ENRICHMENT SERIES
Amendment By National Constitutional Convention: A Letter to a Senator

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[Introductory Note: Article V of the United States Constitution provides that "the Congress,...on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments...." This language, seemingly clear in meaning on the surface, has spawned a constitutional controversy of significant dimensions. In short, does the Article V language authorize state applications for a national Constitutional Convention limited as to subject matter, or does the Article solely recognize state applications for a general convention, to propose such amendments as seem proper to the Convention?

Recently, Professor Black wrote the following letter concerning the controversy to Senator Edward Kennedy (D. Mass.), Chairman of the Senate Judiciary Committee. The letter provides a valuable dissertation on the history and meaning of the applicable language of Article V, according to a leading constitutional scholar. In particular, the letter takes issue with the finding of a special committee of the American Bar Association that Article V authorizes Congress to establish procedures limiting a Constitutional Convention to the subject matter propounded in the state applications. The letter is reproduced as written, save for the addition of footnotes to sources cited in the manuscript.—Ed.]

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June 1, 1979

Honorable Edward Kennedy, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C.

My Dear Senator Kennedy:

About seven years ago, Senator Sam Ervin's bill,† concerning the

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processing of state-legislative applications for a constitutional convention under Article V, had passed the Senate and was in the House Judiciary Committee. At that time, I wrote a letter to the late Congressman Celler, concerning this bill, which I thought a very bad one, both as to policy and as to constitutionality. This letter was afterwards published by the Yale Law Journal, under the title, Amending the Constitution: A Letter to a Congressman.\(^2\) I enclose a copy of this composition as printed.

That letter addressed itself to the whole Ervin bill; much of it is not therefore relevant to any pressing current issue, and will not become so relevant unless some version of this bill surfaces again. But the most important question raised by the bill was the question whether state applications for a convention limited as to subject-matter were valid, and so effectively imposed an obligation on Congress to call a convention. The Ervin bill rested on the assumption that they were valid; my contention was that they were not, and that consequently no number of them could create a legal or moral obligation on Congress's part.\(^3\) This issue, as you have shown yourself to be aware, is today, or may shortly become, a live one.

I have had occasion recently to go very carefully over what I then wrote on this issue, and I stand by every word I said.

One very important development must be noted. The state of this controversy has been heavily affected by the appearance, since my letter to Congressman Celler was written, of a Report by a Special Constitutional Convention Study Committee of the American Bar Association, Amending of the Constitution by the Convention Method Under Article V (1974) [hereinafter cited as Bar Report]. This Report commits itself to the view that applications for a subject-limited convention are valid.

I have reason to believe that this Report now exerts a powerful influence. It is my view that it is deeply flawed, and entirely fails to make its case on this issue. I am sure you will agree that such a fateful question as this cannot be decided on the basis of the respective aggregate prestige of the sponsors of the respective views, but must at last be settled, rather, by the weight of argument. I intend, therefore, to give you my grounds for persevering in my former conviction. I shall not reargue the entire case, since my earlier writings are in your hands, but shall confine myself to considering new aspects either directly raised or suggested by the Bar Report.

I shall, for clarity's sake, put headings over my principal topics.

\(^2\) Black, Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189 (1972) [hereinafter cited as Black].

\(^3\) Id. at 196-204, especially 199.
Introductory

The Constitution's Article V provides for a method of amendment never till now used. "The Congress,...on the Application of the Legislatures of two-thirds of the several states, shall call a Convention for proposing Amendments...." These proposals, to become effective, must be ratified by three-fourths of the States, just as is true of proposals passing through Congress, the method of proposing always used up to now.5

Recently, many State Legislatures have passed resolutions asking Congress to call a Convention "for the purpose of proposing" some specific amendment, spelled out in detail. It now seems possible that one or more of these proposals will be the subject of convention applications from 34 States, the magic two-thirds.

We must separate our judgment on the merits of any particular amendment from our judgment on the legitimacy of the procedure. If we make a wrong precedent now, as to the meaning of Article V, we will open wide a door probably never to be closed. Before we pack our bags for this Convention, let's stop and ask "Is this trip really necessary?"

I think that the applications now on file are nullities, imposing no obligation on Congress. I think the Article V language means a "general Convention," to propose such amendments as seem good to that Convention. And I think that the state applications, to be effective, have to ask for that, and not for something radically different—a severely limited Convention. Applications asking for something other than what is meant by Article V are nullities, and thirty-four times zero is zero.

