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"The Monster Approaching the Capital:" The Effort to Write Economic Policy Into The United States Constitution

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"THE MONSTER APPROACHING THE CAPITAL:*

THE EFFORT TO WRITE ECONOMIC POLICY INTO
THE UNITED STATES CONSTITUTION

I. INTRODUCTION

The states are asking Congress to call a constitutional convention under Article V of the United States Constitution to propose an amendment requiring a balanced federal budget. This movement began in the mid 1970's, and quickly gained momentum.1 To date, thirty2 of the necessary thirty-four states have made applications, with New Hampshire the most recent in the spring of 1979.3 Credit for this swift and comprehensive drive has been given to the National Taxpayers Union.4 Governor Jerry Brown of California also promoted this movement in his 1979 inaugural speech.5 In spite of his support, however, the California legislature rejected the convention after hearing extensive testimony before its Ways and Means Committee.6

The deliberation by the California legislature is not characteristic of the treatment given this proposal by other states. The majority of other state legislatures did not hold committee hearings and debates were brief. The voting reflected the legislators' general attitude concerning the goal of a balanced federal budget, and not necessarily their well-reasoned commitment to a constitutional convention call, or its ramifications.7 The state applications themselves reflect this uncertainty. Many of the state applications seek a constitutional convention as an alternative to congressional inaction on this matter.8 Others contain "self-destruct" provisions whereby the application would be deemed void and rescinded if Congress proposes such an amendment through the alternative method of Article V.9 Still others, some of

2 Id. at 12-13.
5 Gunther, supra note 3, at 2.
6 Id. at 4 and n.11.
7 Id. at 3-4. See also id. at 19, discussing the Montana legislature's deliberation on this issue. A resolution was almost passed in 1979 which would have made Montana the thirtieth state to apply for a constitutional convention. One legislator, just before the final vote, urged his colleagues to consider the significance of its passage as if they were, in fact, the thirty-fourth state. The Montana legislature did not approve the resolution.
9 Georgia, Idaho, Iowa, Kansas, Mississippi, Nevada, New Hampshire, North Carolina, Georgia and South Dakota. See App. at p. 750, infra.
which are included in both the aforementioned groups, have deemed themselves "continuing applications" for a convention. Some state applications do not contemplate action by Congress, but simply ask Congress to call a convention for proposing a balanced budget amendment. One characteristic common to almost all state applications is the desire to limit the scope of the convention to constitutional restraints on federal spending with the goal of achieving a balanced budget. These delimiting provisions within the applications evidence the suspicion of a runaway convention. The only other constitutional convention in our history took place in Philadelphia in 1787. Under the Articles of Confederation, there was no authority to propose a new constitution at the convention, nor to wander from the specific subject matter contained within the proposals by the state legislatures. However, once assembled, a wholly new constitution emerged for ratification by the states despite protests that the delegates lacked this power.

Article V of the United States Constitution provides two methods for proposing amendments. The twenty-six amendments which are now part of the Constitution have been initiated by the first method—they were proposed by a two-thirds vote of Congress, and subsequently ratified by three-fourths of the states. The thirty state applications currently before Congress are brought through the uncharted waters of the second method.


11 Colorado, Delaware, Indiana, Louisiana and North Dakota. See App. at p. 750, infra.

12 But see, 125 CONG. REC. S1310 (daily ed. Feb. 8, 1979). The application of North Dakota, rather than specifying that its call is for the "specific and exclusive purpose" of proposing some variant of a balanced budget amendment, asks that a convention be called "for such purposes as provided by Article V of the Constitution."

This may be recognition on the part of the North Dakota legislature that because the convention mode of amending the Constitution is completely untested and Congress has not yet legislated guidelines, no one is certain whether a "limited" convention can be called. However, in the 1st Session of the 97th Congress, Senator Orrin G. Hatch of Utah introduced a bill which would institute procedures for calling a convention under Article V. This bill was approved November 3, 1981, by the Constitution Subcommittee and is now before the Senate Judiciary Committee. S. 817, 97th Cong., 1st Sess., 127 CONG. REC. S2794 (daily ed. Mar. 26, 1981).

