CHAPTER 2

CONSTITUTIONAL CONVENTION OF 1787 AND CIRCUMSTANCES SURROUNDING ARTICLE V

In the fall of 1786, a committee from five States met at Annapolis, Md., for the purpose of adjusting certain commercial differences.[1] However, because so few States were represented, the committee did not proceed with its business but recommended that a further meeting, made up of all the States, be held in Philadelphia in May of the next year.[2] Thus was initiated the Federal Convention of 1787. On February 21, 1787, Continental Congress adopted a resolution authorizing the Convention to meet—

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.[3]

When it met in Philadelphia, the main business of the Federal Convention was first embodied in a plan on the union submitted by Edmund Randolph on behalf of the Virginia delegation.[4] Randolph's 13th resolution provided for amendment whenever it would "seem necessary" and did not require the consent of the National Legislature. As originally introduced it stated:

> provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.[5]

In the Committee of the Whole, several members did not see the wisdom or propriety of making the consent of the National Legislature unnecessary. As a result, the latter part of the provision was lost,[6] and as such, was submitted to the committee on detail.[7] That committee returned what is known as the first draft of the Constitution, and in article XIX thereof provided for amendment by having the National Legislature call a convention whenever two-thirds of the State legislatures petitioned for it. Article XIX read:

> On 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.[8]

The draft was printed for the delegates and was the basic instrument used in future discussions. It, together with a record of the proceedings, was referred to another committee known as the Committee on Style and Revision.[9] Two days later the committee reported back a second draft and, as it turned out, this draft was the final one on the Constitution. After further discussion and additional revision by the Committee of the Whole, the draft, as revised, was agreed to by the delegates of all the States and was signed by all but three of the delegates.

When article XIX of the first draft was discussed by the delegates, it was agreed to unanimously.[10] However, in the second draft

Mr. Gerry moved its reconsideration on the ground that, as the Federal Constitution was to be paramount to State constitutions, any provision which permitted two-thirds of the States to obtain a convention, and thus subvert and change State constitutions, might not be proper.[11] Alexander Hamilton seconded Gerry's motion, but for another reason. Hamilton objected to the present form of the article because he did not believe the proposed manner for introducing amendments was adequate. He thought there should be an additional method. The National Legislature, in his view, would be the first to perceive the necessity of amendments and should, therefore, also be empowered, when two-thirds of each branch of the National Legislature concurred, to call a convention.[12] In addition, he pointed out that it would be essential to provide an expeditious method for amending the new document and not to rely on the State application process alone to remedy defects which Hamilton thought were very soon to become evident in the fabric of the new government. He also thought that if the article was not changed "the State legislatures will not apply for alterations but with a view to increase their own powers."

The Convention proceeded to study several measures (proposed by Roger Sherman, of Connecticut, and James Wilson, of Pennsylvania) which would have injected the National Legislature into the process for proposing amendments, but discussion was postponed in order to take up a proposition moved by Madison. Madison's proposal left proposed amendments entirely in the hands of the National Legislature either (1) upon application of two-thirds of the several States or, (2) when deemed necessary by two-thirds of both Houses of Congress. This proposal read:

> The Legislature of the U— S— whenever two-thirds of both Houses shall deem necessary, or on application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid for 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.[13]

The Madison proposal, except as modified by provisions added at the end thereof to pacify the protests of slavery interests, was finally accepted.[14]

The Committee on Style and Revision reported back the article as article V. It read:

> 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 and sections of article.[15]

Considerable discussion was had on the article in this form before final agreement was reached. Objections were made to the provisions which would give the Congress plenary powers over the amending procedure. On the motion of Gouverneur Morris and Elbridge Gerry, the article was amended so as to require that a convention be called upon application of two-thirds of the States.[16] This amendment was adopted over the misgivings of Madison who "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 a convention on the like application"and who pointed out that in constitutional conventions "difficulties might rise as to the form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided." [17]

After a further amendment, in the nature of a proviso, was adopted which was a protective measure urged by the smaller States and which stated that no State without its consent was to be deprived by the article of its equal suffrage in the Senate, the final drafting of article V was completed and it emerged from the 1787 Convention in its present form.

There can be no doubt that article V of the Constitution, like so many of the other articles, was promulgated in an atmosphere of compromise. As noted in a staff report [18] of the House Committee on the Judiciary:

> those who feared that the efforts of the States to modify the basic document to meet arising exigencies would be ineffectual or that the State legislatures by the amending process, would seek only to aggrandize their own powers, were comforted by the provision authorizing the National Legislature to offer amendments upon concurrence of two-thirds of both Houses of Congress. Conversely, delegates who were disquieted less a small coterie in the Federal Legislature rule the Nation from a distant Capitol totally unresponsive to the needs and desires of the States were relieved by the fact that it would be mandatory upon Congress to call a Constitutional Convention upon receipt of applications for such proceedings from two-thirds of the State legislatures.

CITATIONS

[1] New York, New Jersey, Pennsylvania, Delaware, Virginia (Elliott's Debates (1937 facsimile of 1836 ed.), I, 116–117).
[2] Ibid., p. 118.
[3] Ibid., p. 120.
[4] Farrand, The Records of the Federal Convention of 1787 (Rev. ed.; 1937), I, 20–23. Sitting as a Committee of the whole, the convention discussed and modified the Randolph Plan or Resolution (Virginia Plan). The Randolph Resolutions, as altered and agreed to, were reported from committee. Thereafter William Patterson submitted the so-called New Jersey plan and moved its substitution for those of Randolph's (Farrand, I, 242–245). However, the Committee of the whole voted to re-report without alteration the modified Randolph Plan (Farrand, I, 322). This plan was discussed in the convention, and a recess was taken to permit the Committee on Detail to conform the resolutions to reflect the action taken by the convention (Farrand, II, 128). The Committee reported back the first draft of the proposed Constitution (Farrand, II, 177–189).
[5] Ibid., I, 22.
[6] Ibid., I, p. 202–203.
[7] Ibid., I, p. 237; II, p. 85.
[8] Ibid., II, p. 188.
[9] Ibid., II, p. 556.
[10] Ibid., II, p. 467–468.
[11] Ibid., II, p. 557–558.
[12] Ibid., II, p. 558.
[13] Ibid., II, p. 559.
[14] Ibid., II, p. 559–560.
[15] Ibid., II, p. 602.
[16] Ibid., II, p. 629–630.
[17] Ibid., II, p. 630–631.
[18] U. S. Congress, House, Committee on the Judiciary, Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates, 82d Cong., 2d sess., 1952, p. 4.

CHAPTER 3

HISTORICAL DEVELOPMENT UNDER ARTICLE V SINCE ADOPTION OF CONSTITUTION

In accordance with the provisions of article V, amendments to the Constitution may be proposed in two ways:

(1) by Congress, whenever two-thirds of both Houses deem it necessary; and

(2) by Convention, called by Congress upon the application of the legislatures of two-thirds of the States.

Of the two methods, only the first has ever been attempted and successfully employed. Concerning the latter method, at least two-thirds of the States have, at one time or another, made application to the Congress for a convention.[1] Petitions calling for a convention were filed with the Congress as early as 1789,[2] 2 years after the Convention in Philadelphia. At that time, the States of New York and Virginia, through their respective State conventions which were convened for the purpose of ratifying the then proposed United States Constitution, submitted to the Congress, along with their notices of ratification, certain proposed amendments in the nature of a bill of rights.[3] No constitutional convention was convened by the Congress, however, and in fact, Congress negated the problem by presenting, pursuant to the first method, above, a joint congressional resolution containing the amendments, which comprise the Bill of Rights, to the States for their approval.[4]

The next petitions seeking conventions were from Georgia, South Carolina, and Alabama in 1833. These States applied to Congress for a convention looking toward amending the Constitution so as to settle certain disputed powers.[5] Their petitions were entered on the Senate Journal, but no further action was ever taken.

In the days immediately preceding the Civil War, five State legislatures petitioned for the calling of a Constitutional Convention to revise the Constitution.[6] These petitions were an attempt to restore and preserve peace in the Union and sought to forestall the impending break by the Southern States by taking—

> * * * into consideration the propriety of amending the Constitution so that its meaning may be definitely understood in all sections of the Union; * * *.[7]

While the applications were submitted to and received by the Congress, no further action was taken. In all, the foregoing 10 petitions constituted the entire output for the first hundred years of our Federal Government under the United States Constitution.

In 1893, the Nebraska Legislature applied to Congress for a convention to consider an amendment which would authorize the direct election of Senators.[8]

Between that date and 1911 a total of 73 petitions relating to the election of Senators were adopted by 31 State legislatures.[9] This was the largest number of petitions recorded calling for a convention on a particular subject. The second largest number concerned the Federal

power over the taxation of incomes on which 32 applications have been submitted by 27 States.[10] Beginning with New York in 1906, 27 States have petitioned for a convention on the subject of prohibiting polygamy, and 29 petitions from 22 States have sought a general revision of the Constitution without specifying a particular subject.[11] These are the four subjects on which the greatest number of petitions have been received.

From 1 to 8 petitions have been presented to Congress on a wide variety of subjects, including world federal government, limitation of Presidential tenure, repeal of the 18th amendment, taxation of tax-exempt securities, regulation of hours of labor and minimum wages by Congress, treatymaking, and methods of apportionment.[12] In all, there have been over 195 petitions in the last 60 years—as distinguished from 10 in the first 100 years—of our Nation. However, many of the petitions adopted since the turn of this century represent second and third petitions from several of the State legislatures, and some legislatures have rescinded their earlier actions.[13]

There can be no doubt that many petitions in the past were initiated, not in the belief that Congress would convene a Constitutional Convention, but in the hope that the petitions would spur Congress to adopt a suggested proposal as its own and submit it to the States for ratification under the first method of amending the Constitution. One such undertaking in particular (the 17th amendment calling for the popular election of Senators) proved very successful. The 17th amendment was, of course, initiated by the Congress, but between 1894 and 1902, the Senate had four times blocked passage of resolutions adopted by the House for this purpose.[14] Only after a considerable number of State petitions calling for a Constitutional Convention had been received did the Senate finally concur in a joint resolution which submitted the then proposed 17th amendment to the State legislatures for their approval.

The history of State petition procedure indicates that it is by far the simpler method for advocates of an amendment to concentrate their efforts on having Congress, by a two-thirds vote of both Houses, initiate a proposed amendment under the first method.

In recent years, however, there has been underway another State petitioning movement seeking a convention to amend the Constitution. Prior to World War II agitation commenced for a tax limitation amendment. Its sponsors sought to have Congress propose an amendment for State ratification, and being unable to obtain substantial aid in Congress, they launched a drive enlisting State aid, through the State petitioning process, to bring about a Constitutional Convention. By the end of 1944, 17 States had petitioned the Congress calling for a Constitutional Convention with the purpose of amending the Constitution so as to limit income taxes.[15] Congressmen, when the movement reached the above proportions, became concerned. World War II had put a great strain on the Federal Treasury and through the efforts of Members of Congress and various Federal officers, seven States withdrew their petitions.[16] While World War II and the need for high taxes thus quelled the urgings of the advocates of tax limitations, strangely enough the prospect of higher taxes, caused by the Korean conflict, instead of quelling, only brought

greater and renewed efforts for the tax limitation amendment. In 1951, 7 States approved the proposal of a convention [17] and by the end of May 1957 Congress had received, in all, 32 petitions from 27 States seeking a convention to amend the Constitution so as to limit the Federal taxing powers. However, as pointed out in the introduction to this thesis, there is a great disagreement on what constitutes a valid effective petition and how petitions are to be counted. These, among others, are the problems discussed at length in later chapters.

CITATIONS

[1] See Table I, appendix.
[2] U. S., Congress, House, 1st Cong., 1st Sess., 1789, House Journal, pp. 29–36; U. S., Congress, House, 54th Cong., 2d Sess., 1897, House Doc. 353, Pt. 2, p. 310, Nos. 125, 126.
[3] U. S., Congress, House, 1st Cong., 1st Sess., 1789, House Journal, pp. 32, 34.
[4] U. S., Statutes at Large, 15, pp. 21, 22, 97, 98 (1789); U. S., Congress, House, 83d Cong., 1st Sess., 1953, House Doc. 211, p. 16.
[5] U. S., Congress, Senate, 22d Cong., 2d Sess., 1833, Senate Journal, pp. 65–66, 83; U. S., Congress, House, 54th Cong., 2d Sess., 1897, House Doc. 353, Pt. 2, pp. 282, 345, App. Nos. 625, 625a, 625b. Georgia sought an amendment concerning the personal rights of Indians, South Carolina sought to define more definitely the powers of the State and Federal Governments, Alabama petitioned for a convention to consider the proposal of amendments.
[6] Kentucky, U. S., Congress, Senate, 36th Cong., 2d Sess., 1861, Senate Journal, p. 189, 190; Indiana, Ibid., pp. 420, 421; Virginia, Ibid., p. 149; Illinois, Laws of Illinois (1861), p. 281; Ohio, Laws of Ohio (1861), Vol. LVIII, p. 181. (See also U. S., Congress, House, 54th Cong., 2d Sess., 1897, House Doc. 353, Pt. 2, pp. 360–365, App. Nos. 873, 900, 940a, 970, 970a.)
[7] U. S., Congress, Senate, 36th Cong., 2d Sess., 1861, Senate Journal, p. 420.
[8] See Tables 1 and 2, appendix.
[9] See Table 2, appendix.
[10] See Tables 2 and 3, appendix.
[11] See Table 2, appendix.
[12] See Table 2, appendix.
[13] See Tables 1, 3, and 5, appendix.
[14] Wheeler, Is a Constitutional Convention Impending, 21 Illinois Law Review, 782, 786 (1927).
[15] See Tables 3 and 5, appendix.
[16] Statements of Representative Wright Patman, 91 Cong. Rec. 7236–7239 (1945); 97 Cong. Rec. 10070–10072 (1951); Table 5, appendix.
[17] See Tables 3 and 5, appendix.

