly restricted? What sort of convention is it, anyway, that convenes to discuss national economics, for instance, if after all is said and done its exclusive alternatives are to vote "yea" or "nay" on a single proposition that the convention is deemed to have no authority to modify in any way?

And, again, what is to happen with the work products from a "limited" convention? If they are to be routed through Congress as the conduit by which they are then to be submitted for ratification by "the one or the other Mode of Ratification" as "Congress" is to determine (according to article V itself), what then does Congress do? Should Congress decline to submit such proposed amendments to either mode of ratification if reasonably persuaded that the convention acted *ultra vires*? The point is not that no reasonable answer can be suggested but rather that we eliminate these kinds of issues outright by accepting the interpretation you and Charles support.

So, Bruce, all in all I think there is *much* going for the view that (a) amendment conventions cannot be circumscribed; and (b) state legislative resolutions inconsistent with a convention understood to have unqualified proposing authority are not to be counted. (This second point is consistent, however, with a state legislative resolution calling for a convention even while expressing a statement of subjects which that state deems sufficient to warrant the call.) In brief recapitulation, the points are these:

1. Such a construction of article V wholly avoids difficulties that must necessarily arise under any other construction—difficulties for which there are no self-evident answers even for those who would attempt to cope with them in good faith and the mere contemplation of which itself suggests that such a construction could not have been intended and ought not be preferred.

2. Such a construction of article V regards the authority of conventions as fully equal to that of Congress (rather than as more lim-

ited). This is far more in keeping with federal principles because the means accessible to states for proposing amendments to the Constitution is as generous in its authority as the means accessible to Congress.

3. Such a construction is also in keeping with the history of the Constitution itself. No small or passing disadvantage should be thought sufficient to assemble in convention to alter the nation's fundamental charter; when sufficient need is perceived to assemble in convention, that convention may set its own course respecting the alterations it may see fit to propose. This view of the matter was, in one sense, "ratified" in Philadelphia, and the propriety of that conduct was itself "ratified" in state conventions.

4. Even though the power of a convention should appropriately be equal to the power of Congress (when convened consistent with article V), no state should be provided encouragement to solicit so important an event merely to entertain some grievance or proposal peculiar to itself. No one's "call" for a convention should be deemed bona fide by Congress unless it is plain that the call contemplates a willingness to have a truly open convention assembled—a convention capable of entertaining other kinds of amendments than that of particular or narrow interest to "triggering" states. Since article V is not simply a means of changing the Constitution, but is at the same time a deliberate constraint on the ease of doing so, each state is made to put its own interests in the Constitution "at risk" insofar as it would, on its own account, put other states (and other people) at risk by the amendments it thinks proper to propose in such a convention.

The argument I have recapitulated, borrowed in large measure from you and from Charles, might well be persuasive to Congress. Insofar as Congress may consider it sound, I think it most unlikely the Supreme Court would gainsay the congressional judgment. Even assuming the Court would deem the issue a justiciable one (when presented in an otherwise suitable test case), I would guess that there is nothing so plainly incorrect about this congressional interpretation of article V that a majority could be mustered on the Court to override the congressional view.

If this be correct, the argument would be validated in every practical sense and for every practical purpose once Congress itself becomes persuaded of its rightness and utility: not because congressional opinion alone is enough, but because the Court can be expected to yield to that opinion under circumstances where congressional opinion is not *plainly* wrong. Judicial deference presumably is greatest in respect to article V questions, as virtually all the cases suggest. In this area of judicial review, probably nothing less than Thayer's "plain error" stan-

dard of judicial review would move the Court to hold against Congress. And, again, I see no "plain" error in this argument.

If the issue is, however, not the expediency of this interpretation of article V but its rightness (as, for instance, a conscientious Member of Congress might personally wish to consider), I should feel obliged to suggest that the interpretation is unsound. The argument I have attempted to restate, whether considered as a whole or in any particular part, really does not convince me at all, not because I do not think it "convincing," but simply because I do not think it is true. Rather, my sense of things from the reading I have been doing (which, quite unfairly, I cannot put into neat citation here) is very different.