13 Gunther, supra note 3, at 4. Reportedly, the advocates of a balanced budget amendment have assured others that a convention "is not likely to come about" because the real aim is to "spur" Congress to propose its own amendment, and additionally, that even if it is convened, it will be limited to the consideration of only that amendment. Id.


15 U.S. CONST. art. V. states:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other mode of Ratification may be proposed by the Congress . . . .
Many thorny issues are raised by the prospect of a new constitutional convention. Congressional duties and limitations when acting on the state applications are unclear. For example, is Congress under an absolute duty to call the convention if the thirty-fourth application is properly tendered; what discretion is allowed in evaluating the applications; can Congress set standards for form and timeliness; can the scope or purpose of the convention be limited; and if so, and the delegates stray from the limited purpose, what will be the effect.

It is not within the scope of this comment to answer all the above issues. The focus of this paper will be a review of solutions suggested by Constitutional scholars with an emphasis on current proposed legislation. The Constitutional Implementation Act of 1981 (hereinafter S.817) and S.J. Res. 58. The current Congressionally-proposed amendment will be discussed in relation to the state applications. A brief review of the legislative history behind Article V will highlight the current efforts by Congress to provide some procedural guidelines for a state-summoned convention. Finally, the provisions of the various state applications will be compared. As a preface to this discussion, the nature and activities of the organizations credited with sponsoring this movement will be addressed.

II. SPONSORING ORGANIZATIONS OF THE BALANCED BUDGET AMENDMENT

The major sponsors of this attempt to summon a national convention under Article V are the National Taxpayers Union (hereinafter N.T.U.) and the American Farm Bureau Federation. N.T.U. is a public affairs organization formed to marshall public opinion. With a membership numbering 100,000, N.T.U. is committed to the reduction of government spending, protecting taxpayers' rights, and reducing taxes generally. Its activities include a lobbying effort in Washington, D.C. and at the state level. Due to N.T.U. persistence in the 1970's, a growing number of state legislatures began to adopt provisions placing spending and taxing limitations within their state constitutions. The most significant efforts resulted in Proposition 13 and Proposition 4 in California.

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20 N.T.U. is headquartered in Washington, D.C.
23 Id.
N.T.U. president, George Snyder, and the legislative director, David Keating, and Harry Bell, President of the South Carolina Farm Bureau Federation, offered testimony regarding the proposed balanced budget amendment of the 97th Congress, S.J. Res. 58, before the Senate Subcommittee on the Constitution. Chairman Hatch specifically noted the efforts of N.T.U. and the National Tax Limitation Committee in reporting out the resolution.

The American Farm Bureau Federation, a conglomeration of 49 state farm bureaus, analyzes the problems of its member bureaus and "formulates action to achieve educational improvement, economic opportunity, and social advancement." Its purported membership is over three million. Besides lending its support to the constitutional amendment movement, it has recently brought suit against three federal agencies in an effort to curtail further federal disbursement of funds to the United Farm Workers. It has also resisted efforts to raise the minimum wage paid alien farm workers.

III. HISTORICAL EVOLUTION OF ARTICLE V

If these sponsoring organizations are successful in their efforts and Congress calls a constitutional convention under Article V, what will be the contours of this convention? The state applications operate on the presumption that the scope of the convention can be limited to proposing a balanced budget amendment. Legislative history underlying Article V must be analyzed in order to determine whether this is what was contemplated by the inclusion of this mode of proposing amendments to the Constitution.