PART II

VALIDITY OF STATE APPLICATIONS REQUESTING CONGRESS TO CONVENE A CONSTITUTIONAL CONVENTION

CHAPTER 4

ACTION OF GOVERNOR ON STATE APPLICATIONS

Insistence that the convention clause of Article V is mandatory raises many questions concerning the validity of applications calling for a convention. One involves gubernatorial consent. How, for example, shall Congress classify the petition from the State of Pennsylvania which was vetoed by its Governor.[1] Article V states that Congress shall call a convention on the application of the "Legislatures of two-thirds of the several States" and there is no indication, from the language of the article, whether the term "legislature" means action solely by the legislative houses of the States or whether it includes the established channels for statutory enactments, including the assent of the governors.

In deciding whether gubernatorial action affects the validity of a State application, it is necessary to determine the meaning of the word "legislatures" as set out in article V providing that:

> The Congress * * * on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments * * *,

The word "legislature" is used 13 times in the Constitution as originally adopted and 7 times in its amendments.[2] However, the term "legislature" in different circumstances does not always imply, as noted in Smiley v. Holm,[3] the performance of the same function. Ordinarily, the legislature acts as the lawmaking body in each State government. Under the Federal Constitution, it performs additional duties. It was intended to act, as noted in the Smiley case, as an electoral body, under article I, section 3, in the choice of United States Senators, prior to the adoption of the 17th amendment; as a ratifying body, under article V, with respect to proposed amendments, and as a consenting body, with regard to the acquisition of lands by the United States under article I, section 8, clause 17.[4]

Wherever, therefore, the term "legislature" is used in the Constitution, it is necessary to consider the nature of the particular action in view. Legislatures, in calling upon Congress to convene a convention, would not seem to be acting in the exercise of a lawmaking power but as agencies of the Federal Government, discharging a particular duty in the manner which the Constitution requires.[5] The matter of a Federal constitutional convention pertains exclusively to Federal affairs—not State domestic issues—and State legislatures, in soliciting the Congress, would be acting as representatives of the people of the State under the power granted by article V. The article

therefore imports a function different from that of lawmaker and renders inapplicable the conditions which usually attach to the making of State laws. Furthermore, the Constitution speaks as of the time it was adopted, and in the beginning very few of the original States granted the veto power to their governors.[6]

As further indicia that action by governors was not intended, the Constitution uses the terms "executives" and "legislatures" in its text, and both terms were well-understood expressions. Article I, section 3, clause 2 gave the "executive" of the State authority to fill, temporarily, vacancies in the office of Senator,[6a] and article IV, section 3, clause 1 forbids the formation of new States by the junction of two or more States or parts of States without the consent of the "legislatures" of the States concerned. In fact, the Constitution expressly identifies the members of State legislatures and requires members of the several State legislatures to support the Constitution.[7] Article IV, section 4, guarantees the protection of every State against domestic violence on the application of the "legislature" or of the "executive" when the legislature cannot be convened. If the framers of the Constitution had intended that "legislature" include gubernatorial action, it could have used the word "State" which could include the governor, or some other expression such as "the legislature with the approval of the executive." Both terms are in no way novel, and both are used in other provisions of the Constitution.

The functions of a legislature as contained in article V are at odds with the ordinary duties of a deliberative body in conducting its statutory business. By way of analogy, the Supreme Court, speaking of ratifications of amendments by State legislatures, stated [8] that—

> * * * ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.

By the same reasoning, it would follow that the application process, like ratification, would fall within the same category as a select proceeding under article V.

Another Supreme Court decision which would seem to remove the executive branch of the State government from participation in the application process is Hollingworth v. Virginia.[9] In that case it was argued that the 11th amendment was invalid in that the joint resolution passed by the Congress proposing the measure to the States was never submitted to the President of the United States for his approval. In a footnote to the case, Mr. Justice Chase rejected the contention that the President's approbation was necessary by stating to the Attorney General:

> There can, surely, be no necessity to answer that argument. The 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.[10]

It therefore would not be incongruous to conclude that since the President has no functions to perform in the submission of amendments to the States for ratification, the actions of State governors, similarly, are unnecessary in the application process under article V. Ames states that: [11]

> The most reasonable view would seem to be that the signature of the chief executive of a State is no more essential to complete the action of the legislature

upon an amendment to the Federal Constitution than is that of the President of the United States to complete the action of Congress in proposing such an amendment.

CITATIONS

[1] Pennsylvania Session Laws (1943) p. 922; Montana's Governor vetoed a petition relating to income tax but the petition sought congressional action under the first method of amendment and not a convention. Montana House Journal (1951) pp. 596–597.

[2] U. S., Constitution, Art. I, sec. 2, cl. 1; U. S., Constitution, Art. I, sec. 3, cl. 1. U. S., Constitution, Art. I, sec. 3, cl. 2 (twice). U. S., Constitution, Art. I, sec. 4, cl. 1. U. S., Constitution, Art. I, sec. 8, cl. 17. U. S., Constitution, Art. II, sec. 1, cl. 2. U. S., Constitution, Art. IV, sec. 3, cl. 1. U. S., Constitution, Art. IV, sec. 4, (twice). U. S., Constitution, Art. V, (twice). U. S., Constitution, Art. VI, cl. 3. U. S., Constitution, Art. XVII, cl. 1. U. S., Constitution, Art. XVII, cl. 2 (twice). U. S., Constitution, Art. XIV, sec. 2. U. S., Constitution, Art. XIV, sec. 3. U. S., Constitution, Art. XVIII, sec. 3. U. S., Constitution, Art. XX, sec. 6.

[3] 285 U. S. 355, 365 (1932).

[4] Smiley v. Holm, Secretary of State, 285 U. S. 355, 365–366 (1932), citing Hawke v. Smith No. 1, 253 U. S. 221, 231 (1920); Leser v. Garnett, 258 U. S. 130, 137 (1922).

[5] Cf. Hawke v. Smith No. 1, 253 U. S. 221, 230 (1920).

[6] Only two states had veto powers by the chief executive, Massachusetts and New York—Massachusetts, Constitution (1780), chap. 2, sec. 1, Thorpe, American Charters Constitutions and Organic Laws, III, 1909; Laws of New York (1789), chap. 11.

[6a] Clause 2 was changed by clause 2 of the 17th amendment but the term "executive" was again used.

[7] U. S., Constitution, Art. VI, cl. 3.

[8] Hawke v. Smith No. 1, 253 U. S. 221, 229 (1920).

[9] 3 Dall. 376 (U. S. 1798).

[10] Ibid. p. 380.

[11] U. S., Congress, House, 54th Cong., 2d Sess., 1897, House Doc. 353, pt. 2, p. 298 (1897), Ames, The Proposed Amendments to the Constitution of the United States During the First Century of its History, p. 298.

CHAPTER 5

CONGRESSIONAL POWER TO REGULATE STATE APPLICATION PROCEDURE

Another issue pertaining to State applications is whether Congress may regulate the procedures of State legislatures in proposing constitutional conventions. As noted earlier the amending power conferred by article V of the Constitution is manifestly a Federal function in which the States take part in proposing constitutional conventions and ratifying amendments.[1] At the same time, however, State legislatures are not subject to absolute congressional control. While the act of petitioning or ratifying is a Federal function, the legislature performing the act is nonetheless the State legislature and a clear distinction must be kept in mind between acts which are necessary and proper for Congress to carry out constitutional requirements, and those which in any way seek to restrict the freedom of action of State legislatures. Certainly, Congress may not dictate to the States what they may or may not suggest in proposing a constitutional convention or when they may propose it. Such action would be beyond the scope of article V, either expressed or implied.

Nor may Congress pick the legislature which is to ratify its proposals. In 1866, for example, when the 14th and 15th amendments were under consideration in the United States Senate, resolutions were offered, providing among other things, that the amendment be submitted, not to the State legislatures then in session, but to future legislatures. These proposals were defeated.[2] It was pointed out that the Constitution referred to those legislatures in existence at the time the amendment was submitted. If they failed to act upon the proposal, it was possible that future legislatures may, but Congress had no right to withdraw the power from the existing legislatures and say, that those in existence in 1869 shall not act upon it, but those of 1870 or 1872 may act.[3] While Congress may, as will be discussed later, set a reasonable time within which States must ratify amendments, it appears that it is without power to choose a future legislature or a session of a legislature. This is for the reason that article V provides generally, and without restriction, that amendments become effective when ratified by the legislatures of three-fourths of the States. To permit Congress to so restrict State legislative action would be a misconstruction of article V.

When the Founding Fathers framed the Constitution of 1787, they did so against the background of State laws and legislatures and customs which were already in existence. When they wrote the Constitution they made provision for those laws and they recognized State legislatures as bodies in being. Cooley, in his book on constitutional limitations,[4] points out that when a constitution is adopted there are in existence at the time of adoption known and settled rules and usages, which form a part of the law of the State or Nation, in reference to which their constitutions are evidently framed, and where

the usages and rules require the observance of certain forms and procedures, the constitution itself will also be understood or interpreted as requiring them, because in assuming their existence and being framed with reference to them, it in effect adopts them as part of its provisions as though they had been expressly incorporated therein.[4]

Where, for example, the legislative power is to be exercised by two houses, and by settled and well-understood parliamentary law, these two houses are to hold separate sessions for their deliberations, and the determination of one upon proposed legislation is to be submitted to the other for separate determination, a constitution in providing for two houses, speaks with reference to the settled custom, incorporating within it, so to speak, a rule of constitutional interpretation, so that it would require no prohibitory clause to forbid the two houses from combining in one, and, jointly enacting laws by the vote of a majority of all.[5]

In addition, the customary rules of order and routine, such as every deliberative body must have, are always understood to be under its control, and subject to change at its will. Historic precedents leave to the discretion of the legislative bodies, the choosing of their officers,[6] the determination of their rules of proceedings,[7] and the election and qualification of their members.[8] These bodies also have always had the recognized power to punish their own members for disorderly conduct and other contempts of their authority.[9]

It would seem only proper that such powers should rest with the body immediately interested, so that its members may proceed with their deliberative functions without being subject to undue delay and interruption and confusion.[10] These rights have been developed over the years through socalled "parliamentary precedents."

Legislatures, furthermore, must of necessity be allowed to proceed in their own way, without interference, in the collection of information necessary for the proper discharge of their functions.[11] When deemed desirable to examine witnesses, the legislatures must have the power and authority to seek them out. So also with regard to the voting of legislatures, otherwise Congress would be able to tailor and reorganize those bodies to its own liking, and to dictate procedure to congressional advantage.

Under the rule of Field v. Clark [12] procedural requirements in the passage of legislation are deemed to have been properly met when the legislation is certified correct by the presiding officers. Only the legislators themselves may question whether a bill has been duly enacted into law, and their acquiescence in the record of the legislative proceedings is deemed to be an acknowledgment that the legislative requirements to the passage of the act have been performed. Once performed, such action cannot be questioned even by the courts, though there may be patently an error (omission or otherwise) in the legislation itself. This is so even though the constitutional and legislative requirements are capable of judicial investigation and decision. While mindful that the courts have the duty to enforce constitutional provisions relating to the passage of laws, the United States Supreme Court in the Field case, nevertheless held that the courts should not seek to go behind enrolled acts which carry the solemn assurances of both legislative houses, through the certification of their presiding officers, and the executive, that the legislation has passed.[13]

The Court, in the Field case, classified this problem as a "political question" [14] and stated that the respect due a coordinate branch of the Government required the judiciary department to accept the assurance as evidenced by the authentication that the legislation was validly enacted into law. In engrossing the bill a clause known as section 30 relating to a rebate of taxes on tobacco, which was shown in the journals of both Houses of Congress to have been regularly passed, was omitted in the engrossed bill. This bill was signed by the presiding officers of Congress and approved by the President. In holding that it would not go in back of the enrolled bill the Court pointed out that the evils which could result from accepting an authenticated act as conclusive evidence that it was passed validly by Congress would be far less than those that would certainly result from a rule making the validity of an enactment depend upon the manner in which the journals, and other materials, are kept by legislative clerks and other subordinate officers.