During virtually all the time the Constitution was being composed, and during the subsequent months it lay before conventions assembled in the states (except in Rhode Island, which refused to have anything to do with it at any stage), uncertainty accompanied its passage. This thoroughly eclectic instrument was marked by features very different from the lesser document it was meant to replace. It also embodied a variety of features different from the English experience. Most parts were untested in colonial or state experience; the document was not woven from any one thread of political science or classical experience. Rereading all of the principal discussions of the period, rather than merely indexed portions on article V in particular, makes plain what one otherwise might tend to forget: in many, many particulars the "workability" of the Constitution was felt to be highly uncertain. The thing is full of close compromises—the propriety of which was stoutly defended, to be sure, but the long-term suitability of which (and even the short-term consequences of which) were, admittedly, highly indeterminate.

That occasion for particular repairs might well arise almost at once was diffidently recognized. Such an occasion might depend, for example, upon the chance circumstances of what the national government might in fact be like—once transformed from paper description to protean reality. It would surely depend, too, upon the uncertain impact the conduct of that national government could have upon the states (and, more especially, on their retained home-rule powers). Such occasions might separately arise, and most obviously (as seen at the time) upon the recognized eventuality that the omission of a Bill of Rights should prove to have been an awful error—even as Jefferson insisted to be true and as was reflected in the serious misgivings of others.

Then, following proposal of the Constitution, the task of securing ratification by nine states proved nearly insurmountable insofar as the scant provisions in article I, section 9 struck many in the state conven-

tions as yielding far too little security against the possibility of self-serving interpretations Congress might presume to make of its peculiarly enumerated powers and the Supreme Court—as an agency of that same national government—might presume to sustain. Providing for modes of change was thus not lightly considered or casually arrived at: only by being persuaded that these would be ample against every contingency could doubting persons be made to think the plan safe to try at all—notwithstanding substantial sentiment that the Articles of Confederation were themselves a failure.

More to the point, the fact that no one could foresee just how responsive the untried "Congress" might be to the felt necessities for amendment meant, necessarily, that no critical reliance could be placed upon Congress as a plausible sole or even plausible best source for every kind of amendment. That the "state mode" of introducing amendments by called convention never, by itself, produced a single amendment to the Constitution does not derogate from this in the slightest. Rather, it may show only that the Congress proved to be better than expected—itself responsive with sufficient adequacy to carry into amendment every major and sustained demand for that kind of change.

The various stages of drafting through which article V passed convey an additional impression as well: that the state mode for getting amendments proposed was not to be contingent upon any significant cooperation or discretion in Congress. Except as to its option in choosing between two procedures for ratification, either "by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof," Congress was supposed to be mere clerk of the process convoking state-called conventions. Certainly it was not imagined to sit astride that process as a hostile censor, a body entitled to impose such stringent requirements upon the states as effectively to render the state mode of securing particular amendments nearly impossible. To put the matter simply, a generous construction of what suffices to present a valid application by a state, for consideration of a particular subject or of a particular amendment in convention, is far more responsive to the anticipated uses of article V than a demanding construction that all but eliminates its use in response to specific, limited state dissatisfactions.

To be sure, concern was expressed (principally by Madison) over just what Congress was expected to do in the execution of its duty to "call a Convention" when required so to do "on the application of the Legislatures of two thirds of the several States." Madison thought that far too little attention was given to that problem in Philadelphia. The Philadelphia Convention *was* itself remiss in this regard, even as all of

the writings that centered on Senator Ervin's proposed guideline legislation in the 1960s make quite clear. But neither that oversight in the Convention nor any writings suggest that anything less than a permissive construction, rather than an exclusionary one, is closest in keeping with the expected uses of this feature of article V.

In several places, moreover, it is made very plain that certain kinds of amendments state legislatures might wish to have considered by a convention would be precisely the kinds least likely to be forthcoming from Congress—indeed, the very kinds to which Congress could be expected to be hostile. Congress might prove to be a wholly reliable instrument to propose amendments occasioned by discovered shortcomings most felt at the national level. But insofar as the felt shortcoming was one of Congress' own doing (for instance, in the self-aggrandizement of its powers at the expense of state powers), a check for a specific shortcoming of that kind was the power of states to mount adequate support from like-minded legislatures elsewhere, to convoke a convention where a corrective measure might be approved, subject thereafter only to ratification pursuant to whichever mode of ratification Congress elected.