Although the delegates to the Philadelphia Convention generally agreed that an easier amendment process than was available under the Articles of Confederation was needed, they were also aware of the need for permanency in the federal structure. They therefore rejected a motion requiring ratification by two-thirds of the states, and settled on ratification by three-fourths. The resolution of this issue was easier than that of the convention proposal method for amendments. The draft that emerged from the Committee of Detail in August, 1787 contemplated excluding the "Na-

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24 Id. at 15. N.T.U. officers testified on May 20, 1981, and Harry Bell on April 9, 1981.
25 Id. at 12-13.
29 ARTICLES OF CONFEDERATION, art. XIII. No alteration of the Articles of Confederation was possible unless agreed to by Congress and confirmed by the legislatures of all the States, thereby giving each state a veto power to prevent any amendments to it. U.S.C. xxxv, xxxviii (1976). See Dellinger, The Recurring Question of the "Limited" Constitutional Convention, 88 YALE L.J. 1623, 1624-25 (1979).
30 Dellinger, supra note 29, at 1625.
tional Legislature" from the amendment process.\textsuperscript{31} Initiation of amendments would be the states' sole province with the congressional role limited to calling the convention, and that convention would be the sole source of amendments, apparently without the need for ratification by the states.\textsuperscript{32} The resolution of this issue was difficult because of the differing views reflected by the localist and centralist positions.\textsuperscript{33} "Localists feared that [a] wholly autonomous convention could subvert states' rights."\textsuperscript{34} The centralist view, as represented by Hamilton, opposed this method on the ground that barring the National Legislature from any role in initiating amendments would threaten the national structure and unduly accord power to the states.\textsuperscript{35} Madison then offered a compromise draft which was tentatively adopted by the Convention:\textsuperscript{36}

\begin{quote}
The Legislature of the U-S—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 one or the other mode of ratification may be proposed by the Legislatures of the U.S:\textsuperscript{37}
\end{quote}

Madison's draft resembles what eventually became Article V. Congress would have been the sole proposing source of amendments, but would respond to initiation of amendments by the states. However, the convention method of proposing amendments was not provided for in Madison's draft.

After the debates on Madison's draft, the constitutional convention scheme resurfaced.\textsuperscript{38} The delegates voted to substitute language providing for a constitutional convention when two-thirds of the states applied.\textsuperscript{39} Unfortunately, records of the accompanying debate do not shed much light on the reason for the changes.\textsuperscript{40} Roger Sherman expressed "fears" that under Madison's proposal the three-fourths majority of states upon ratification of an amendment proposed by Congress might derogate the rights of individual states, such as denying their equality in the Senate or abolishing them altogether.\textsuperscript{41} Mason objected because he thought it gave Congress too much

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\textsuperscript{31} Gunther, supra note 3, at 14.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 559 (M. Farrand ed. 1937) [hereinafter cited as II Farrand].
\textsuperscript{38} Id. at 629. See Dellinger, supra note 29, at 1628.
\textsuperscript{39} II Farrand, supra note 37, at 630. See Dellinger, supra note 29, at 1628.
\textsuperscript{40} II Farrand, supra note 37, at 629-33.
\textsuperscript{41} Dellinger, supra note 29, at 1629.
control. In his view, under both modes of Madison's draft, the states had to depend ultimately on Congress, and if the federal government became too oppressive, the states would be wholly dependent upon Congress for the proposing of new amendments. These objections sounded the need for some protection of state interest over federal interest. Both suggest the need for the autonomy of the constitutional convention.

The final draft that emerged from the Philadelphia Convention and which is now Article V of the Constitution grants parallel methods for the proposing of amendments: by Congress with two-thirds majority of both Houses, or by a convention upon the application of two-thirds of the states. The congressional role in the second method is limited to calling the convention. Based on the Philadelphia Convention as the only historical model upon which to interpret the authority of such a convention, it would seem that its drafters and delegates intended that in future conventions there should be a high degree of autonomy to address any issue which the delegates may consider of national interest. To conclude that Congress has other than a ministerial function in the convention process would be a strained construction of the meaning and purpose of Article V in light of the legislative history and the only historical model available.