While no doubt Congress could defeat the internal workings of State legislatures by simply refusing to recognize their actions if they did not comply with congressional mandates, it would be more prudent in the light of court decisions and historical precedents to recognize the established rule that deliberative bodies have the right to regulate their own proceedings and to accept State applications when certified to, as having been validly adopted.

CITATIONS

[1] Hawke v. Smith No. 1, 253 U. S. 221, 230 (1920), chapter 4, supra.
[2] Ames, The Proposed Amendments to the Constitution of the United States During the First Century of its History, pp. 288–290.
[3] Cooley, A Treatise on Constitutional Limitations (8th ed.; 1927).
[4] Ibid., I, p. 267.
[5] Ibid., p. 267.
[6] In Re Speakership, 15 Col. 520 (1891).
[7] French v. Senate, 146 Calif. 604 (1905).
[8] The People v. Mahaney, 13 Mich. 481 (1865).
[9] While many State constitutions expressly provide for such authority, such authorization is not necessary, since it is believed to exist in the legislatures whether expressly conferred or not. It is "a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be affected by a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language." And, "independently of parliamentary customs and usages, our legislative houses have the power to protect themselves by the punishment and expulsion of a member." (Hiss v. Bartlett, 3 Gray (Mass.), 468, 473, 475 (1855); see also French v. Senate, 146 Cal. 604, 80 Pac. 1031.)
[10] Cooley, A Treatise on Constitutional Limitations (8th edition; 1927), I, 270–271.
[11] Tillinghast and Arthur v. Carr, 4 McCord 152 (S. C. 1829).
[12] 143 U. S. 649 (1892); see also Kelley v. Marron, 153 Pac. 262 (1915).
[13] Field v. Clark, 143 U. S. 649, 671–672 (1892).
[14] See chap. 12 for a discussion of "Political Questions."

PART III

CONTROL OF CONSTITUTIONAL CONVENTIONS

CHAPTER 6

POWER OF CONGRESS TO BIND A FEDERAL CONSTITUTIONAL CONVENTION AND TO RESTRICT THE SCOPE OF ITS DELIBERATIONS

Probably the most vital question relates to the power of the Congress to bind a constitutional convention, or, to put it another way, the power of the convention to nullify or ignore congressional acts seeking to restrict the scope of its deliberations. Assuming the right of the Congress, for example, to call a convention into being, has it the further right to impose restrictions upon its actions, to dictate to the convention its organization and modes of procedure; in short to subject it to the restraints of legislative law?

Those who deny that Congress has the power to bind a convention rely heavily on the so-called doctrine of "conventional sovereignty." According to this theory, a convention is, in effect, a premier assembly of the people, a representative body charged by the people with the duty of framing the basic law of the land, for which purpose there devolves upon it all the power which the people themselves possess. In short, that for the particular business of amending and revising our Constitution, the convention is possessed of sovereign powers and therefore is supreme to all other Government branches or agencies.[1]

On the other hand, those who assert the right of the Congress to bind a convention contend that the convention is, in no proper sense of the term, a sovereign. It is, they argue, but an agency employed by the people to institute or revise fundamental law. While there may be a special dignity attaching to a convention by reason of its framing fundamental law, no such dignity or power should attach which would invest it with a primacy over other branches of government having equally responsible functions. A constitutional convention has the general characteristics of a legislature, but with the functions and organization only of a committee. Since its assembling is infrequent and dependent, for the most part upon considerations of expediency, it follows that the Congress, whose function it would be to declare and enforce the expediency, would be the proper body to determine the time and conditions for its assembling and to announce the will of the people in relation to the scope of the business committed to the convention.

Before considering the power and scope of a constitutional convention, it is important to distinguish between a revolutionary convention and a constitutional convention. The revolutionary convention, as its name implies, is part of the apparatus of a revolution. Jameson says it consists of those bodies of men who, in times of politi-

cal crisis, assume, or have cast upon them, provisionally, the function of government.[2] They either supplant or supplement the existing governmental organization:

> The principal characteristics of this species are, that they are *dehors* the law; that they derive their powers, if justifiable, from necessity,—the necessity, in default of the regular authorities, of protection and guidance to the commonwealth,—or, if not justifiable, from revolutionary force and violence; that they are possessed, accordingly, to an indeterminate extent, depending on the circumstances of each case, *of governmental powers*; finally, *that they are not subaltern or ancillary to any other institution whatever, but lords paramount of the entire political domain.* [Italics in original.][3]

A constitutional convention, on the other hand as its name implies, is constitutional; not simply having for its object the framing or amending of constitutions, but as being within rather than without the pale of fundamental law. It is, says Jameson, "ancillary and subservient and not hostile and paramount to" the government then existing:[4]

> Its principal feature, as contradistinguished from the revolutionary convention, is, that at very step and moment of its existence, it is subaltern,—it is evoked by the side and at the call of a government preexisting and intended to survive it, for the purpose of administering to its special needs. It never supplants the existing organization. It never governs. Though called to look into and recommend improvements in the fundamental laws, it *enacts* neither them nor the statute law; and it performs no act of administration.[5] (Italic in original.)

It is clear from the foregoing that conventions, whose definitions thus mutually exclude each other, cannot be the same. A constitutional convention appointed under law and the Constitution, which presumes to overpass the limits imposed upon it by its creators, and seeks to do acts requiring the exercise of revolutionary powers, ceases to be a constitutional convention and becomes in the eye of law an extralegal or revolutionary convention.[6]

It might be well to note at this point that while the constitutional convention of 1787 acted beyond the scope of its authority, the Congress itself ratified and consented to the action of the convention and, in fact, transmitted its proposals to the States for their ratification. At no time did the convention seek to bypass or overrule the Congress; rather it submitted the draft Constitution to the Congress for its consideration and approval.[7]

Most authorities agree that a constitutional convention, once convened, would be limited by article V. The real area of disagreement is whether a convention would be further limited by the conditions set forth in a congressional act calling it together. Those who do not think a convention would be limited, point out that a convention ought to be independent of Congress—free, even to alter the powers of Congress itself under the Constitution. They offer the argument that it was fear of this contention which caused the Congress, after much pressure had been brought to bear on it for a constitutional convention, to adopt instead, under the first method, the proposal which resulted in the 17th amendment to the Constitution on the popular election of Senators. Many argue that if Jameson's theory of an ancillary and subservient convention was valid, the Congress would have had no need to fear the then proposed constitutional convention in that Congress could have restricted the convention in its work and, among other things, prohibited it from dealing with the question of senatorial elections (art. I, sec. 3). In adopting the first

alternative method in the amending process, they urge that the Congress, in fact, conceded it could not control the scope of a convention's proceedings.

This whole matter, of course, can be dismissed as being more argumentative than decisive. The Senate took the easy way out and avoided the issue. Whatever its merits, it can hardly be said that the Congress, in proposing the 17th amendment to the States, decided this all-important issue.

While this question, then, has never been directly decided by Congress or by the courts, it seems that the whole scheme, history, and development of our Government, its laws and institutions, require the control of any convention and the most logical place for exercising that control would be in the enabling act convening it, or in some other Federal statutory law. Under article V, Congress calls the convention after the required number of states have submitted petitions. It has the duty to announce the will of the State legislatures in relation to the scope of the convention's business and, under the necessary and proper clause, it may set up the procedures and conditions so that the convention may not only function, but that it may control the convention's actions to make certain that it conforms to the mandates and directives of the Congress, the State legislatures, and ultimately the people. This does not mean that the convention may not exercise its free will on the substantive matters before it; it means simply that its will shall be exercised within the framework set by the congressional act calling it into being.

Dodd has no doubt on this question. He points out that a convention does not supersede the existing government; it "is bound by all restrictions either expressly or impliedly placed upon its actions by the Constitution in force at the time." [8] In the case of our Federal Constitution, a new Constitution as proposed by a convention certainly could not become effective until promulgated and, in accordance with article V (which permits Congress to select the mode of notification), ratified by the legislatures of three-fourths of the States. A convention then is an instrument of government and acts properly only when it stays within the orbit of its powers. Since the Congress is the branch of the Federal Government which has the duty of calling the convention, and since it acts at the requests of the States, and since both, in the final analysis, represent the people, the ultimate source of all power, a Federal constitutional convention, to act validly, would necessarily have to stay within the designated limits of the congressional act which called it into being.

"Necessary and proper" clause

Inherent in all questions concerning constitutional law is one relating to the effect various Articles of the Constitution have on each other. Article V is no exception and must be read and viewed in the light of all the other provisions of the Constitution.

In connection with congressional power, a provision which affects substantially all provisions is the so-called necessary and proper clause.[9] It reads:

> [The Congress shall have Power] * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

By its terms there is conferred upon Congress:

(1) the power to make all laws which shall be necessary and proper for carrying into execution all powers which had previously been conferred and, in addition, (2) all other powers vested by the Constitution in the Government of the United States * * *.[10]

This clause has been declared to be an enlargement of the powers granted to Congress and enables it to select the means necessary [11] to effectuate those powers. Thus since Congress, under article V must call the convention, it of necessity must have the power to fix the date and place of meeting. Further, since article V places on Congress the function of selecting the method of State ratification, it must legislate into law a set of Federal rules governing the process.[12] There is then a close relationship between the principal congressional power conferred under article V and the supporting or ancillary powers, conferred under the necessary and proper clause, to carry the principal power into execution. Without the supporting power, the principal power would cease to exist.[13]

These powers apply not only to procedural functions such as convening the convention and adopting the mode of ratification, but they also apply to the vital issue of declaring whether the convention shall consider either a single subject, a limited number of subjects, or a large scale overhauling of the Constitution. As will be discussed below, Congress, acting on the applications and at the request of the State legislatures, may limit the scope of such conventions and as a corollary it follows that Congress may adopt the means necessary to invoke such limitation upon the convention.

General revision or specific amendment

Few States in the past, when they submitted applications asking for a constitutional convention, sought merely to have a convention convened. Many have specified the particular subject matter that the convention was to consider. The power to limit a convention to a particular subject, or to several subjects has, of course, never been officially determined. Wheeler, in a University of Illinois law review article,[14] felt that conventions must be general in scope and stated that a State application calling for a specific amendment could have no legal or binding effect on a convention, except that the petition could be counted in determining whether a requisite number of petitions had been submitted for calling a convention.[15] Other writers differ with this view, however, and in fact one has taken the position that not only may a convention be limited to the consideration of specific subjects, but under no circumstances could it be given unlimited general revisionary powers to promulgate a new constitution.[16]

Article V states that Congress shall call a convention "for proposing amendments." If these words were to be literally construed it might be argued that a convention could not create an entirely new instrument to supersede the present Constitution. Yet argument could be made that, under such language, a convention could propose what is equivalent to a new Constitution by a series of separate amendments in the form of an addendum to the present Constitution.

The kind of government which we enjoy would seem to warrant the proposition that our Constitution can be both generally revised or specifically amended if the people so wish it. The Founding Fathers had little doubt about general revisionary powers of a convention. This is reflected in the fact that the first 2 applications for a conven-

tion were submitted less than 2 years after the constitutional convention of 1787 and were petitions for a convention of a general nature.[17] Since that time there have been 29 petitions seeking a general revision of the Constitution.[17a]

At the same time, the action of the States indicates that conventions may also be of a limited nature. Beginning with the present century there have been very few applications for a general convention, and instead there has been an increasing number of petitions requesting conventions to consider specific proposals only.[18] Twenty-seven States have sought a limited convention to prohibit polygamy.[19] Twenty-seven States also wish to change the Constitution, through a convention, to limit the Federal power over the taxation of income.[19] Thirty-one States once sought a convention to deal with the subject of direct election of senators.[19] Other subjects on which applications have been made for limited conventions cover world Federal Government, repeal of the 18th amendment, limitation of presidential tenure, treaty making, taxation of Federal and State securities, protective tariff, Federal regulation of wages and hours of labor, Federal tax on gasoline, tideland boundaries, control of trusts, Federal grants-in-aid, popular ratification of amendments, constitutionality of State enactments, the Townsend plan, revision of article V, reapportionment, balancing the budget, distribution of proceeds of Federal taxes on gasoline, and State control of schools.[20]

The States, of course, are given a major role under article V both in initiating a convention movement and in finally ratifying a convention's work.[21] In addition, as we have seen, one of the major reasons for incorporating the convention method of amending the Constitution into our basic law was to create a remedy by which the States, in the event Congress was unwilling to act, could compel action. The convention method of amending the Constitution would be reduced to an unworkable absurdity both from the standpoint of the States having a voice in the convention process and from the magnitude of the operation and its ultimate effect on our Government, if only general conventions were permissible under article V.