At the very least—and this is all that really must be decided now—each pending application for a Convention "for the purpose of proposing" some minutely described amendment is a travesty of anything the Framers of Article V could have conceived. Absolutely nothing faintly supports such an absurd distortion of a provision for a deliberative process. I hope Congress will not be intimidated by such "applications"; they place Congress under no obligation whatever.

"Plain Meaning" and Context

The question, first and last, is what is meant, in Article V, by the words, "...a Convention for proposing Amendments...." The best approach to ascertaining the plain meaning of these words is to ask what they would mean, without modification, in the procedural context in which they are intended to be used. Lawyers sometimes "track the statute," phrasing

4 U.S. Const. art. V.
5 Id.
allegations or prayers in the exact statutory language. Suppose a state legislature, “tracking” Article V, were to transmit to Congress a paper saying: “Application is hereby made that Congress call a convention for proposing amendments”—the exact language of Article V. Two and only two questions could arise: First, would such an application be valid. Secondly, what would it mean.

I am tempted to say that these critical questions answer themselves. But there has been so much confusion on this that I will—though embarrassed by the obviousness of what I shall have to say—go a little further.

First, the application, so worded, would of course be valid. Thirty-four such applications would oblige Congress to call a convention (provided Congress could agree on the procedural and constituency specifications—and there would be a duty resting on each member of Congress to try so to agree). That would be true exactly because Article V is “tracked.” How could it be that an application for the very thing the Article mentions, in the very words of the Article, would not be valid?

Secondly, the words used would mean “a general, unlimited convention to ‘propose’ such amendments as it thinks proper.” Since I can think of no possible basis for doubting this, I cannot know how to support this conclusion, beyond pointing to its obviousness. Perhaps one might go so far as to ask, “If not that, what would they mean?”

Observe how putting the matter this way transforms the “plain meaning” and contextual issues. We are not talking, any longer, about which of two “plain meanings” the Article V language has. Unless one is prepared to contest the answers to my two questions regarding this “tracking” application, one must start from the position that the Article V language has one plain meaning that is beyond doubt—that “a Convention for proposing Amendments,” whatever else it may mean, plainly means “a general, unlimited convention.”

Establishment of this crucial point quite changes the focus of inquiry. When we inquire now whether a state application for a limited convention asks for what Article V means, we are inquiring whether, in addition to its incontestably plain conferral, on the legislatures, of a very significant power, the power to force the call of a general constitutional convention, Article V is to be taken to give them, as well, a different power, not at all obviously meant by Article V. In an inquiry concerning correct amendment procedure, where, more than anywhere else, very clear legitimacy is requisite, I should think that great clarity of justification should be looked for before one adds, to plain meaning, another meaning far from plain.

The Bar Committee Report adopts, perhaps unconsciously, the rhetorical device of conceding that the general, unlimited convention is a
possibility, but of doing so rather off-handedly, after having fully stated its case for the limited convention.⁶ (The Report does not, so far as I can tell, explicitly bring out that the very bill before them, the Ervin bill, was unconstitutional root and branch, even on the Bar Committee’s own view, because, in its Section 2, it limited the state legislatures to asking for subject-limited conventions.⁷)

But this order of presentation has to be reversed. We start with the plain fact that Article V means at least “a general convention.” Seen from that perspective, the Report brings forth nothing near sufficiently weighty to support the addition of a second and far from plain meaning.

The Report invokes the concept of equality: “[T]he convention method...was intended to stand on an equal footing with the congressional method.”⁸ But so it stands, if Article V be taken to refer only to a general convention. Such a convention, as one of the two “proposing” bodies under Article V, would stand exactly on an “equal footing” with Congress, the other “proposing” body under Article V. The equality to be sought, as to national concerns, is an equality between the two national bodies to which the “proposing” function is given.

The Bar Report puts forward a “greater includes the less” argument, seeing “no sound reason as to why they [the state legislatures] cannot invoke limitations in exercising...” their authority to procure a convention call.⁹ (Note here the assumption that the burden of persuasion rests on the adversary, without saying why. This is hardly worthy of the Bar Association!) This argument ignores the fact—which underlies much of the Bar Report’s other reasonings—that a general convention and a limited convention are different in kind. They are as different in kind as (1) the freedom to marry; and (2) the freedom to marry one of two or three people designated by somebody else.

The Report argues that Article V must mean a limited convention, because otherwise the state legislatures would be “discouraged” from applying for conventions.¹⁰ This argument rests on a poorly concealed begging of the question. Only if we assume in advance that limited conven-

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⁷ The Bar Report, supra note 6, at 18, states: “[W]e consider it essential that implementing legislation not preclude the states from applying for a general convention. Legislation which did so would be of questionable validity since neither the language nor history of Article V reveals an intention to prohibit another general convention.” See also discussion in Black, supra note 2, at 189, 196-204.