IV. THE SCOPE AND AUTHORITY OF A CONSTITUTIONAL CONVENTION

The thirty state applications currently calling for a constitutional convention are seeking something quite apart from what the drafters of Article V presaged. Almost all of the state applications use similar language in seeking

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42 Id.
43 Id. Dellinger interpreted Mason’s objection as reflecting his belief in the need for a constitutional convention having broad authority to propose, draft, debate and revise amendments; it should not be subject to the sole proposing authority of Congress as under Madison’s scheme because Congress might choose to ignore the suggested texts of amendments emanating from the states.
44 See supra note 15, for the text.
45 Congress would be under a duty to call a convention. Incident to this duty would be the power of Congress to establish the means preliminarily necessary for the convention: a designation of the time and place of meeting, and the appointment of temporary presiding officer(s) until the delegates could select their own. Thereafter Congressional power over the convention should be suspended to allow the states' delegates to freely exercise the amendment-proposing power guaranteed them by Article V. Congressional participation would finally be exercised to provide the mechanism for ratification of any emerging amendments in the manner it may choose under Article V.

Currently before the Senate Judiciary Committee is S. 817 which would implement the procedure for the calling of a constitutional convention. Sponsored by Senators Hatch and DeConcini, S. 817 envisions an active role for Congress in determining the convening and scope of the convention. Pursuant to § 6(a) of S. 817, it would be the duty of each House of Congress to determine whether each application is valid with respect to the same general subject matter. Congress would have the authority to limit the subject matter of the convention, and reject state applications which fall outside this limitation. Pursuant to § 11(b), Congress would have the authority to block the submission of any proposed amendment emanating from the convention to the states for ratification. If a proposed amendment "relates to or includes a general subject which differs from or was not included as one of the general subjects" to which Congress has deemed the convention limited, Congress could by a concurrent resolution refuse to transmit it for ratification by the states. S. 817.

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a convention “for the specific and exclusive purpose” of proposing an amendment requiring some variant form of a balanced federal budget.46 These applications clearly envision a limited-purpose convention.47 Several state applications even contain a provision whereby they will simply self-destruct should the convention “not be limited to such specific and exclusive purpose” as recited therein.48 Within the application of one state is its own restrictive interpretation of Article V and the scope of any convention called pursuant to it.49

There is some discussion among the constitutional scholars that a limited-purpose convention is an anomaly. In a letter addressed to the chairman of the House Judiciary Committee of the 92nd Congress which was considering the passage of a bill similar to the current S. 817, Professor Charles L. Black, Jr. of the Yale Law School expressed his outrage at the absence of any constitutional basis for such legislation.50 Black’s conclusion was premised on the impossibility of a limited convention according to his reading of the relevant Article V phrase.51 He interprets “‘a Convention for proposing Amendments’ [to] mean ‘a convention for proposing such amendments as that convention decides to propose.’”52 According to Black’s analysis, a limited-purpose convention would never be called because a state application which asks for a single purpose convention is asking for something which Article V does not contemplate, therefore, Congress would be under no obligation to summon such a convention. Even if thirty-four applications were before it, Congress would not

46 Variations include requiring simply a balanced federal budget; requiring that federal “costs” not exceed “income”, or federal expenditures not exceed revenues; or requiring that federal appropriations may not exceed revenues. The majority use language similar to the last variation. See App. at p. 750, infra.

47 Quite apart from the consideration of whether Congress can limit the scope and purpose of a constitutional convention is whether the various state legislatures can by their applications bind the prospective convention delegates to that single national issue to which each application is addressed.

48 The Iowa, New Hampshire, South Dakota, Idaho and Colorado applications contain a provision whereby they should be deemed “null and void, rescinded, and of no effect” in the event of such a contingency. North Carolina’s application includes a similar provision. But perhaps the most unambiguous provision is that of Utah which provides that its application can be counted in the convention call only if the convention is limited to the subject matter of its resolution. See App. at p. 750, infra.


[T]he General Assembly interprets Article V to mean that if two-thirds of the states make applications for a convention to propose an identical amendment to the Constitution for ratification with a limitation that such amendment be the only matter before it, that such convention would have the power only to propose the specified amendment and would be limited to such proposal and would not have power to vary the text thereof nor would it have power to propose other amendments on the same or different propositions.