A complete revision of our basic instrument would be the most important task any convention could be asked to undertake. In fact, in all probability, such an event could happen only once under our present Constitution since, if a complete revision were to be accomplished, the powers of amendment under our present Constitution would be superseded by provisions in the new Constitution. It would therefore seem incongruous, as has been suggested, to hold that conventions may be only general in scope and that petitions seeking specific amendments for one purpose or another, should therefore be transformed into requests for a general convention.[22]

The States, of course, ask for either a limited or general reformation of the Constitution. It would be the duty of Congress to promulgate rules for counting the applications and determining the kind of convention to be convened. Congress would have to determine whether the language of State applications seeking an amendment on a specific subject should be identical in their texts, or whether applications using varying language but appertaining to the same subject matter generally would be acceptable. Clearly the latter method is preferable

and has been suggested by Corwin and Ramsey in their law review article, the Constitutional Law of Constitutional Amendment.[23]

CITATIONS

[1] For those who hold that such a Convention would be a "premier assembly" of the people embodying their sovereign powers and would be unlimited and absolute, the following apt description was made in 1847, in connection with the Illinois State Constitutional Convention (and it is pertinent to a Federal convention):

"We are here, the sovereignty of the state. We are what the people of the state would be if they were congregated here in one mass meeting. We are what Louis XIV said he was—'We are the State'. We can trample the constitution under our feet as waste paper, and, no one can call us to an account save the people. * * *" (Illinois, Constitutional Convention (1847), debates p. 27.)

In more recent years a similar view was expressed by Senator Heyburn in the United States Senate:

"When the people of the United States meet in a constitutional convention there is no power to limit their action. They are greater than the Constitution, and they can repeal the provision that limits the right of amendment. They can repeal every section of it, because they are the peers of the people who made it." (46 Cong. Rec. p. 2769, Feb. 17, 1911).

[2] Jameson, Constitutional Conventions (4th ed.; 1887), p. 6; see also 35 Michigan Law Review, p. 284-285.

[3] Jameson, ibid., p. 6.

[4] Ibid., p. 10.

[5] Ibid., p. 10.

[6] Behout and Kass, How Can New Jersey Get a New Constitution, 6 University of Newark Law Review (1941) pp. 7-8; Stephens, Constitutional Convention Report, Georgia Bar Association, (1931) p. 219. This issue is discussed in chapter 7 wherein state cases are cited upholding the position that conventions may not go beyond the scope of legislative acts calling them into being. See e. g. Opinion of Justices, 6 Cush. 573 (Mass. 1833); Erwin v. Nolan, 280 Mo. 401 (1920); Wells v. Bain, 75 Pa. 39 (1874).

[7] J. M. Beck, The Constitution of the United States (New York: Oxford University Press, 1924), p. 173 et seq.

Before the convention adjourned it resolved "That the preceding Constitution be laid before the United States in Congress assembled." By direction of the convention, Washington sent a letter in which he said for the convention that "We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the best advisable." (Charles A. Beard, The Supreme Court and the Constitution (1938).)

The Congressional resolution authorizing the transmittal of the draft Constitution reads, in part, as follows:

"That the said report, with the resolutions and the letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case." (Beck, Constitution of the United States, p. 176; William H. Black, Our Unknown Constitution (Real Book Co., 1933).

[8] Dodd, The Revision and Amendment of State Constitutions (1910), p. 93.

[9] U. S., Constitution. Art. I. sec. 8, cl. 18.

[10] Watson, The Constitution of the United States (1910), I, 701.

[11] McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819); U. S. Congress, Senate, 82d Cong., 2d sess., 1952, Senate Doc. 170, Constitution of the United States of America (1952), 307.

[12] Rottschaeffer, Handbook on American Constitutional Law (1939), 387.

[13] Tucker, Constitution of the United States (1899), I, 368, but see Tucker, ibid., p. 365. The "necessary and proper" clause stated to be unnecessary since Congress, having been granted a principal power, by implication may adopt the means necessary to execute the power.

[14] Is a Constitutional Convention Impending? 21 Illinois Law Review (1927), 782, 795.

[15] Applications for different specific amendments ought not be considered as calling for a general revision of the Constitution. A more acceptable view would seem to be that several applications each concerned with a different aspect of the Constitution do not represent a general dissatisfaction with the Constitution taken as a whole.

[16] Child, Revolutionary Amendments to the Constitution, 10 Const. Rev. (1926), 27. Child argues that the phrase in Article V calling a convention "for proposing amendments" excludes the idea that a convention could promulgate a new or substantially revised Constitution. (P. 28.)

[17] New York and Virginia, See Tables I and II, appendix.

[17a] See Table 2, appendix, item 4.

[18] See Tables 1, 2, 3, appendix.

[19] See Table 2, appendix.

[20] See Table 2, appendix.

[21] U. S., Constitution, Art. V.

[22] See footnote 15 above.

[23] 26 Notre Dame Lawyer (1951), 135, 194.

CHAPTER 7

POWER OF STATES TO CONTROL CONSTITUTIONAL CONVENTIONS—BOTH STATE AND FEDERAL

The issue of whether a State legislative body has the power to limit a State convention to the consideration of certain specified topics has arisen many times in connection with State constitutional conventions. While it would be difficult, because of the many situations under which State conventions may convene, to lay down a uniform rule applicable to all State constitutional conventions, it is nevertheless possible to point to certain concepts and principles which are recognized by State judicial authorities as controlling.[1]

To begin with, State legislatures do not have ultimate control over conventions; it is the people who exercise this control. Of course, the power of limiting the scope of State conventions depends, in the first instance, upon the particular provisions in each State constitution. In this connection, State constitutions may be classified into two general groups: (1) those which contain no provision for constitutional conventions, and (2) those which provide, either in elaborate detail or just generally, for conventions.[2]

In States whose constitutions make no provision for constitutional conventions, it has been generally recognized since In Re Opinion to the Governor (Rhode Island) [3] that such conventions may, with the approval of the electorate, be assembled through legislative action and further, that they may be called even though the State constitutions provide a specific method of amendment (other than by convention).

In the Rhode Island case above, the Governor of Rhode Island asked the State supreme court whether it would be a valid exercise of the power of the legislature, if the legislature should provide, by an act or resolution, for the calling of a convention to revise or amend the constitution of the State. The constitution contained no mention of a constitutional convention. It provided for constitutional change only by direct proposals made to the people by the legislature for ratification by three-fifths of the voters. In holding that the method expressly set forth in the constitution did not prohibit the legislature from providing by law for calling a constitutional convention, to be chosen by the people, for revising the constitution, the court stated that one method of amendment could not, by implication, prohibit the legislature from proposing a revision of the constitution by another method, namely, by a constitutional convention. The court pointed out that there was no inconsistence between the power of a legislature to provide for a convention to be chosen by the people, and the power, by following a prescribed procedure, to propose, directly to the people amendments to the constitution.

Argument was made that where a power is given to do a thing in a particular way, the affirmative words marking out the particular way prohibit, by implication, all other ways. In rejecting the argu-

ment the court noted that the power to provide by law for the calling of a convention, while different from the method set out in the constitution, was not an inconsistent power and relied on the rule that if two constructions of a provision are reasonably possible, one of which would diminish or restrict the right of the people, and the other of which would not do so, the latter must be adopted. The court also noted that New York in 1845 had convened a convention even though its constitution provided a different method of amendment.[3a]

Another case in point is State v. American Sugar Refining Co.[4] There the State of Louisiana moved to cancel the license of the Sugar Refining Co. to do business in that State because of the company's violation of section 190 of the 1913 constitution relating to antitrust and monopoly practices. The Sugar Refining Co. protested on the ground, among others, that section 190 of the 1913 constitution was void in that it was adopted in contravention of article 75 of the constitution of 1798 which expressly provided the only method of amending the constitution, namely, by resolution of "the general assembly at any session thereof" with the concurrence of two-thirds of all the members elected to each House. In holding that a convention could be convened even though such a method was not one of the methods provided for by the constitution itself, the court quoted Cooley on Constitutional Limitations:

> Some of these constitutions pointed out the mode of their own modification; others were silent on that subject, but it has been assumed that in such cases the power to originate proceedings for that purpose rested with the legislature of the State, as the department most nearly representing its general sovereignty; and this is doubtless the correct view to take on this subject. Const. Lim. (7th ed.) p. 56. (p. 744).

Specific amending provisions apparently cannot, under State constitutional law, exclude the sovereign right of the people, acting through their legislatures, from making changes in fundamental law through methods other than those expressly provided for in their fundamental law.[5]

The courts also seem to agree that the powers of State constitutional conventions, however convened, may be effectively limited by the terms of the legislative act calling it into existence, the only qualification being that the approval for the limiting power be obtained from the people at an election held for that purpose. A case which clearly outlines this proposition is Cummings, Secretary of State v. Beeler.[6] There the Tennessee Legislature desired to call a convention to consider certain proposals recommended by a commission which had earlier been appointed to study changes needed in the constitution. The legislature wished to have the work of the convention restricted to amending only specified parts of the constitution, in line with the commission's recommendations. It therefore asked the State court for a declaratory judgment on whether it could propose a limited convention to the people.

The State constitution provided two methods of amendment: (1) by legislative proposal to the electorate for direct, popular approval and (2) by convention. The convention provision authorized the legislature "to submit to the people the question of calling a convention to alter, reform or abolish this constitution." The court noted that there was nothing in the constitution expressly prohibiting the legislature from submitting limited questions to the people, and that since the legislature was leaving the question of limited powers to

the people for decision, it was the people and not the legislature who were limiting the work of the convention which they, as sovereign and with ultimate power, had the right to do.

A case with similar issues and reaching the same conclusions is Staples v. Gilmer.[7] Section 197 of the Virginia constitution provided that its legislature could submit to the electors the question "shall there be a convention to revise the constitution and amend the same?" The Virginia Legislature proposed to submit the above question to the electors with the added provision that the convention be limited to amendments regarding the right to vote "by members of the Armed Forces while in active service in time of war."

In holding that such a limitation could be placed upon the convention, the court said:

> If the electors vote in favor of a convention, it may amend the constitution as well as revise it, and where the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the constitution but not the whole constitution, an affirmative vote of the people on such question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the constitution suggested to them by the legislature. The wishes of the people are supreme. Some agency must ascertain the desire of the people, and the legislature, by section 197, has been selected by them to do so (p. 627).

Of special importance on this issue is the case of Wells v. Bain [8] wherein the Pennsylvania State Constitutional Convention declined to observe restrictions placed upon it by the State legislature's act. The act of 1872, under which the convention was assembled, provided that the constitution which it framed should be voted upon at an election held in the same manner as general elections, and that one-third of the members of the convention should have the power to require the separate submission to the people of any change proposed by the convention. The convention disregarded the legislative act by providing machinery of its own for the submission of the constitution to the people in the Philadelphia area, and appointed election commissioners for this special purpose. It also refused to submit an article to the proposed constitution separately although it was claimed that a third of the members of the convention had voted for a separate submission. The court granted an injunction restraining the commissioners appointed by the convention from holding an election in Philadelphia. It declared that the submission of the constitution in a manner different from that provided by law was clearly illegal. The court said that the convention had no power except that conferred by legislative act, and that any violation of that act or any action in the excess thereof would be restrained.

As noted earlier, State legislatures do not exercise ultimate control over conventions; it is the people. However, as a practical matter, the legislatures play an effective and controlling role in calling constitutional conventions. They determine if and when a convention should be had. In the legislative acts submitting the propositions for vote by the people, they determine the specific subjects which the conventions, if voted by the people, will consider. The electorate, in voting, have usually only two choices: either to vote "no," or to vote "yes" for a convention in which the legislature has already prescribed the subjects to be considered.

State power over Federal conventions

Arguments in recent years have sought to shift some of the emphasis on control over Federal conventions from the Congress to the State

legislatures. In support of this position of State legislative control, the State of Georgia,[9] in its application for a Federal constitutional convention which would have taken up the problem of revising the constitution generally, declared in its resolution that the Federal convention was to amend the Constitution—

> * * * in the particulars herein enumerated and in such others as the people of the other States may deem needful of amendment.

New York, in 1931, in declaring its right to control the scope of Federal conventions, made application for a convention to propose an amendment to repeal the 18th amendment "and no other article of the Constitution." [10]

In recent years, many States have expressly cited in their petitions the particular subject matter they intended that the convention should consider.[11] In fact some have included in their applications the exact wording of the amendment to be considered and proposed by the convention.[12]

In the 83d Congress, resolutions were introduced in the Congress itself which sought to amend article V itself.[13] Because Congress took no action, the substance of these measures was set out in a uniform, model resolution and sent to the leaders of State legislative bodies asking them to introduce the proposal and have their legislatures take early action. The sponsors hoped that the several States would adopt these resolutions with their uniform, identical provisions and put them in the form of petitions calling upon the Congress to convene a constitutional convention for the sole purpose of amending article V. Certainly this unified, mass action which, incidentally, has already been adopted by several of the State legislatures, supports the theory that State legislatures can limit a convention to the consideration of specific amendments.[14]

If these contentions be accepted, State applications may be considered as mandates to the Congress, not only to call the convention, but also to specify the scope and limit of a convention's deliberations in accordance with State directives. Only recently the State of Indiana in 5 separate applications [15] calling for conventions to consider 5 different subjects set forth the above theory in the following language in its resolutions:

> For the reason that the power of the sovereign States to propose amendments to the Constitution of the United States by convention under article V has never been exercised and no precedent exists for the calling or holding of such convention, the State of Indiana hereby declares the following basic principles with respect thereto: that the power of the sovereign States to amend the Constitution of the United States under article V is absolute; that the power of the sovereign States to propose amendments to the Constitution by convention under article V is absolute; that the power of the sovereign States extends over such convention and the scope and control thereof and that it is within their sovereign power to prescribe whether such convention shall be general or shall be limited to the proposal of a specified amendment or of amendments in a specified field; that the exercise by the sovereign States of their power to require the calling of such convention contemplates that the applications of the several States for such convention shall prescribe the scope thereof and the essential provisions for holding the same; that the scope of such convention and the provisions for holding the same are established in and by the applications therefor by the legislatures of the two-thirds majority of the several States required by article V to call the same, and that it is the duty of the Congress to call such convention in conformity therewith; that such convention is without power to transcend, and the delegates to such convention are without power to act except within, the limitations and provisions so prescribed.

