WHO CONTROLS A CONSTITUTIONAL CONVENTION?—A RESPONSE

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Although I am pleased to have provoked such thoughtful comments from my colleague,[1] I do not agree that his objections to the thesis of my recent *Yale Law Journal* article[2] are either slight or marginal. I append this brief note to clarify the extent of the disagreement.

There are, to be sure, important points on which we agree. We agree, for example, that it would not be inappropriate for a constitutional convention to consider but a single subject and to propose a single corrective amendment.[3]

We differ quite sharply, however, with respect to a critical question: who is empowered to control a constitutional convention? Professor Van Alstyne has suggested that a group of applying state legislatures may dictate to a constitutional convention the exact text of the amendment the convention is to "propose" (if it takes any action at all). I have argued, on the contrary, that the "Convention for proposing Amendments"[4] is granted final authority under article V to define the issues to be addressed and to determine the nature and text of any amendments to be proposed for ratification.

I need not recount in detail the arguments I have previously set forth in support of this conclusion. Drawing upon the debates at the Constitutional Convention of 1787, I argued that the convention mode was created to provide a method of proposing amendments that was an alternative to proposal by Congress, but independent as well of the state legislatures.[5] I suggested that the framers' rejection of a draft plan that would have permitted state legislatures to propose, as well as to ratify, amendments was in part a reflection of the concern expressed by Hamilton and others that "[t]he State Legislatures will not apply for

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1. Van Alstyne, *The Limited Constitutional Convention—The Recurring Answer*, 1979 DUKE L.J. 985.

2. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979).

3. For a contrary view, see Aekerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8.

4. U.S. CONST. art. V.

5. See Dellinger, *supra* note 2, at 1624-30.

alterations but with a view to increase their own powers . . . ."[6] By substituting a constitutional convention for the state legislatures as a body to propose amendments, the drafters created an alternative proposing mechanism free of both the possible self-interest of Congress and the potential parochialism of the state legislatures. By leaving to the states the final authority to *ratify* all amendments, the framers carefully divided the power to amend the Constitution between state and national interests.

Professor Van Alstyne's narrow reading of the authority of a constitutional convention is reflected in his recurring references to the convention method as the "state mode"[7] of proposing amendments. But there is no "state mode" for proposing amendments created by article V; it provides, on the contrary, for a "Convention for proposing Amendments."[8] The phrase "state mode" is one which, as far as I can ascertain, was never used at the Philadelphia Convention. There was considerable discussion of the need for a method of proposing amendments that was independent of Congress. The alternative chosen, however, was proposal by a national convention, and not proposal by state legislatures.

If I am correct that a "Convention for proposing Amendments" has the final authority to determine what amendments to propose, how should Congress treat state legislative applications that may erroneously presume to predetermine the subject or even the exact text of any amendment that is to be "proposed" by the convention? The question is essentially one of construing the intent of the applying state legislature: Does the applying legislature wish its application to be counted as one seeking a convention if that convention will have final authority to determine the amendments to be proposed?

The hypothetical state application with which Professor Van Alstyne ends his correspondence obscures this critical issue, for it provides scant basis for determining whether the hypothetical legislature—which seeks a convention "for the purpose of" proposing a specific amendment—would favor or oppose calling an article V convention authorized to make its own final judgment concerning what amendments to propose. As I noted in my earlier article, "[t]he use of the phrase 'for the purpose of' is not necessarily inconsistent with recognition by the applying legislature that the convention would be free to consider other amendments."[9] Having no knowledge of the context in

6. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (M. Farrand ed. 1937).
7. *See, e.g.*, Van Alstyne, *supra* note 1, at 990.
8. U.S. CONST. art. V.
9. Dellinger, *supra* note 2, at 1637.

which this future hypothetical application might be brought forward (or of what the settled professional opinion might then be about these issues), one cannot confidently speculate about the assumptions made by such a legislature. My answer to Professor Van Alstyne's hypothetical is intended to emphasize that an application is not *necessarily* invalid simply because it is accompanied by a suggested amendment, as long as the applying legislature understands its proposed amendment only to have the force of a recommendation.

It is important to note, however, that most of the applications presently pending in the real world are free from this ambiguity. With only one or two exceptions, they apply for the calling of a convention for the *sole* and *exclusive* purpose of proposing an amendment the exact text of which is set out in the applications. These applications implicitly, and still others by express provision,[10] make it clear that they are *opposed* to a "Convention for proposing Amendments" if such a convention is empowered to determine for itself what amendments to propose. Professor Van Alstyne considers such applications to be valid. I do not.[11]

10. The North Carolina application, for example, sets out the exact text of the amendment it proposes and explicitly provides that "this application and request be deemed rescinded in the event that the convention is not limited to the subject matter of this application." N.C.S.J. Res. 5 (1979), *reprinted in* 125 CONG. REC. S1123 (daily ed. Feb. 6, 1979).

11. Professor Van Alstyne would have Congress act upon a sufficient number of such applications by calling a convention and imposing upon that convention whatever strictures of subject matter or predrafted text had been sought by 34 identical applications. I would not have Congress act upon such applications, since they call only for a convention shackled by constraints that Congress has no power to impose, and since they expressly or by implication oppose the calling of a convention on any other basis.