⁸ Bar Report, supra note 6, at 11-12.

⁹ Id. at 16.

¹⁰ Id.
tions are meant by Article V is there anything improper or regrettable in legislatures' being "discouraged" by their not being available. We are all "discouraged" in some ways by the state of the law.

But—more fundamentally—what are the legislatures being "discouraged" from doing? From asking for a general convention? But the assumption of the Bar Report is that they are "discouraged" from that already, by the very nature of the general convention. From asking for limited conventions? But if that is what is meant the argument is a squirrel-cage; the very thing we are talking about is whether the legislatures are entitled at all, as a matter of law, to force the call of limited conventions. The Committee seems to be saying that, if it be held that the sound law of the matter is that Article V does not empower the legislatures to force the call of limited conventions, they will be discouraged from asking for these. Quite.

Remember, too, Senator, that the supposed "discouragement" is to arise from a fear of the very thing—a general convention—that is incontestably meant by the Article V language, provided one agrees with the arguments with which I began this section.

(There is, by the way, a startling paradox here. Since three-quarters of the state legislatures must, under the usual procedure, ratify any amendment "proposed" by a general convention, it is a little hard to explain a great fear, on the part of these same legislatures, that they may be overwhelmed by unwanted amendments. Whom are they afraid of? I leave the resolving of this paradox to those who are so vigorously supporting these state-legislature applications. The problem is only shifted by the thought, doubtless not likely of frequent realization, that state conventions may be designated by Congress as the ratifying bodies; fear of the headlong folly of such conventions is a fear of the people who will elect them. Why, indeed, is one so afraid of the general national convention? Is it well to trust any part at all of the amendment process to people who, you think, would go wild if you turned them loose?)

These Bar Report arguments are poor stuff in themselves. To put them in the context I believe to be established by the opening paragraphs of this section, they are obviously not of a weight sufficient to support a second meaning, far less than plain, in addition to the quite plain meaning of the phrase, "...a Convention for proposing Amendments..."

I stress once again that, if I am right about the meaning of the Article V language, applications for a limited convention are not applications for the thing meant by Article V, are therefore not valid Article V applications, and so impose no obligation on Congress.
The Bar Report’s treatment of these should be set out in full:

The debates at the Constitutional Convention of 1787 make clear that the convention method of proposing amendments was intended to stand on an equal footing with the congressional method. As Madison observed: Article V “equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.” The “state” method, as it was labeled, was prompted largely by the belief that the national government might abuse its powers. It was felt that such abuses might go unremedied unless there was a vehicle of initiating amendments other than Congress.

The earliest proposal on amendments was contained in the Virginia Plan of government introduced in the Convention on May 29, 1787 by Edmund Randolph. It provided in resolution 13 “that provision ought to be made for the amendment of the Articles of Union whenever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.” A number of suggestions were advanced as to a specific article which eventuated in the following clause in the Convention's Committee of Detail report of August 6, 1787: “On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose.”

This proposal was adopted by the Convention on August 30. Gouverneur Morris's suggestion on that day that Congress be left at liberty to call a convention “whenever it pleased” was not accepted. There is reason to believe that the convention contemplated under this proposal “was the last step in the amending process, and its decisions did not require any ratification by anybody.”

On September 10, 1787 Elbridge Gerry of Massachusetts moved to reconsider the amending provision, stating that under it “two thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State-Constitutions altogether.” His motion was supported by Alexander Hamilton and other delegates. Hamilton pointed to the difficulty of introducing amendments under the Articles of Confederation and stated that “an easy mode should be established for supplying defects which will probably appear in the new System.” He felt that Congress would be “the first to perceive” and be “most sensible to the necessity of Amendments,” and ought also to be authorized to call a convention whenever two-thirds of each branch concurred on the need for a convention. Madison also criticized the August 30 proposal, stating that the vagueness of the expression “call a convention for the purpose” was sufficient reason for reconsideration. He then asked: “How was a Convention to
be formed? by what rule decide? what the force of its acts?" As a result of
the debate, the clause adopted on August 30 was dropped in favor of the
following provision proposed by Madison:

"The Legislature of the U.S. whenever two thirds of both Houses shall
deam necessary, or on the application of two thirds of the Legislatures of the
several States, shall propose amendments to this Constitution, which shall be
valid to all intents and purposes as part thereof, when the same shall have
been ratified by three fourths at least of the Legislatures of the several States,
or by Conventions in three fourths thereof, as one or the other mode of
ratification may be proposed by the Legislature of the U.S."