Just how far States may go in imposing their wills on conventions is a matter on which the Founding Fathers failed to define the limits

in article V. It is evident, however, that together, the Congress and the State legislatures play the dominant roles. Together they not only initiate but also finally approve the work of any convention. With this ultimate power at their commend, they may fence off the boundaries of power within which a convention must operate.

While both have important roles, the greater and final power, as has been and will be further pointed out in other chapters in this thesis, lies in the Congress of the United States, not so much because of the express provisions of article V which creates the power, but by reason of the article's failure to place sanctions on the Congress and for its failure to provide for review of congressional action.

CITATIONS

[1] The power of limiting the scope of state conventions depends, in the first instance, upon the particular provisions in each state constitution. In this connection, state constitutions may be classified into two general groups:

(1) those state constitutions containing no provision for Constitutional Conventions.[a]

(2) those states providing (a) for Constitutional Conventions generally,[b] and (b) in detail what the powers and duties of the convention shall be.[c]

[a] Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, Vermont (2 Vanderbilt Law Review 29 (1948); 21 Tennessee Law Review 867 (1950).

[b] Iowa, Maryland, Michigan, Missouri, New York, New Hampshire, Ohio, Georgia, Maine.

[c] Michigan, Missouri, New York. (For clause and section citations, see chart below.)

State constitutional provisions relating to conventions

State	Clause	Section
Alabama	18	286
Arizona	21	2
Colorado	19	1
Delaware	16	2
Florida	17	2
Georgia	13	1
Idaho	20	3
Illinois	14	1
Iowa	10	3
Kansas	14	2
Kentucky		258
Maine	4	3
Maryland	14	2
Michigan	17	4
Minnesota	14	2
Missouri	15	3
New Hampshire	99	
New York	14	2
Ohio	16	2

[2] See footnote 1 above.

[3] Opinion of the Court to the Governor, 55 R. I. 56, 178 Atl. 433 (1935).

[3a] See discussions of this issue, pp. 62-63, infra.

[4] 137 La. 407, 68 So. 742 (1915).

[5] Opinion of the Court to the Governor, 55 R. I. 56, 178 Atl. 433 (1935). In this case the court noted that there are three known recognized modes by which the people can give consent to an alteration of an existing lawful frame of government, viz:

(1) the mode provided in the existing constitution;

(2) a law, as the instrumental process of raising the body for revision and conveying to it the powers of the people;

(3) a revolution.

The court pointed out that the first two means are peaceful ones through which the consent of the people is obtained. If consent is not given, any change in government would be revolutionary. Irregular action whereby a convention would assume to act for the whole, the state, is revolutionary.

[6] 189 Tenn. 151 (1949).

[7] 183 Va. 613, 33 S. E. 2d 49 (1945).

[8] 75 Pa. 39 (1874).

[9] U. S. Congress, Senate, 71st Cong., 2d sess., 1930, Senate Doc. 78, p. 25.

[10] 75 Cong. Rec. 48.

[11] See appendix, Table 6.

[12] See appendix, Table 6.

[13] U. S. Congress, House, 83d Cong., 2d sess., 1954, H. J. Res. 568, 569, 40 American Bar Journal (1954), pp. 767, 974. Resolutions would add a third method of amending the Constitution. See also U. S. Congress, House, 84th Cong., 1st sess., 1955, H. J. Res. 168, H. J. Res. 169.

[14] See item 19, Table 2, appendix.

[15] Congressional Record, Daily, 1957, pp. 5761-5764, Revision of Art. V, Sec. 3, limit treaty-making power, Sec. 3, Reapportionment, Sec. 3, Limitation of Federal Taxing Power, Sec. 3, Balancing the Budget. Sec. 3; see also to similar effect, Michigan and Nebraska legislatures resolution calling for limitation of Federal taxing power, U. S. Congress, House 82d Cong., 2d Sess., 1952, House Committee on the Judiciary, Problems Relating to State Applications for a Convention to propose Constitutional Limitations on Federal Tax Rates, pp. 26-27.

CHAPTER 8

POWER OF CONGRESS TO REFUSE TO CALL CONSTITUTIONAL CONVENTION

May Congress refuse to call a convention should the requisite number of States comply? Apparently it may, although the intent of the framers of the Constitution was otherwise. The Founding Fathers included the Convention provision in article V as a remedy for the States to bring about constitutional reform in the event the Federal Government refused to do so.[1] It was certainly their intention that Congress should have no discretion in the matter of calling a convention once two-thirds of the States applied.[2]

Madison, on the question, stated: [3]

> It is to be observed however that the question concerning a general convention will not belong to the Federal Legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it: if not, the other mode of amendments must be pursued.

James Iredell, before the North Carolina ratifying convention, also stated:

> that it was very evident that it (the proposal of amendments) did not depend on the will of Congress; for that the legislatures of two-thirds of the States were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such convention, so that they will have no option (italic in original).[4]

In addition to the above statements made contemporaneously with the adoption of the Constitution as to its true intent, there are the express words of article V that Congress "shall call a convention." It is doubtful, however, that there is any process or machinery under our constitutional system by which the Congress could be compelled to perform this duty. It is argued by some that the congressional act being ministerial, the courts could compel the legislative branch to act by way of mandamus, otherwise the whole intention of the framers would be nullified.[5] It seems more likely, however, that the courts would refuse to issue such a writ for the same reasons that they have refused to issue writs on the President of the United States, namely the doctrine of separation of powers which proscribes action by one branch of our Government against another. In Mississippi v. Johnson,[6] the Supreme Court, among other things, pointed out that:

> The Congress is the legislative branch of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

Courts today in line with that decision, and the more recent case of Coleman v. Miller would probably rule that the question is political and therefore not justiciable.[7]

From a legal standpoint, there is the same situation as arose from the failure of Congress to reapportion the number of Representatives in the House of Representatives, which article I, section 2, clause 3,

requires it to do every 10 years, but which in 1920 Congress failed to do. Thus while Congress has the mandate to perform, its failure or refusal to do so apparently gives rise to no enforcible cause of action. In line with this point, it may be observed that court orders, even if it could be argued that the States had a right to bring legal actions in the courts against an unwilling Congress to call a convention, would have little meaning or effect since the courts lack the necessary tools to enforce their decisions against the Congress.[8]

As a consequence, public opinion and, ultimately, the ballot box,[9] are the only realistic means by which the Congress can be persuaded to act. A Federal statute, as suggested in this thesis, containing the provisions for convening a Convention, could, as a practical matter, go a long way in easing the road for congressional action.

CITATIONS

[1] Farrand, The Records of the Federal Convention of 1787 (Rev. ed. 1937) I, 203.
[2] See excerpts from the constitutional debates, Tuller, W. K., A Convention to Amend the Constitution, quoting from Elliott's Debates, 193 N. Amer. Rev. 375-378 (1911).
[3] Documentary History of the Constitution, V, 141, 143, citing Madison's Letter to Mr. Eve, 1/2/1789.
[4] Elliott's Debates (2d ed.; 1937), IV, p. 178. But see Walter F. Dodd, Judicially Non-Enforceable Provisions of Constitution, 80 University of Pennsylvania Law Review (1931), p. 82: "In general, a constitutional provision which states that a legislature 'shall' perform a duty is equivalent to a statement that it 'may' or 'shall have power'."
[5] Tuller, A Convention to Amend the Constitution, 193. North American Review (1911), pp. 379-381; Cuvillier, Shall We Revise the Constitution (1927), 77 Forum, pp. 323-325; Packard, F. E., Legal Facets of the Income Tax Rate Limitation Program, 30 Chi-Kent Law Rev. 128 (1952).
[6] 4 Wall. 475, 500 (U. S. 1866).
[7] 307 U. S. 433 (1939); Willoughby, The Constitutional Law of the United States (1929), I, 597. Willoughby notes, however, that had the performance of the act of calling a convention been placed in the hands of anyone other than the Congress or the President, there is little doubt that the courts would have compelled some sort of action.
[8] Frank, John P. "Political Questions" set out in Supreme Court and Supreme Law, edited by Edmond N. Cohn, Indiana Univ. Press, Bloomington (1954), p. 39.
[9] See Colegrove v. Green, 328 U. S. 549, 556 (1946).

CHAPTER 9

RIGHT OF REVOLUTION

A theory of constitutional law being urged today by the Communist Party in America, and which is pertinent to the problems involved in this thesis, is one relating to a so-called right of revolution. According to its supporters, the right of revolution is a concept recognized by our Constitution and protected by it.

If such a theory be valid, then it could be argued, since it presupposes changing our form of government in a manner other than that provided for in article V, that a Constitutional Convention, once convened, could disregard congressional directions and article V, and adopt extra-legal means in establishing a new or revised Constitution.

It is a matter of common knowledge, of course, that today free countries with free institutions are on the defensive and, in some instances, are being destroyed by organized violence. Communistic philosophy is based in part on the principle that internal weakness is an inherent character of free institutions and that the American concept of liberty with its constitutional safeguards inhibits any defense against internal enemies.[1] In fact, members of subversive groups in America are cynically taking advantage of the protection of the very constitutional safeguards which they are seeking to destroy.

The decisions of our courts protecting the rights of individuals have been more widely publicized than those which have upheld the right of the Government to defend itself and protect itself against unlawful change. The decisions, nonetheless, have clearly outlined and upheld both kinds of rights. An outline of some of those decisions together with an historical development of this controversial political doctrine can be helpful in obtaining a clearer understanding of a government's power to protect and preserve itself.

When English colonists first migrated to America, they brought with them England's political philosophy, its government, and its law. England itself had experienced attempted unlawful change of government during the so-called English rebellion of 1688. The rule of conduct developed at that time set the standard for future conflicts. In 1688 the King of England was condemned because of his usurpation of governmental power and for tyrannical acts.[2] While it was argued by some that it was the people who, in fact, were in rebellion against their King, Parliament took the position that when the people have entrusted the powers of government to their King and the Parliament, and the King in turn usurps the legislative function and corrupts the Parliament, he is exercising power without lawful authority. In such a situation, as noted by John Locke, the renowned political philosopher of that era,[3] the people are not in rebellion but are acting in self-defense and in behalf of their own self-preservation.[4] Locke asserted that the King had to be resisted when he attempted to do that which he had no authority for doing; that which was a "breach of trust in not preserving the government agreed on." [5] A nation is

ruled by, and with the consent of, the governed, and changes may be made only if the governed so wish.

Our Founding Fathers accepted this principle. Changes, in time, are inevitable and the Founding Fathers wisely made provision in the constitutional instrument to provide for such changes. The provisions, however, envision orderly and lawful change, not change, as will be discussed, by extra-legal or unconstitutional means, be the means violent or nonviolent.

The first substantial challenge to orderly and nonviolent change in this country came in 1820–30 when South Carolina asserted the "right" of a State to nullify an act of Congress. At that time, many of the States, especially those in the South, took the position that the tariff acts with their rising rates were the cause of increased poverty in the southern States. Since northern States were prospering, the tariff acts were looked upon as discriminatory and unconstitutional devices for taxing the South for the benefit of the North. John C. Calhoun, then Vice President of the United States and a South Carolinian, developed a plan to protect the peculiar interests of his and other Southern States—a plan known as the nullification movement. Simply stated, nullification was based on a two part principle: (1) that the Federal Constitution was a compact or agreement between States, and (2) that the individual States were sovereign and indestructible. As sovereign, South Carolina, and any other State for that matter, had the right to judge when its agent, the Federal Government, exceeded its powers. In 1832, after a finding that the Federal Government had exceeded its powers, the South Carolina Legislature declared the Federal tariff acts to be "null, void, and no law" not binding upon her, her officers, or citizens. It forbade Federal officials to collect customs duties within the State and threatened instant secession from the Union if the Federal Government attempted interference.[6]

President Jackson took prompt action to preserve the Union and maintain the law of the land. His position was that the United States was indivisible and that no State could revolt. He reinforced military garrisons in South Carolina and thereafter issued a proclamation stating that the nullification ordinance passed by that State was an overt act of rebellion and had no basis in constitutional law. He pointed to the paradoxical situation of South Carolina seeking to retain its place in the Union and enjoying Federal benefits, and at the same time wishing to be bound only by those laws that it chose to regard as constitutional.[7] Jackson proclaimed:

> I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed (pp. 483–484).