What, then, is the contemplated function of a called convention under *these* anticipated circumstances? Surely not that the only kind of appropriate (and thus legitimate) convention is one within which a complete reapprasial of the whole Constitution would be either desirable or required. Surely not that Congress could turn aside even identically phrased, single-item resolutions submitted by more than two-thirds of the states resolved to have a particular (constitutional) grievance considered in convention, by suddenly placing a wholly unexpected price tag (a "Catch 22" as it were) on that right—that unless these same states were also willing that the proposed convention consider anything else appealing to the individual fancy of some delegates, some special interests, or some other states, then Congress was at liberty to refuse to call any convention at all.

There is, in all the places I have looked, no discussion anywhere of this "Catch 22" interpretation of article V. I cannot believe that the reason for this lack of discussion is that such an interpretation was itself so widely assumed, and so widely regarded as so utterly uncontroversial, as universally to have been taken for granted. Rather, I believe it is because the very notion that such an idea would be thought of even as a possible interpretation of article V, much less as a plausible interpretation, was beyond imagination. That interpretation stands the whole matter on its head.

That a general convention, itself like the one at Philadelphia, con-

voked deliberately to undertake (in your words) "an unconditional reappraisal of constitutional foundations"[10] is the only kind of convention or even the typical kind of convention anticipated under article V strikes me as decidedly untrue. To the contrary, while allowed by article V, such a convention is the least likely to be the foreseeable object of states expected to make use of their collective authority in article V. An event most likely to provide the most expected (and legitimate) use of this power would be just that: a *particular* event, an untoward happening, itself seen as a departure from, or as a suddenly exposed oversight within, the Constitution. The event would be the kind of thing, however, Congress might not be expected swiftly to repair, especially if Congress were itself the source of the mischief; the kind of thing, rather, providing specific occasion for parallel state resolutions to consider a particular proposal (or alternative proposals) in convention at once to be called for the purpose.

In sum, on the basic issue I quite agree with the student's view stated in the *Harvard Law Review* seven years ago:

> Although it would be contrary to article V if Congress attempted to limit the scope of a convention when the states had applied for an open convention, it would seem to be consistent with, if not compelled by, the article for Congress to limit the convention in accordance with the express desires of the applicant states.[11]

So far as I would differ from this view, it is a very mild difference. It is perfectly plausible that Congress might leave all debatable degrees of germaneness to the discretion of the convention itself. When convinced that within a reasonable number of years (*e.g.*, seven) that it has in fact received applications from two-thirds of the several states requesting a call for convention consideration of a given subject of sufficient common description that further insistence for more perfect agreement among the applications would clearly be unreasonable, however, Congress *is* under a constitutional obligation to call a convention responsive in good faith to those applications.

Indeed, I think that Congress could *least* decline to call a convention if, in keeping with identically worded state legislative resolutions to this effect, the sole function of that convention would be to do no more than to deliberate and to debate the pros and cons of an exactly particularized proposal, with choice at the convention's conclusion for the delegates only to vote "yea" or "nay." If two-thirds of the state legislatures might perchance agree on the exact wording of an amend-

10. Ackerman, *supra* note 3, at 8.

11. Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1628-29 (1972) (footnote omitted).

ment they would wish to be reviewed in a called convention for discussion and vote, this would seem to me to state the paradigm case in which Congress should proceed with the call—and limit the agenda exactly in accordance with the unequivocal expressions of those solely responsible for the event. On the other hand, were Congress to presume altogether to disregard these resolutions, as though neither singly nor in the aggregate did they qualify as proper applications under article V, I should think it outrageous.

The notion that nothing may be considered by means of convention unless everything may be considered in that same convention seems to me a *non sequitur* having no basis whatever in article V. The typical convention called under article V would surely least be like—rather than most be like—*the* Convention of 1787. The most proper use, rather than the least proper use, of such a convention would be in contemplation of a fairly modest change rather than a wholesale change. That thirty-four states could be instructed by Congress that they may not resolve a common call for a convention for the sole purpose of considering a repeal of the sixteenth amendment unless they mean also to consider a repeal of the other twenty-five and of all six articles as well (and to manifest that willingness in the resolutions they submit to Congress) seems to me the ultimate in congressional cynicism. Yet all of this is explicit in the position that you and Charles have suggested. I do, as I said at the beginning, have some doubts.

Cordially,
William Van Alstyne /s/