On September 15, after the Committee of Style had returned its report,
George Mason strongly objected to the amending article on the ground that
both modes of initiating amendments depended on Congress so that "no
amendments of the proper kind would ever be obtained by the people, if the
Government should become oppressive...." Gerry and Gouverneur Morris
then moved to amend the article "so as to require a convention on applica-
tion of" two-thirds of the states. In response Madison said that he "did not
see why Congress would not be as much bound to propose amendments ap-
plied for by two thirds of the States as to call a Convention on the like ap-
lication." He added that he had no objection against providing for a con-
vention for the purpose of amendments "except only that difficulties might
arise as to the form, the quorum &c. which in Constitutional regulations
ought to be as much as possible avoided."

Thereupon, the motion by Morris and Gerry was agreed to and the
amending article was thereby modified so as to include the convention
method as it now reads. Morris then successfully moved to include in Article
V the proviso that "no state, without its consent shall be deprived of its equal
suffrage in the Senate."

As to the first paragraph in this passage: I have already dealt with the
"equal footing" point. I don't know of anything in the 1787 debates at
Philadelphia that supports the statement with which the above quotation
opens. I dare say the Bar Committee didn't either, for the Madison quote is
not from the Philadelphia records, but from the Federalist. Nor does it
weigh very much on either side of the present controversy; the origina-
tion "of the amendment of errors" might be accomplished by forcing the call
of a general convention. As to what "prompted" the "state" method, or
who on earth "labeled" it that, there is little or no evidence; the Bar
Report cites none. The last sentence of the paragraph weighs nothing on

11 Id. at 11-14.
12 See text accompanying note 8 and following, supra.
the present scale; a general convention would of course be a "vehicle of initiating amendments other than Congress," quite as well as would a limited convention. More so.

For whatever reason, the Bar Report, in mentioning the Virginia Plan's provision for amendment without the assent of the National Legislature, does not tell us that this latter provision, excluding Congress, was repeatedly postponed, by vote after vote, and never passed, so that the Committee of Detail went into session with nothing resolved on except that there should be "Provision...for the Amendment of the Articles of Union...." The suggestion that any policy at all emerges from all this would be (or is?) simply ridiculous.

The rest of the Bar Report's quoted treatment of the 1787 Philadelphia debates is of a not unknown genre of "legislative history" —the kind that tells you a few things here and there, but never quite gets down to explaining why they prove what they are obviously put forward to prove. Marching on my own feet, I will discuss first the most critical juncture, the action on September 15, 1787, by which the language now under scrutiny was added. I think it well to put before your eyes the whole (very short) episode, as reported by Madison, beginning with the Article as it stood before this language was voted in:

Art—V. "The Congress, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year 1808 shall in any manner affect the (1 & 4 clauses in the 9.) section of article 1."

Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.

Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the peo-

14 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 133 (Farrand ed. 1937) [hereinafter cited as FARRAND].
ple, if the Government should become oppressive, as he verily believed would be the case.

Mr. Govr. Morris & Mr. Gerry moved to amend the article so as to require a Convention on application of 2/3 of the Sts

Mr Madison did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.

The motion of Mr. Govr Morris and Mr. Gerry was agreed to nem: con (see: the first part of the article as finally past). 15

You will note that not only Mason but also Sherman objected to the amending article, as it then stood. The Bar Report mentions only Mason; I can’t think why. While Mason, broadly, thought amendment was too difficult under the article as it stood, Sherman thought, broadly, that it was too easy, and therefore dangerous. He feared, specifically, the amending power of the States. Why does the Bar Committee think the immediately following alteration (which was to the present form) was proposed by Morris and Gerry to meet Mason’s fears, and not to meet Sherman’s fears? As Madison immediately saw and said, the Morris-Gerry proposal did not respond to Mason’s fears at all, so far as Congress’s role went. The proposal, instead, put another body, the convention, between the state legislatures and the passage of an amendment to the Constitution. This interposition of another, nationally-oriented body might more plausibly be seen as a response to Sherman’s fears of “the States.”