51 Id. at 197-204.

52 Id. at 199.

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be obliged to call a limited-purpose convention because "[t]hirty-four times zero is zero."\footnote{Id. at 198.}

In considering whether a state application for a limited convention could be construed as an application for an unlimited convention, Black answers negatively.\footnote{Id. at 200.} Characterizing this inference as "absurd both logically and politically,"\footnote{Id.} such an argument would have to rest upon the assumption that a state, by seeking a limited convention, is also indicating its interest in an open-agenda convention, where any subject might be broached. Black's argument here has special force when it is applied to the current states' drive for a balanced budget amendment. In addition to the general subject matter of their applications, these thirty applications have one common characteristic—they seek to limit the scope of the convention to that solitary matter.\footnote{Id. at 198.} It is evident from the texts of the applications that the state legislatures considered and expressly rejected an unlimited convention.

Professor Van Alstyne of Duke University takes exception to Professor Black's basic premise.\footnote{Van Alstyne, supra note 14, at 1295.} After restating and amplifying the arguments posed by Black, he describes the argument that the only constitutional convention contemplated by Article V is an open and free-wheeling one as a "Catch 22" interpretation.\footnote{See infra note 63 and the accompanying text for variations in the language of the applications.} Although a state should pose its application with a bona fide "willingness to have a truly open convention,"\footnote{Id. at 1304.} and its legislative resolution inconsistent with this understanding should not be counted by Congress in the tally as a valid application,\footnote{Id. at 1301.} he nevertheless concludes that such a general convention is the least likely to be contemplated by disgruntled states.\footnote{Id. at 1300.} Van Alstyne foresees a "particular event, an untoward happening"\footnote{Id. at 1305.} as being the most likely triggering device for parallel state resolutions. As such, he argues that Congress would be under a constitutional obligation to call a convention. This type of convention would provide a vehicle for modest change.

Even under Van Alstyne's analysis, the current applications for a balanced budget amendment would be invalid since they evidence no "bona fide willingness" to accept the prospect of an unlimited convention. The majority of them condition their application for a convention on the "specific
and exclusive purpose” of proposing some variant form of a balanced budget amendment.63 One state proposes its own text for such an amendment, then provides for its application to be considered by Congress only with those which propose an “identical” amendment.64 Its legislature included its own interpretation of an Article V convention, and in its application stated, that “such amendment would be the only matter before it, that such convention would have power only to propose the specified amendment and would be limited to such proposal and would not have power . . . to propose other amendments on the same or different propositions.”65 Clearly this state contemplates a simple vote on the amendment and a convention with no proposing authority nor power over its agenda.66 Another state which offers a proposed text for the amendment rather than embarking upon an interpretation of Article V seeks a convention for “such purposes as provided by Article V of the Constitution.”67 Two other states offer a text for the proposed amendment, and suggest that the convention be limited to this matter.68

One may construe these delimiting provisions in the applications as not negating a “bona fide willingness” for an unlimited convention, but rather accepting this eventuality and simply limiting their intent for this specific call. However when one considers the haste with which the resolutions were passed, and the guarantees of their promoters,69 such a construction would be strained indeed.

Professor Dellinger is another advocate of the view that state applications which limit the purpose and scope of the convention should be de-

63 Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Iowa, Maryland, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia and Wyoming. North Carolina asks Congress to call a convention for the “exclusive” purpose of proposing a balanced budget amendment. Closely related to this category are the applications of Florida and Kansas which ask for a convention limited to the “sole purpose” and “sole and exclusive purpose” respectively of some variant form of a balanced budget amendment. See App. at p. 750, infra.

64 See the text of the Delaware application at supra note 49.

65 Id. (Emphasis added).

66 Van Alstyne characterizes this type of application as envisioning a convention which Congress could least decline to call. Van Alstyne, supra note 57, at 1305. However, it would seem that this type of application does not at all evidence a “bona fide willingness” to have a truly open convention.