The firm stand of President Jackson won out and, while Federal tariffs were reduced somewhat as a face-saving gesture for South Carolina, its nullification ordinance was repealed. The "right" to destroy the Union by "nullification" was successfully repulsed.

The "right" to destroy the Union by "secession" was also repulsed but it took a civil war to prove it. Lincoln, of course, had long denied any constitutional right of revolution. In his first inaugural address, he summed it up this way:

Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. * * * *it being impossible to destroy it except by some action not provided for in the instrument itself.* [Italics supplied.][7a]

We have, then, instances of the Government deciding, in a political manner, that there is no constitutional right of revolution or rebellion.[8] In another manner—that is, by judicial decision—our United States Supreme Court has also decided the question and declared that the Constitution supports no right of revolution. After the turn of the present century, world unrest and discrimination problems arising under the 14th amendment brought before our courts the whole question of constitutional rights.[9] Shortly after World War II, the Supreme Court was called upon to decide the question on the right to advocate revolution. In Gitlow v. New York,[10] Benjamin Gitlow was convicted under a New York statute which forbade the advocacy of criminal anarchy (overthrowing organized government by force or violence).[11] He published a radical journal called The Revolutionary Age and advocated, among other things, "mass action for the conquest of the power of the state." Quoting Story, the Supreme Court held that the "state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means." [12]

Any consideration of the right of revolution involves first of all the question of how far one may go in advocating changes in government. Criticizing one's government does not automatically constitute incitement to revolution. A distinction is to be made between mere expressions of opinion on the one hand, and urging others to some definite act of violence against the government. This distinction was brought out in Herndon v. Georgia.[13] Herndon, an organizer for the Communist Party, was found guilty, under a Georgia statute, of inciting insurrection among southern Negroes against the state because he urged them to unite against white domination. The Supreme Court, in reversing the conviction, announced the principle that it was not unconstitutional for one to express a belief in the need for a change in, even the complete conversion of, the government so long as it was accomplished by peaceful, constitutional means.

The Gitlow and Herndon cases determined in broad outline the individual's right to advocate political change by lawful means. They also established the right of a government to legislate against acts of incitement and rebellion.[14] Later cases established the right of government to outlaw organizations created for revolutionary purposes.[15] No one—be it an individual, a group, an organization, or a political party—may advocate revolution.[16] The most notable case in which this communistic doctrine was denounced is Dennis v. United States.[17] There, the petitioners, leaders of the Communist Party in the United States, were indicted under the Smith Act,[18] for conspiring to teach and advocate the overthrow and destruction of the United States by force and violence. It was argued, on behalf of the petitioners, that the people, as sovereign, have an "historically established right to advocate revolution," and that the Constitution recognized such right.[19] The Declaration of Independence was cited as proof of the Constitution's and the people's recognition of such a "right." To contend otherwise, according to the petitioners, would mean that the Government was an entity, independent of the people,

endowed with the right of self-perpetuation, even if the people did not wish to perpetuate it.

Judge Learned Hand, when the case was before the court of appeals, in denying that such a right existed under the Constitution, succinctly pointed out that no government could tolerate it and exist.[20] He stated:

> The advocacy of violence may or may not, fail; but in neither case can there be any "right" to use it. Revolutions are often "right" but a "right of revolution" is a contradiction in terms, for a society which acknowledged it, could not stop at tolerating conspiracies to overthrow it, but must include their execution (p. 213).

When the case was decided in the Supreme Court, Chief Justice Vinson, writing for the majority, observed that the Constitution can only be changed by "peaceful, lawful, and constitutional means."[21] He further stated:

> Whatever theoretical merit there may be to the argument that there is a "right" to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. (p. 501).

The fallacy in the Communist party theory lies in the fact that there is a natural law "right" of revolution but not a constitutional "right of revolution." Whenever any form of government becomes oppressive, or when a dictator has usurped the powers of government, there is, of course, the natural right of the people, recognized in international law, to relieve themselves of such oppression, if they are strong enough to do so, by overthrowing the government and initiating a new one.[22] The Declaration of Independence was based on this natural law concept and the American colonists invoked it in throwing off the unyielding yoke of despotism and tyranny forced upon them by England.

The Communist concept adopts this theory but such a concept is clearly to be distinguished from orderly changes in government brought about through constitutional and lawful means. Chief Justice Vinson gave the constitutional answer to this question when he stated that there was no such right "where the existing structure of government provides for peaceful and orderly change." And our Constitution so provides.

The Founding Fathers, fresh from their own revolution, did not seek, in molding the Constitution, to forge a political straitjacket on the generations which were to follow them. Instead, they foresaw that changes, in time, would be inevitable and they wrote article V into the Constitution providing for such changes.

Applying the rule laid down by the Supreme Court in the Dennis and other cases to the problem at hand, and considering the political action taken by our Government to suppress rebellions, it becomes apparent that changes in our form of government can only be accomplished by peaceful, lawful, and orderly means in the manner provided for by the Constitution. A Constitutional Convention, therefore, would be bound to function within, and in accordance with, the provisions of article V and congressional enabling acts, under the "necessary and proper" clause, calling it into being.[23]

CITATIONS

[1] History has shown, unfortunately, that governments have been destroyed from within both by agents of foreign sovereigns and by corrupt or overzealous public officials and organizations.

[2] The English Law Courts at the Close of the Revolution of 1688, 15 Michigan Law Review, 529, 1912.

[3] Locke, Essay Concerning the True and Original Extent of Civil Government (J. P. Dutton, ed. 1924), pp. 224-242.

[4] Ibid., p. 240. The framers of the United States Constitution accepted this theory for their government and, in fact, invoked it when the colonies broke with England because of the oppressive and tyrannical acts of George III. The Declaration of Independence, composed in large part by Thomas Jefferson, contains phrases taken directly from Locke's treatises, and Locke's pronouncements underlying England's action in its own rebellion were recast by Jefferson to fit the American Revolution. (Hayes, Revolution as a Constitutional Right (1938), 13 Temple Law Qt. 19.)

Strangely, however, the Declaration of Independence which was used by our own nation to justify our break with the English government is relied upon by those who today insist that there is a right of revolution which must be recognized if our present Constitution is to be consistent with the ideals of our founding fathers. (Brief for Petitioners before the United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).)

The founding fathers, in framing the Constitution, did not specifically mention that there was no right of revolution or rebellion. They were creating a government, not providing for its overthrow. Since the instrument was silent, it remained for the Supreme Court and the political acts of our government to define the rights of its citizens, acting either as individuals or as groups, to oppose their government. Hayes, Revolution as a Constitutional Right (1938), 13 Temple Law Qt., 19; Brief for petitioners before the United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).

[5] Locke, ibid., p. 240.

[6] U. S., Congress, Senate, 54th Cong., 2d Sess., 1897, Senate Doc. 353, Pt. 2, p. 282; U. S., Congress, Senate, 22d Cong., 2d Sess., 1833, Senate Journal, pp. 65-66, 83; Am. An. Reg. VIII, 297; U. S., Congress, House, 54th Cong., 2d Sess., 1897, Senate Doc. 353, Pt. 2, p. 345.

[7] Morison, S. F., and Commager, H. E., The Growth of the American Republic, 3d ed., Oxford University Press (1942).

[7a] Old South Leaflets, I, Boston, containing Lincoln's Inaugurals, p. 3.

[8] The government, by political action in sustaining the doctrine that there is no constitutional "right of revolution" put down rebellious forces in the Wyoming Valley Insurrection, 1872; Shay's Rebellion, 1786-1787; The Whiskey Rebellion, 1794; Fries's Rebellion, 1842 ("Window Tax war"); Door's Rebellion, 1842 (Rhode Island).

[9] At the time of World War I, two decisions were handed down, upholding the right of the government to protect itself against its enemies even to the extent of providing punishment for criticizing in newspaper articles the policy of the government. (Schaefer v. United States, 251 U. S. 466 (1919); Gilbert v. Minnesota, 254 U. S. 325 (1920).

[10] 268 U. S. 652 (1925).

[11] McKinney's Consolidated Laws of New York, Penal Law, sections 160, 161 (1909).

[12] 268 U. S. 652, 667 (1925).

[13] 295 U. S. 441 (1935); also Herndon v. Lowry, Sheriff, 301 U. S. 242 (1937).

[14] See also Whitney v. California, 274 U. S. 357 (1927); DeJonge v. Oregon, 299 U. S. 353 (1937); Fiske v. Kansas, 274 U. S. 380 (1927).

[15] Dennis v. United States, 341 U. S. 494 (1951); United States v. Schneiderman, 106 Fed. Supp. 906, 938 (1952); United States v. Foster, 9 F. R. D. 367, 394 (1951).

[16] Kjar v. Doak, 61 F. 2d 566 C. C. A. Ill. (1932); Gitlow v. Kiely, 44 Fed. 2d 227 D. C. N. Y. (1930).

[17] 341 U. S. 494 (1951).

[18] 54 Statutes at Large 671; 18 U. S. Code, sec. 11 et seq., (1952 ed.)

[19] Brief for petitioners before United States Supreme Court, p. 267, Dennis v. United States, 341 U. S. 494 (1951).

[20] 183 Fed. 2d 201 (2d Cir. 1950).

[21] United States v. Dennis, 341 U. S. 494, 501 (1951).

[22] Personal Memoirs of U. S. Grant (1885) p. 786.

[23] The philosopher, John Dewey, is quoted in Sidney Hook's Heresy, Yes—Conspiracy, No as saying "The democratic idea of freedom is not the right of each individual to do as he pleases, * * *." (New York: The John Day Co., 1951, p. 15). The free expression and circulation of ideas, as guaranteed by the First Amendment to the Constitution, is not, as we all know, an absolute freedom or right. One cannot, as Justice Holmes noted, yell "fire" in a crowded theater; nor may one blast another's reputation by libelous accusation. Hook stated the governing rule: "no right is absolute when it endangers rights of equal or greater validity." (Ibid., p. 20.)

There is nothing self-contradictory in asserting that, in any society, human beings have a moral right to revolution. What is self-contradictory is the belief that one has a legal right to revolt.

As stated in Herndon v. Georgia, 295 U. S. 441 (1935), merely critizing one's government does not automatically constitute incitement to revolution. Such action is protected by the First Amendment. How far one may go in such criticism is the real problem. Congress, through legislation, sets the bounds. It has enacted laws against sabotage and subversion, and has provided severe penalties for violators of those statutes. However, prison sentences have not been a sufficient deterrent. Furthermore, sentences are usually imposed after a disastrous event has occurred.

A policy of "preventive" action, comparable by way of analogy to preventive medicine, has been developed. It is known, for example, that a few strategically placed communists in government can do incalculable harm. Witness the taking of the atom bomb secrets by Klaus Fuch, Harry Gold, etc., from the government proving grounds in New Mexico. To combat this type of danger a program has been undertaken, the purpose of which is to eliminate questionable persons from sensitive spots in government. As part of this program, Congress, in enacting the Smith Act, has outlawed not only all overt acts to overthrow the government through force and violence, but also has made punishable a conspiracy to teach any doctrine advocating such violence. In other words, mere talking about it can, under certain circumstances, be unlawful.

It may well be that, in an effort to further tighten the defense security of our nation, Congress will outlaw actions and words which years ago would have been considered proper and lawful criticism of the government. So that, while a person has a moral right, protected by the First Amendment, to criticize his government, the right is not only not absolute, but all criticism, words as well as acts, must be done within the bounds set by Congress, which today because of developments in world political conditions, seem to be narrowing.

CHAPTER 10

EXPRESS AND IMPLIED LIMITATIONS CONTAINED IN THE CONSTITUTIONAL INSTRUMENT

A question vigorously debated about the time of World War I concerned the limits—both expressed and implied—imposed by the Constitution itself upon the subject matter of proposed amendments.[1] It will be observed that, by article V, certain amendments to the Constitution were expressly prohibited, namely, (1) those relating to the slave trade, and (2) those which would deprive a State, without its consent, of equal suffrage in the Senate. Article V provides:

> * * * that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article V thus contains two express restrictions upon things which might be accomplished by amendment. One of these restrictions expired in 1808, and the other is still in force.

In addition to the express restrictions, it has been argued by reputable writers[2] that there are further limitations implied by the very nature of the instrument itself which are intended to preserve and perpetuate our union and its republican form of political government. These implied limitations are to be found in the instrument when read as a whole and in particular in the 9th and 10th amendments which reserve to the sovereign States those powers which were not expressly delegated to the Federal Government. Police powers and the right of local self-government are cited as examples of powers forever reserved to the States.