In only one way was this change possibly responsive to Mason’s speech. He was, you will note, afraid that “the people” could not obtain amendments they wanted. If any one thing is certain about 1787 thinking, it is that “the people” and “the legislatures” were not thought to be the same thing—as some recent blusterings seem to assume they are. On the other hand, it was conventions that were seen as the organs of “the people.” This is why the new Constitution was sent out for ratification by conventions rather than by the legislatures. I am not guessing; this thought occurs at many points, but is best expressed by Madison, on June 5, 1787, in defending this submission to conventions: “[H]e thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.” 16 That is what he thought a convention embodied.

15 Id. at 629-30 (footnotes omitted).
16 1 FARRAND, supra note 14, at 123.
It is possible then, that the insertion of a convention mode of proposal may have been conceived as a partial satisfaction of Mason’s concern about “the people.” But if that is true, then the suggestion is not that such a body, the visible organ of “the people,” was to be led in with blinders put on by the legislatures, who were contrasted with “the people” in the discussion of the mode of ratification to be chosen for the new Constitution. Mason’s fears, if they concerned the power of “the people,” would be best answered by a provision for a general convention, wherein “the people” had most ample scope of authority.

It is to be noted, moreover, that Gerry (who co-proposed the present language) and Mason (whom it was supposed to mollify) were both, some minutes later on the same day, going to refuse to sign the new Constitution on the ground that a new “general Convention” was not to be absolutely mandatory, as they thought it should be.\(^\text{17}\) How likely is it that people so minded would be pushing on the same day for subject-limited conventions? Is it not more likely that, disappointed in not getting an absolutely mandatory second general convention, they were pushing for the next best thing—the chance to get such a general convention by legislative applications?

The only other passages of any importance concern the Committee of Detail’s August 6 provision (quoted by the Bar Report, above) and the September 10 change therein.

The Bar Report rightly sees that the August 6 proposal was for a convention, to be summoned on application of two-thirds of the legislatures, that would have final power to amend, without “ratification by anybody.”\(^\text{18}\) What the Bar Committee seems not to have seen is that, even if this provision did allow the legislatures to limit such a convention to a particular subject or proposal, the propriety of that dispensation, in the case of a convention with final power, needing no ratification, is a different thing, by light-years, from the propriety or necessity of limiting a convention whose proposals do have to be ratified. The two things have nothing to do with each other. The Bar Committee’s failure to see this is the more remarkable since it is a difference alluded to in an article they cite just at this point, and on the very page they cite.\(^\text{19}\)

Above all, the Bar Committee does not seem impressed by the fact that this August 6 proposal, on which they seem to be placing some sort of reliance, was rejected and thrown out, on September 10, on the grounds

\(^{17}\) 2 FARRAND, at 631-32.

\(^{18}\) BAR REPORT, supra note 6, at 12.

\(^{19}\) See Weinfield, Power of Congress Over State Ratifying Conventions, 51 HARRY L. REV. 473, 481 (1938), cited at BAR REPORT, supra note 6, at 42 n.21.
that it gave too much power to two-thirds of the states (Gerry)\(^20\) and that "The State Legislatures will not apply for alterations but with a view to increase their own powers" (Hamilton).\(^21\) (Gerry, be it remembered, was a co-mover of the language now in Article V.)

The most curious thing, confounding confusion, is that the phrase "for an amendment of this Constitution" (see the August 6 provision, quoted in the Bar Report, above) probably meant "for the process of amendment of..."—using the word "amendment" to mean this process of amending or its general result, rather than what we would call, in a different phrase, "an amendment to" the Constitution. I have three contemporary examples of this usage. Williamson, a delegate, wrote James Iredell, on July 22, 1787, from Philadelphia, that he hoped the whole "system" agreed on in Philadelphia "may fairly be called an amendment of the Federal Government."\(^22\) Charles Pinckney, in the South Carolina ratification debates, spoke of the aim in Philadelphia as "the formation of a new, or the amendment of the existing system."\(^23\) In Federalist No. 40, Madison refers to the Virginia proposal of the Annapolis Convention as being "towards a partial amendment of the Confederation."\(^24\) The use of the word "partial" implies that "an amendment of the confederation," without that word, would have meant "an unlimited process of alteration." By no possibility does even the phrase "toward a partial amendment," applied to the Virginia initiative for Annapolis, refer to a specific alteration. "An amendment of the Constitution" did not mean the same thing to these people as "an amendment to the Constitution"; I would be interested in seeing examples to the contrary.

Now what does all this prove? Of course, next to nothing. I have been through all this material only because the Bar Committee seems somehow to be assuming it helps their case, without ever saying how or why. I submit that my discussion destroys that assumption. And I think that some of the points I have made may help my own case a little. But the overriding fact is that, however desperately we would like to, we don't know very much about what underlay each vote in Philadelphia in 1787. The records are obviously fragmentary; it is known they became more so as the summer wore on, toward that September 15 on which the crucial vote was taken,\(^25\) two days before fatigued adjournment.