68 The relevant phrasing is: “for the proposing of the following amendment,” Miss. H.C. Res. 51 at 125 CONG. REC. S1308 (daily ed. Feb. 8, 1979); “for the purpose of considering and proposing an amendment to the Constitution of the United States to require that . . . [text]”, Tenn. H.J. Res. 22 at 125 CONG. REC. S1312 (daily ed. Feb. 8, 1979). Louisiana also proposes a text for the amendment, and asks that “the purview of any convention called by the Congress pursuant to this resolution be strictly limited to the consideration of an amendment of the nature as herein proposed,” La. S.C. Res. 73 at 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979). Although Arizona and Nevada provide no text for the proposed amendment, their applications indicate the general nature of the amendment, and seek a convention limited to that purpose. Ariz. H.C. Mem. 2320 at 125 CONG. REC. S1306 (daily ed. Feb. 8, 1979); Nev. S.J. Res. 22 at 125 CONG. REC. S1309 (daily ed. Feb. 8, 1979).

69 See supra note 13.
clared invalid by Congress. He interprets the legislative history and debates behind Article V as presenting two themes:

Congress should not have exclusive power to propose amendments; and state legislatures should not be able to propose and ratify amendments that enhance their power at the expense of the national government. States were empowered under Article V to ratify amendments; the power to propose amendments was lodged in two national bodies, Congress and a convention. 70

A necessary corollary to this argument is that if the state legislatures were permitted to limit the scope of the convention to a specific subject, the proposal power which was intended to be lodged in a national convention would then be shifted to the state legislatures. 71 This result was not the intent of the drafters of Article V. According to Dellinger, since the convention mode of proposing amendments was one in which Congress was to play no significant role, the state applications which ask Congress to limit the subject matter of such a convention are requesting something which Congress cannot grant. 72 Therefore, he reasons, the applications are invalid. 73 Dellinger, like Van Alstyne, suggests that Congress should be convinced that the state legislatures applying for a convention should have a proper understanding of the unbridled authority of the prospective convention. 74

Although Professor Gunther seems to agree with Dellinger's position that a constitutional convention would be a separate body beyond the control of the applying states or Congress, he disagrees that a limited convention may not be called. 75 Gunther says that a single issue convention may be called by Congress, but ultimately the scope of its agenda rests upon its own authority. Congress may specify the purpose of the convention, but this would be no more than a "moral exhortation" to the convention delegates. 76

V. ATTEMPTS TO DEFINE PROCEDURES FOR IMPLEMENTING A CONSTITUTIONAL CONVENTION

There have been other recent struggles with the virgin process of amending the Constitution through the convention mode of Article V. The Supreme Court decisions in Baker v. Carr 77 and Reynolds v. Sims 78 establish-

70 Dellinger, supra note 29, at 1630.
71 Id.
72 Id. at 1637.
73 Id. at 1638.
74 Id. at 1637.
75 Gunther, supra note 3, at 13.
76 Id.
The “one-person-one-vote” principle and applying it to state legislative apportionment procedures met with opposition. Through the efforts of the Council of State Governments and Senator Everett Dirksen, a national campaign was launched to summon a constitutional convention to address the apportionment controversy. By 1967, thirty-two state legislatures had passed resolutions applying for a constitutional convention under Article V. A debate within Congress concerning this untested method of proposing amendments surged and prompted Senator Sam J. Ervin to introduce a bill on August 17, 1967 to establish procedures for calling a constitutional convention. This bill passed the Senate in 1971, and again in 1973, but was not considered by the House either time and failed to become law.