It had been argued that the 15th amendment was unconstitutional because it attempted, against the will of the States which did not ratify it, to invade the field of local self-government and fix the composition of the several electorates.[3] Similarly it had been urged that the adoption of the 18th amendment was an unconstitutional exercise of the amending power since it sought to bring within Federal control a matter, which, under the Constitution as originally adopted, was intended never to be withdrawn from State control. The amendment, it was contended, constituted an addition to the Constitution rather than a revision of a subject already incorporated in that instrument, and such a graft upon the Constitution destroyed its essential character as it was originally agreed to.[4] The 19th amendment, on woman suffrage, was objected to upon the grounds that it expanded the proportions of the electorate of the sovereign several States, destroying their autonomy.[5]

All of these problems, of course, have long since been decided by various decisions of the United States Supreme Court.[6] It has always upheld the validity of the present amendments to the Constitution. In fact, by the time Leser v. Garnett[7] was decided (1922), the Court dismissed the argument that the character or subject matter of amend-

ments is intrinsically limited by the Constitution itself with only summary comment. It stated:

> The first contention is that the power of amendment conferred by the Federal Constitution and sought to be exercised does not extent to this amendment, because of its character. The argument is that so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body. This amendment is in character and phraseology precisely similar to the 15th. For each the same method of adoption was pursued. One cannot be valid and the other invalid. That the 15th is valid, although rejected by 6 States including Maryland, has been recognized and acted on for half a century. See United States v. Reese (92 U. S. 214), Neal v. Delaware (103 U. S. 370), Guinn v. United States (238 U. S. 374), Myers v. Anderson (238 U. S. 368) (p. 136).

When the United States Constitution was promulgated it was necessary, in order to create an effective central Government, that some of the powers exercised by the State governments be transferred to the central government. From the very nature of things, the central government was better suited, in certain situations, to exercise powers for all the States which the States, acting individually, could not properly do for themselves. This end could not be accomplished except by the surrender, on the part of the States, of some of their powers. The whole scheme of Government became then a distribution of powers between the central government and the States—determinations were made as to what powers were to be delegated to the Federal Government and what powers were to be reserved to the States.

It is reasonable to assume that the framers of the Constitution divided the powers of government between the States and the Federal Government in a manner they then believed to be necessary. They recognized, however, that as time went on, experience might show that the Constitution could be improved by changing the distribution of powers as then made. If it had been intended that none of the powers then reserved should ever be taken from the States, language undoubtedly would have been used to express such an intent. However, just the opposite took place. At the time article V was under consideration at the Constitutional Convention, a provision was twice proposed that no State, without its consent, should "be affected in its internal police" and it was twice rejected by the Convention.[8] Judged by both the language rejected and the language finally employed in article V, the true intent would seem to have been that there could and would be changes in the distribution of powers and therefore that consideration could be given to matters or subjects not then enumerated in the Constitution.

This conclusion is in accord with actual practice. Amendments since the adoption of the Constitution have been on many subjects. Some have taken from the States power theretofore reserved to them, while others have curtailed the power of the Federal Government. Slavery, for example, was originally a matter solely of State concern subject to the police powers of the States. The intent to continue State control was, in fact, expressly provided for in article V preserving the safeguards of this control to the States until 1808 as against any amendment which could have been made. Even after 1808, slavery continued a matter of State concern. However, when the time came that the sentiment of the people demanded that slavery should no longer exist, the desired end was accomplished through the 13th amendment.

The 14th amendment invaded previously reserved rights by divesting the States of their power to legislate with respect to the individual rights of their citizens where before they had such power. The 15th amendment infringed on State power with relation to voting, and restrains the right of States to regulate suffrage not only as to national elections, but also to internal elections. The 19th amendment on women suffrage also invaded the political autonomy of the States by increasing the number of voters by roughly 100 percent.

The process of amendment has not been a one-way street, however. Amendments have also been adopted limiting the power of the Federal Government, the most notable examples being the first 10 amendments.

In summary it may be said that because of the very nature of things, almost any amendment that could be adopted would take either from the States or from the Federal Government some of the powers belonging to them respectively under the original Constitution. In addition, there is nothing to indicate an intention that amendments should be confined to one subject matter or another. The history of the amendments already adopted and even those which were not adopted but were considered, show that all manner of subjects have been entertained.

Going from implied limitations to express limitations, it will be recalled that article V contained 2 exceptions to the amending powers; 1 was temporary (on slavery and expired in 1808), and 1 permanent (equal suffrage in the Senate). The enumeration of these exceptions in our fundamental law clearly shows that our Founding Fathers intended that the subject matter of these provisions was not to be changed.

It is, of course, a well-recognized rule of construction that an earlier legislative body cannot bind a later legislative body and, therefore, the framers of the Constitution at the Convention of 1787 could not bind the hands of the States and Congress if they called a constitutional convention today. In the light of this rule, it would seem at first blush that the Founding Fathers either wrote into article V a provision that could not be binding, or, if binding, one that could never be changed—even by the people where ultimate power lies. The answer, however, can be found in the clause itself. It does not prohibit change in the representation of a State in the Senate absolutely. It only prohibits change where the State or States concerned have not consented. It reads:

> "* * * and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

It will be recalled that amendments to the Constitution generally need only be ratified by the legislatures of three-fourths of the States. In other words, amendments, when three-fourths of the States have approved them, become part of the Constitution and bind all of the States—even those which rejected ratification. However, in connection with the subject of equal State suffrage in the Senate, the provision quoted above goes further and requires not only ratification by three-fourths of the State legislatures, but also the consent of the States concerned. It is inconceivable that any State, especially the smaller States, would ever consent to the abolition of equal suffrage in the Senate of the United States, but even if such a circumstance did come

about, the present restrictive clause would not bar such a change in the Constitution once consented to by the State or States concerned. Once consented to, the prohibition would no longer exist.

CITATIONS

[1] National Prohibition Cases, 253 U. S. 350 (1920), concerning the validity of the Eighteenth Amendment to the United States Constitution.
[2] See Willoughby, The Constitutional Law of the United States (2d ed.; 1929), I, 958.
[3] Machen, Is the Fifteenth Article Void? (1910), 23 Harvard Law Review 169; Neal v. Delaware, 103 U. S. 370 (1880).
[4] Marbury, The limitations Upon the Amending Power (Dec. 1919), 33 Harvard Law Review, p. 223.
[5] See also, for contention that state autonomy and reserved powers may not be altered, Curtis, Constitutional History of the United States (1897), II, 160; McCulloch v. Maryland, 4 Wheat. 316, 403 (1819); Collector v. Day, 11 Wall. 113, 124 (1870); Gordon v. United States, 117 U. S. 697, 705 (1884).
[6] Fifteenth Amendment, by Neal v. Delaware, 103 U. S. 370 (1880); Eighteenth Amendment by National Prohibition Cases, 253 U. S. 350 (1920); Nineteenth Amendment by Leser v. Garnett, 258 U. S. 130 (1922).
[7] 258 U. S. 130 (1922).
[8] Elliott's Debates (2d ed.; 1937), I, 316-317; Madison's Papers 531-532 and 551-552.

PART IV

TIME LIMITATIONS WITH RESPECT TO STATE APPLICATIONS

CHAPTER 11

LAPSE OF TIME AFFECTING APPLICATIONS

When two-thirds of the States have applied for a convention, the applications, supposedly, attain binding force. Such action, ordinarily, would preclude discretionary power or decision on the part of Congress, since article V directs that body to convene a convention. As noted in preceding chapters, however, article V provides no legal sanction for its own enforcement, and there seems to be no judicial process for enforcing its provisions.

A convention, under article V, after the requisite number of States have made application, does not automatically come into being. It must be called by the Congress. Whether Congress can be made to act has already been discussed. Whether Congress should act and when, assuming it is willing, raises still further problems. Does an application, for example, once made, remain always alive and valid, or can it become legally ineffective because of a lapse of time that may have occurred after its adoption by the State legislature and during its pendency before the Congress? Does an application lapse into a state of invalidity because, possibly, some factor intervened to shorten its life? [1]

The amending article is silent on the subject of what force or effect the lapse of time will have on an application. The Supreme Court dealt with an analogous situation concerning the length of pendency of an amendment proposed by the Congress to the States for ratification in the case of Dillon v. Gloss [2] and thought that amendments ought not be left open for all time:

> We do not find anything in the article which suggests that an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective. We do find that which strongly suggests the contrary.

In the Dillon case, Congress proposed to the States for ratification a resolution which resulted in the 18th amendment. In the resolution, Congress fixed a period of 7 years within which three-fourths of the States had to ratify or else the resolution would have been lost. In upholding this action on the part of Congress, the Court announced (1) that Congress could fix a reasonable time within which proposed amendments had to be ratified, and (2) that 7 years was without question a reasonable time. The Court also noted that the proposal of an amendment and its ratification were not unrelated events:

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[2] 256 U. S. 368, 374 (1921).
[3] Ibid., pp. 374–375.
[4] See also Coleman v. Mill
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First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.[3]

In passing on this case the Court enunciated the so-called "contemporaneous" test and it would seem logical to apply this same interpretive technique in dealing with State applications for constitutional conventions. Certainly there is nothing in article V which suggests that an application of a State, once made, is to be valid for all time or that the application of one State may be separated from those of other States by many years and still be effective. On the contrary, the implications seem to go the other way. Using the same reasoning which the Court employed in Dillon v. Gloss, quoted above, and employing it by way of analogy, it would appear, first, that State applications and the calling of a convention are not unrelated acts but are succeeding steps in a single endeavor, not to be widely separated in time. Secondly, since it is only when legislatures deem amendments to be necessary that applications for a convention are made to the Congress, a reasonable inference is that such a convention is needed to "presently" dispose of the needs of the people. Thirdly, since an application is made in response to popular demand and is effective when made by the legislatures of two-thirds of the States, "there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people, in all sections at relatively the same period" which applications "scattered through a long series of years would not do." From this the conclusion may be drawn that an application should have force for a reasonable time only.[4]

CITATIONS

[1] The duty of answering or developing solutions for solving these problems finally devolves on Congress. The States, in anticipation, may influence the Congress and even control its decision to some degree by submitting applications in a form and manner which they believe desirable. See ch. 7, supra.

[2] 256 U. S. 368, 374 (1921).

[3] Ibid., pp. 374–375.

[4] See also Coleman v. Miller, 307 U. S. 433, noting statement in Gloss v. Dillon that amendment process is a series of related events, succeeding steps in a single endeavor which should be reasonably related in time.

CHAPTER 12

POLITICAL QUESTIONS

It is well settled that the courts will not decide "political questions." [1] The principal reason is that the duty to determine such questions is to be found in the executive or legislative branches of our Government and not in the judicial. When a case is presented involving a political question the courts will look to the so-called political branches of Government, i. e., the executive and legislative, to learn what position those departments have taken in the matter. The courts then act in conformity with it. The result of such procedure is that the merits of the case are not decided as an independent question by the courts; rather the action of the political department concerned becomes a rule of decision which the courts accept as controlling.[2]

A reading of the cases indicates that the most important facet in the development of the doctrine, insofar as it is pertinent to this thesis, was the fact that the political departments, in the normal performance of their functions, had better means and facilities available to them to determine the question involved.[3] Most questions of policy are based upon the needs and exigencies of the times in which they arise. They involve an appraisal or evaluation of economic, social, and political issues which can hardly be reduced to exact terms for admission as evidence in a court of law and of which the courts cannot reasonably take judicial notice.[4]

As a result, the courts, in developing the "political question" doctrine, have given a finality of action to the decisions of our political departments. Many illustrations are to be found in the field of foreign relations. In Doe v. Braden, for example, the courts refused to inquire into the constitutional powers of the King of Spain with whom the United States had negotiated a treaty.[5] Objection was made that the King, at the time the purchase of the territory of Florida was being considered, could not annul certain grants of land he had made earlier to Spanish citizens within the territory. The court refused to consider the objection, stating that it was for the President and the Senate of the United States to determine whether the King's powers were sufficient in this instance. Whether our Government was right or wrong in interpreting the King's power under Spanish law was not controlling. The conduct of our foreign affairs requires that the State Department have a wide latitude in determining issues in the light of our political needs. To permit others to overrule questions of policy would greatly hamper the conduct of our foreign negotiations. Chief Justice Taney stated the Court's reasoning thusly: [6]

> * * * it would be impossible for the executive department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power by the constitution and laws, to make the engagements into which he entered.

Whether a treaty has been broken has also been held to be a matter which the courts will not determine. In Ware v. Hylton [7] the United States Supreme Court stated:

> These are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.

One of the leading cases involving political questions is that of Taylor v. Morton [8] where it was pointed out that the courts had no suitable machinery to determine such questions:

> These powers have not been confined by the people to the judiciary, which has no suitable means to exercise them; but to the executive and legislative departments of our Government. They belong to diplomacy and legislation, not to the administration of existing laws.

This view has been expressed in other cases covering many different subjects such as the beginning and ending of wars as declared by Congress and the President,[9] control of aliens,[10] guaranties of a republican form of government under the United States Constitution,[11] recognition of foreign governments,[12] domestic violences.[13] These cases all treat political questions as ones which should be properly and finally determined by the legislature or the executive.

There is no precise rule which can be cited to describe what is meant by the term "political question." As noted above it has been applied to a variety of issues. John P. Frank states that it is more amenable to description by an itemization of the subjects declared to be political by the courts than by a broad general definition.[14]

Charles Post says that the term "political questions" is a magical formula which has the practical result of relieving the courts from the necessity of further considering a particular problem.[15] It is a device, according to Post, by which the courts transfer the responsibility for deciding questions to another branch of Government.