\(^{20}\) 2 FARRAND, supra note 14, at 557-58.
\(^{21}\) Id. at 558.
\(^{22}\) 3 FARRAND, at 61.
\(^{23}\) Id. at 248.
\(^{25}\) The proceedings of Sept. 15, 1787, are recorded in 2 FARRAND, supra note 14, at 621-40.
Again, I think it best to put before your eyes the short Bar Report passage:

Both pre-1787 convention practices and the general tenor of the amending provisions of the first state constitutions lend support to the conclusions that a convention could be convened for a specific purpose and that, once convened, it would have no authority to exceed that purpose.

Of the first state constitutions, four provided for amendment by conventions and three by other methods. Georgia’s Constitution provided that

“no alteration shall be made in this constitution without petitions from a majority of the counties,...at which time the assembly shall order a convention to be called for that purpose,* specifying the alterations to be made, according to the petitions referred to the assembly by a majority of the counties as aforesaid.”

Pennsylvania’s Constitution of 1776 provided for the election of a Council of Censors with power to call a convention

“if there appear to them an absolute necessity of amending any article of the constitution which may be defective....But the articles to be amended, and the amendment proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject.”

The Massachusetts Constitution of 1780 directed the General Court to have the qualified voters of the respective towns and plantations convened in 1795 to collect their sentiments on the necessity or expediency of amendments. If two-thirds of the qualified voters throughout the state favored “revision or amendment,” it was provided that a convention of delegates would meet “for the purpose aforesaid.”

*Note the similarity between this language (emphasis ours) and the language contained in the earliest drafts of Article V [footnote by the Committee].

(I have left in the starred footnote, which is on the same page as the quoted text, because it is an excellent illustration of the embarrassing in-consequence of many of the semi-reasonings in the Bar Report. The reference is to the August 6 proposal of the Committee of Detail, which I

26 BAR REPORT, supra note 6, at 14-15.
have discussed above. Note the following: First, this August 6 proposal was not a "draft" of Article V; it was a provision that was rejected, and replaced by Article V. 27 But that is the least of it, for, secondly, one reals at the idea that the mere use of the general and neutral word "purpose," in two different passages, implies that the "purposes" themselves resemble each other in any way. Thirdly, if the Committee thinks this similarity does have any probative force, what in the world do they make of the fact that the word (like the phrase containing it) is not found in the version of Article V that actually did pass and is now in the Constitution?

This footnote is typical. A hint is dropped that something is being proved or suggested by some such "evidence" as this. (If that is not the intention, why the footnote?) On anything like competent analysis, this insinuated probative force turns out to be zero. But meanwhile a cumulation of such hints creates, in the minds of the unwary, the impression that there is a rich historical foundation for the Bar Committee's conclusions. I hope you will ponder this example well.)

To turn to the text of the Bar Report, just quoted: The Georgia material cited by the Bar Committee has to do with a "convention" that is to be empowered to alter the Georgia Constitution— not merely to "propose" alterations. 28 I can't see how anyone would think that the propriety of firm instructions to a convention so empowered could have anything to do with the interpretation of a provision (in our Article V) regarding a convention that is merely to "propose." (The Bar Committee seems chronically blind on this; see above.) 29

Perhaps even stranger, however, is the fact that the ABA Committee did not turn four pages further along in Poore (their source) and note that the Georgia Constitution of 1789 (more nearly contemporary to the federal Constitution than was the one they do cite) provided:

Sec. 7. At the general election for members of assembly, in the year one thousand seven hundred and ninety-four, the electors in each county shall elect three persons to represent them in a convention, for the purpose of taking into consideration the alterations necessary to be made in this constitution, who shall meet at such time and place as the general assembly may appoint; and if two-thirds of the whole number shall meet and concur, they shall proceed to agree on such alterations and amendments as they may think proper; Provided, That after two-thirds shall have concurred to proceed to

27 See FARRAND, supra note 14, 557-59, 629-30.
28 See GA. CONST. art. LXIII (1777), at 1 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 383 (1878) [hereinafter cited as POORE].
29 See text accompanying notes 18-19, supra.
alterations and amendments, a majority shall determine on the particulars of such alterations and amendments.\textsuperscript{30}

This “convention,” even though fully empowered to amend without further need of ratification, was made a “general” convention. How can Georgia be counted as on the Bar Committee side?

The Pennsylvalnia Convention, also relied on by the Bar Report, is to be a convention empowered to change the Constitution, and not merely to propose changes.\textsuperscript{31} How, again, can the proprieties as to limitation of such a convention be thought to carry over to the Article V “convention,” whose acts must, to have effect, be ratified by three-quarters of the States?

Just flipping the pages of Poore, the authority cited by the ABA Committee, I am surprised (or perhaps when younger would have been surprised) that they didn’t go just a little further into Poore’s two volumes than they did. It might have been instructive to know, for example, that the New Hampshire Constitution of 1784—much closer in time to the federal Convention than is either of the two State Constitutions they do choose to cite—provides for the call of an unlimited convention for proposing amendments.\textsuperscript{32}

Their handling of the Massachusetts material needs special treatment; I refer you to the just-quoted part of the Bar Report.\textsuperscript{33}

Although the reference there is specific, and there is direct quotation, no citation is given. The obvious reference is, however, to Chapter VI, Article X, of the Massachusetts Constitution of 1780. Let me set out this Article, without deletions:

X. In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution in order to amendments.

And if it shall appear, by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary’s of-

\textsuperscript{30} Ga. Const. art. IV, § 7 (1789), in 1 Poore, supra note 28, at 387.
\textsuperscript{31} See P.A. Const. § 47 (1776), in 2 Poore, at 1548.
\textsuperscript{32} N.H. Const. pt. II (1784), in 2 Poore, at 1548.
\textsuperscript{33} See text accompanying note 26, supra.
fice, to the several towns to elect delegates to meet in convention for the purpose aforesaid.

And said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen. 34

When you see this whole passage it is obvious that "the purpose aforesaid" is "revising the Constitution, in order to amendments." The voters are not to be canvassed on their wishes as to one or more specific amendments, but "for the purpose of collecting their sentiments on the necessity or expediency of revising the Constitution, in order to amendments."

This is completely confirmed by the title of this Article in the 1780 Massachusetts Constitution: "Provision for a future Revisal of the Constitution."[1] 35

One will look in vain in this passage for any suggestion that the vote to be taken by the General Court is to be on anything but the general question of the "necessity or expediency of revising the Constitution in order to amendments."

This latter phrase is not natural to us, but the only meaning it can bear in the context is "in order to make amendments." Exactly this usage of the phrase "in order to" is attested in the Oxford Dictionary, s.v. "order," 28b with a 1773 example from Burke [...] in order to a treaty. "Revise" undoubtedly bears its etymological meaning, given in the Oxford Dictionary with examples before and after 1780, of "To go over again, reexamine, in order to improve or amend." 36 All this easy dictionary learning—which took me ten minutes and would have taken the Bar Association Committee ten minutes—simply confirms what would be obvious anyway—that this Article X embodies a perfectly straightforward plan for collecting the sentiments of the voters on whether the constitution needs to be looked over with a view to its amendment, and if the voters are of this opinion, the summoning of a convention with a view to its amendment. There is not a hint, anywhere, that instructions as to subject-matter are to bind such a convention, or even to be issued to it. The Massachusetts system, as embodied in the Article, not only does not fit the use the Bar Committee made of it, but is a clearcut example of provision for a general convention to be called when the people think a new look at the constitution is needed, with a view to its amendment—exactly the sort of conven-

34 MASS. CONST. ch. VI, art. X (1780), in 1 POORE, at 972.
35 MASS. CONST. ch. VI (1780), in 1 POORE, at 970.
tion I believe is mandated by our Article V. Who would have guessed this, from the chosen quotations and summary given us by the Bar Committee?

The Nineteenth Century Record

In my earlier letter to Congressman Celler, described and cited above, I said that the notion that state legislatures may limit the subject-matter in their applications for conventions was "nothing but a child of the twentieth century." I used Brickfield's tables, there cited, to establish that, until around the turn of our century, through all the turmoils until that time, nothing but general-convention applications were transmitted to Congress by the States. This, if true, is very important, because it shows that, for more than a century after the Constitution went into effect, this Article V provision was not generally understood as empowering the state legislatures to set the agenda of any convention they applied for, or to apply for a convention so limited.