It is evident from a review of the cases that, upon declaring an issue to be political, the courts disclaim all jurisdiction or authority over the question and accept the decision of the political departments.[16] Some of the reasons for these declarations are apparent. For example, the Constitution places the duty on Congress to detremine the qualifications of its own Members. The courts would not pass upon any issue under this provision because someone else, namely, the Congress, has the clear and unequivocal responsibility to make the particular decision.[17]

John Frank points out that, in some instances, courts declare issues political because they are reluctant to hand down orders which, due to the lack of proper tools, they are unable to enforce.[18] He notes that the judiciary, in many respects, is the weakest division of government, dependent for its effectiveness upon the acquiescence of other branches of government.

Two other categories of political questions—ones directly in point in this dissertation—concern (1) problems which are soluble only by legislative action, and (2) problems where the action involved requires information which a court cannot obtain. For example, in Coleman v. Miller,[19] the Supreme Court was asked to decide how long was a reasonable time for the pendency of a constitutional amendment before the States. In determining that the question was a political one and for the Congress to decide, the Court noted that the issue involved a variety of political, social, and economic conditions

evidence on which could not be appropriately received in a court. Chief Justice Hughes stated: [20]

> * * * the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of revelant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice. * * *

Similarly, in Colegrove v. Green [21] the Court would not interfere with the reapportionment of congressional districts within a State upon the ground that the legislature was better equipped to acquire information and set up a sound districting system. So also in Chicago and Southern Airlines v. Waterman Steamship Co.,[22] the Supreme Court declined to review a decision of the Civil Aeronautics Board relating to international air transportation, because the evidence needed to make a proper determination in the case depended upon information on foreign relations unavailable to the Court.

It is probably easier to look to the effects or results which these decisions have on issues rather than try to reconcile the reasons underlying the decisions. The fact is, however, that the Supreme Court has expanded, over the years, the number of subjects which are classified "political questions." Many of today's political questions might well have been justiciable had the Court so wished to decide them. In general, it may be said the Supreme Court has found it more practical and expedient to leave the decision of certain questions to governmental bodies more appropriately adapted to decide them. And so far as the amending clause, article V, is concerned, at least four members of the Supreme Court have stated that Congress has undivided control over the process:

> Undivided control of that process has been given by the article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control, or interference at any point.[23]

Argument may be made that where an appropriate agency of government has failed or refused to act, the courts will be unable to determine a particular issue because they will have no express view of the agency to entertain. What such an argument fails to take into account is that inaction or no action can be regarded as a positive position taken by the agency concerned.[24] All the courts need do is determine that the question is one which should be properly decided by a particular agency and leave it with the agency to decide it. Post has aptly outlined the proposition: When the Court declares a question "political" it accepts the decision of the political departments whether the decision be expressed or not expressed. He stated:

> * * * when a court declares a question to be a political question, it disclaims all jurisdiction and authority over the question and accepts the decision of the political departments, whether this decision be expressed by act of Congress, official statement or declaration, or treaty, though such decision may well be found in the absence of such expressions.[25]

The fact that the matter is left in midair, so to speak, would not seem to foreclose the courts from declaring an issue political.[26] In fact the Supreme Court, in Coleman v. Miller, has indicated that such is the case, in stating that failure on the part of Congress to set up a reasonable time limitation on ratification of amendments did not cast upon the courts the responsibility of deciding what constitutes "reasonable time".[27]

1 Willoughby, The Constitutio
2 Field, The Doctrine of Politic
3 Coleman v. Miller, 307 U. S.
4 Ibid., 453–454 (1939).
5 16 How. 635 (U. S. 1853).
6 16 How. 635, 657 (U. S. 1853).
7 3 Dall. 199, 260 (U. S. 1796).
8 2 Curt. 454, 461 (C. C. Mass.
9 The Protector, 12 Wall. 700 (
129 Packages, Fed. Case No. 159
10 Chinese Exclusion Case, 130
11 Luther v. Borden, 7 How. 1,
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12 Rose v. Himley, 4 Cranch 24
13 Luther v. Borden, 7 How. 1
14 Frank, John P., "Political Q
N. Cahn, Indiana Univ. Press,
15 Post, Charles G., Jr., The
Press, 1936).
16 Post, p. 124.
17 U. S. Constitution, Art I, se
18 Frank, p. 39.
19 307 U. S. 433 (1939).
20 Coleman v. Miller, 307 U. S
21 328 U. S. 549 (1946).
22 333 U. S. 103 (1948).
23 Coleman v. Miller, 307 U. S
24 A notable example is when
It was clear, because of attenda
reapportionment.
25 Post, p. 124.
26 See also Frank, citing Post,
27 307 U. S. 433, 452–453 (1939).

CITATIONS

[1] Willoughby, The Constitutional Law of the United States (1929), III, 1326.
[2] Field, The Doctrine of Political Questions in the Federal Courts (1924), 8 Minnesota Law Review 485.
[3] Coleman v. Miller, 307 U. S. 433, 454 (1939).
[4] Ibid., 453–454 (1939).
[5] 16 How. 635 (U. S. 1853).
[6] 16 How. 635, 657 (U. S. 1853).
[7] 3 Dall. 199, 260 (U. S. 1796).
[8] 2 Curt. 454, 461 (C. C. Mass. 1885) aff'd. 2 Black 481 (U. S. 1862).
[9] The Protector, 12 Wall. 700 (U. S. 1871); Hamilton v. Dillon, 21 Wall. 73 (U. S. 1874); United States v. 129 Packages, Fed. Case No. 15941 (1862).
[10] Chinese Exclusion Case, 130 U. S. 581 (1889).
[11] Luther v. Borden, 7 How. 1, 42 (U. S. 1849). In this case, the United States Supreme Court observed that "when the Senators and Representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal." See also Pacific Telephone Co. v. Oregon, 223 U. S. 118 (1912).
[12] Rose v. Himley, 4 Cranch 241 (U. S. 1808); United States v. Klintock, 5 Wheat. 144 (U. S. 1820).
[13] Luther v. Borden, 7 How. 1 (U. S. 1849).
[14] Frank, John P., "Political Questions" set out in Supreme Court and Supreme Law, edited by Edmond N. Cahn, Indiana Univ. Press, Bloomington (1954).
[15] Post, Charles G., Jr., The Supreme Court and Political Questions (Baltimore: The Johns Hopkins Press, 1936).
[16] Post, p. 124.
[17] U. S. Constitution, Art I, sec. 5.
[18] Frank, p. 39.
[19] 307 U. S. 433 (1939).
[20] Coleman v. Miller, 307 U. S. 433, 453–454 (1939).
[21] 328 U. S. 549 (1946).
[22] 333 U. S. 103 (1948).
[23] Coleman v. Miller, 307 U. S., 433, 459 (1939).
[24] A notable example is when Congress failed to reapportion Congressional districts after the 1920 census. It was clear, because of attendant publicity, that Congress, by its inaction, intended to do nothing about reapportionment.
[25] Post, p. 124.
[26] See also Frank, citing Post, p. 37.
[27] 307 U. S. 433, 452–453 (1939).

CHAPTER 13

"REASONABLE TIME" AFFECTING APPLICATIONS

The conclusion reached in chapter 11 that an application remains in force for a reasonable time raises the further question of what constitutes a "reasonable time." Orfield suggests that the maximum life of an application should not continue for more than a generation. Quite possibly a reasonable time may be measured by changes or improvements of the social or economic conditions out of which an amendatory move arises. The purpose underlying each application no doubt should also be taken into consideration.[1]

The cases of Coleman v. Miller [2] and Wise v. Chandler [3] before the State courts of Kansas and Kentucky presented for judicial determination, among other things, the question of what is a reasonable time under article V. Both cases involved the question of the validity of a State's purported ratification of the proposed child-labor amendment more than 12 years after it was proposed by Congress.[4] The United States Supreme Court, in Dillon v. Glass,[5] had earlier held that Congress, in proposing an amendment, could fix a reasonable time for ratification and that the 7 years which it had prescribed for the adoption of the 18th amendment was, without question, a reasonable time.[6] The Kansas and Kentucky cases offered an opportunity for a further judicial decision on whether a reasonable time had been exceeded in those instances.[7]

The State courts reached opposite results, the Kansas court holding that despite the lapse of 12 years the proposed amendment still reflected the "felt needs of the day" and was, therefore, still open to ratification;[8] the Kentucky court, on the other hand, holding that a reasonable period during which the State might have acted had expired, and that a resubmission of the proposed amendment by Congress was necessary if further action was to be taken on it.[9]

However, the Supreme Court, in Coleman v. Miller,[10] decided the question by concluding that it was essentially political and not subject to judicial determination. In so deciding, the Court reasoned that, inasmuch as the Constitution set forth no satisfactory criteria for judicial determination of the question, and since a decision would involve an appraisal of a great variety of political, social, and economic conditions, the question was more appropriately one for congressional than for judicial determination.

The Court distinguished Dillon v. Gloss [11] on the ground that Congress had set a definite time within which the proposed amendment had to be ratified. It did not follow, as the Court pointed out, that when Congress has not set a time limitation, the courts had to take on the responsibility of deciding what constitutes a reasonable time.[12]

When a proposed amendment is based upon the needs, economic or otherwise, of the Nation, it is necessary to consider, in determining

what is a reasonable time, the conditions then prevailing throughout the country, and whether they had so far changed since the submission of the proposed amendment as to make the proposal no longer responsive to the conception which inspired it. As the Supreme Court stated (p. 453):

> In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of Government. The questions they involve are essentially political and not justiciable. They can be decided by the Congress with the full knowledge and appreciation ascribed to the National Legislature of the political, social, and economic conditions which have prevailed during the period since the submission of the amendment.

It must certainly be conceded that what is a reasonable time in one situation will not necessarily be reasonable in another. To illustrate: A comparatively short time could probably be held reasonable in the case of an amendment necessitated by the exigencies of a national emergency such as a war or an economic crisis, whereas a much longer period would conceivably be reasonable in the case of an amendment changing the term of office of the President. The suggested test laid down by Jameson [13] which seems to be a workable one is that a proposed amendment—

> has relation to the sentiment and felt needs of today, and that, if not ratified early while the sentiment may fairly be supposed to exist it ought to be regarded as waived * * *.

Such a test certainly sets up no rigid rule which will result in a similar time limitation being applied to every case. It only prescribes that an independent judgment should be used in each particular case in deciding whether sufficient time has elapsed to render the passage of an amendment unnecessary from a practical standpoint and unsupported by general public sentiment.

CITATIONS

[1] Orfield, Lester B., The amending of the Federal Constitution (Chicago: Callaghan & Co., 1942), p. 42.
[2] 146 Kan. 390 (1937), aff'd, 307 U. S. 433 (1939).
[3] 270 Ky. 1 (1937), aff'd. 271 Ky. 252 (1937), dis'd 307 U. S. 474 (1939).
[4] 43 Stat. 670 (1924).
[5] 256 U. S. 368 (1921).
[6] Ibid., 376. Congress adopted the seven year limitation provision because, at that time, several proposals which had long lain dormant were nevertheless subject to being resurrected and acted upon by several states. Between the adoption of the Constitution and 1920, twenty-one amendments had been proposed by Congress and seventeen had been ratified by the requisite three-fourths of the states—some within a single year after their proposal and all within four years (256 U. S. 372). Each of the remaining four, however, while ratified by some of the states, was not ratified by a sufficient number. Two, in fact, were missing only one state for the required ratification (U. S. Congress, House, 54th Cong., 2d sess., 1897, H. Doc. 353, pp. 300, 320). Ohio tried to ratify a long-dormant amendment, in order to defeat the slavery issue. In the light of these circumstances, Congress, in proposing the Eighteenth Amendment, fixed seven years for the period of ratification (U. S. Congress, Congressional Record, 65th Cong., 1st sess., 1918, ibid., 2d sess., 1919, pp. 423–478).
[7] As of 1940, the average time for ratification of the first twenty-one amendments has been computed to be 1 year, 6 months, 21 days; 3 years, 6 months, 25 days has been the longest time used in ratifying (Coleman v. Miller, 307 U. S. 433, 453 (1939)).
[8] 146 Kan. 390 (1937).
[9] 270 Ky. 1 (1937) aff'd. 271 Ky. 252 (1937), dis'd 307 U. S. 474 (1939).
[10] 307 U. S. 433 (1939); on the same day the court dismissed Chandler v. Wise, 307 U. S. 474 (1939) on the ground that the Governor's action had rendered the question moot.
[11] 256 U. S. 368 (1921).
[12] The view might be taken that as a result of the Coleman case, the issue of "reasonable time" is no longer pertinent, or necessary, that Congress, with sole authority over the amending process, can recognize state action regardless of whether the states acted within a reasonable time. As a practical matter, with legal question put aside, it would seem that Congress should use, as good procedure, the reasonable time method in considering questions relating to the amending process.
[13] Jameson, Constitutional Conventions (4th ed.; 1887), p. 634.