The Bar Report presents data on former state applications in such a manner as to make it difficult to get at the nineteenth century pattern. But if you persevere through their material, you can see that it confirms my former statement. As far as these eyes can make out, all applications are in effect classified as "general" by the Bar Report, until 1893. There was one that year for direct election of Senators, and another such in 1895. The next subject-matter limited application was in our own century. (The Bar Report cites a source of their own, an unpublished thesis not previously known to me, which agrees with my own conclusion that the 1833 Alabama memorial, dealing with "nullification" was not really an Article V application at all. And for some reason they do not put a 1790 application for "revision of the Constitution" under the "general" category, where of course it belongs.)

Think what this means. Through the controversies over the Alien and Sedition Laws, over the Embargo, over the "internal improvements" bills, over the Bank of the United States, over the early fugitive-slave laws, not one single state legislature acted as though it thought it had the power to force Congress to call a convention limited to one of these topics. It did not

37 Black, supra note 2, at 189, 203.
38 Id. at 202-203.
39 BAR REPORT, supra note 6, at 59-69.
40 Id. at 63.
42 See BAR REPORT, supra note 6, at 67; and Black, supra note 2, at 202.
43 BAR REPORT, supra note 6, at 68.
even occur to Kentucky and Virginia, in the 1790's, when they were busy with "interposition" against what they felt to be unconstitutional actions of Congress, to go at the matter via a limited Article V convention. Even in the great nullification and slavery contests, of the 1830's and 1860's respectively, the states that submitted applications made them "general," according to the Bar Report's own sources and tabulations.

This is overpowering evidence of an original and long-continued understanding, broken (except for the two 1890's applications mentioned above) only in this century, when some state legislatures thought up a bright (and entirely self-serving) notion.

**Conclusion**

There is no good argument and no solid evidence to support the Bar Report—not enough to serve even after the Bar Committee, quite without warrant, tries to turn the question around so the burden of persuasion seems to lie on the other side. Their treatment of the 1787 Convention debates is either languid or fanciful. Nothing solid so much as tends to sustain their conclusion except the prestige of the Committee's members, and that is not enough to be decisive on a fundamental question regarding ultimate constitutional power.

I don't want to win this fight on any other ground than rightness. But it is fair to point out to you the great importance of the question. The national House of Representatives is the only body, anywhere, wherein the whole American people are represented in proportion to their numbers. The waves of pseudo-populist bilge, that would somehow identify the state legislatures with "the people," break against this rock. (This identification, moreover, would have seemed absurd to the delegates in Philadelphia, as I have already shown.) About half the American people live in nine states. Three-quarters of the states can contain as few as forty percent of the people. Anything that builds up the power of the state legislatures, counted one by one, is not a facilitation of democracy but in derogation of the American national democracy.

I am not attacking the senatorial system, which I believe in. (Indeed, I am just currently working on a defense of the senatorial pattern of representation, now under attack from another quarter.) Nor do I wish to deny to the state legislatures any power that is legitimately theirs. But the population-ratio among states now runs as high as 65 or 70 to one, between five and six times as high as the highest ratio at the coming into effect of the Constitution. A nation believing in democracy ought to think a long time, and weigh evidence and argument very carefully, before it makes a new precedent that moves further toward equating the one to the 65. And a
nation that believes itself to be a nation ought likewise to hesitate before acquiescing in the flow of new power out to 50 legislatures.

I stress the word "precedent," Man and boy, I have been fighting off these "convention" applications for a long time. And I can assure you that if this road, now only a gleam in the legislatures' eyes, is ever opened, the "budget-balancing" amendment, silly and anti-constitutional as it is, will not be the worst you will see. Not by far.

Let me add one final word, of crucial present importance: I have argued, here as in my Celler letter, for the conclusion that an Article V convention must be entirely general, and that a state application asking for something other than that is void. I fully believe in this view. But it would be quite sufficient, for now, to hold to the far more modest proposition that, at the least, an application "for the purpose of proposing" a minutely described amendment is a mere travesty of grown-up constitutionalism, and indeed of the very word "propose," as applied to a solemnly assembled national constitutional convention. Assembling a convention for such a ministerial or rigorously channelled function is a bit of foolishness one can by no stretch of fancy think the Constitution calls for. It reminds me of Henry VIII's congés d'élire, which gave cathedral chapters the "right to elect" a bishop—namely, the bishop designated by Henry VIII. I fully argued this point in a 1963 article, The Proposed Amendment of Article V: A Threatened Disaster.44 The difference between a directly quoted amendment to be "proposed," and a clearly described amendment to be "proposed," is trivial. Many of the current applications are of this kind. I hope at least that Congress will not be intimidated by these. They cannot possibly be what Article V means, and should be regarded as obviously without force.

Yours very respectfully,

Charles L. Black, Jr.
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CLB/lm
Enclosures