On March 26, 1981, ostensibly in response to the current states’ drive for a constitutional convention, Senator Orrin G. Hatch introduced a bill (S. 817) to establish procedures for implementing it. S. 817 differs in many respects from the Ervin bill. The Ervin bill gave a more active role to Congress in determining the validity of the state applications. The rules of procedure for adopting or rescinding a state resolution requesting the convention call would have been determinable by Congress under the Ervin bill, where S. 817 makes this and questions concerning compliance with the rules determinable by the state legislatures. Unlike the Ervin bill, S. 817 does not provide a mechanism for Congress to invalidate a state application initially. Congress may make a determination of validity only upon receipt of thirty-four applications on the same general subject. The one basis for invalidating an application is if Congress determines it is not of the “same general subject” as the others. After Congress determines that there are “valid applications made by two-thirds or more of the States for the calling of a constitutional convention,” it is under a duty to call the convention.

Aside from a clear attempt to limit the scope of authority of a constitutional convention by narrowly defining its agenda to one general subject, S. 817, in effect, gives Congress a veto power over any amendments
emanating from it. According to the scheme proposed by S. 817, if the convention does not abide by the limitations and proposes amendment(s) outside the general subject matter for which the convention is called, Congress could by concurrent resolution refuse to submit such proposed amendment(s) to the states for ratification. This is ironic in light of the recent remarks by the sponsor of this bill that its main purpose is to ensure that Congress would only be empowered to call the convention, and that it would not be "in a position to undermine the convention process." There is grave doubt that Congress would be empowered at all to restrict, limit or otherwise circumscribe the authority of a convention to address any issue it deemed in the national interest. Legislative history and the historical model indicate that there is no foundation for the kind of Congressional control over the convention that S. 817 envisions.

VI. THE STATE APPLICATIONS AND SENATE JOINT RESOLUTION 58

The recent state applications seeking a constitutional convention to propose an amendment requiring a balanced federal budget have taken several forms. State applications have variously called for an amendment to balance the federal budget (seven states), to insure that federal appropriations for any fiscal year not exceed the total of federal estimated revenues (twenty states), to prohibit federal deficit-spending, to prohibit federal costs from exceeding income, and to prohibit federal expenditures from exceeding revenues. Of those states included in the appropriations/revenues formula, two would exclude any federal revenues derived from borrowing in the total estimate of federal revenues for that fiscal year. Also within this appropriations/revenues formula, two states would not only prohibit any increase in the national debt but would require that it be repaid. One state would have the amendment establish a procedure for

89 Id. at § 11(b). The Ervin bill also contains such a provision.
91 See supra text accompanying notes 29-45.
92 See App. p. 750, infra.
93 Florida, Georgia, Iowa, New Hampshire, North Carolina, Oregon and Texas. See App. at p. 750, infra.
94 Alabama, Arizona, Arkansas, Idaho, Indiana, Kansas, Louisiana, Maryland, Mississippi, Nebraska, New Mexico, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wyoming. See App. at p. 750, infra.
99 Louisiana and Mississippi would have the national debt repaid within 100 years following the date of ratification of such appropriations/revenues formula amendment with the rate of repayment to be not less than one-tenth of the debt principal for each ten-year period. Louisiana, S.C. Res. 4, S. Res. 73, H.C. Res. 269, 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979); Mississippi, H.C. Res. 51, 125 CONG. REC. S1308 (daily ed. Feb. 8, 1979).
amortizing the national debt. All the state applications focus on restraint and reduction of federal spending.

The issue remains of how binding upon Congress these applications will be. Many of the state applications call for the Article V convention as an alternative to the inaction of Congress on this matter. Other applications contain a "self-destruct" provision stating that if Congress proposes a similar amendment to that proposed by the state, the application will be deemed "null and void, rescinded, and of no effect." More than half of the state applications ask Congress to propose an amendment, but unlike those few with the self-destruct provisions, it is unclear what the effect of Congress' proposal will be if it differs from the scheme proposed by each state petition. Many of the state applications specifically denote that they are to be considered "continuing applications". Others, however, imposed a deadline for Congress to propose an amendment, which has now expired. Presumably, any amendment proposed by Congress would have no effect on this latter group. These conflicting provisions among the state applications must be carefully analyzed in regard to the impact of the newly-proposed congressional amendment, S.J. Res. 58, which has been sent by its committee to the Senate floor.

This 97th Congress has made prodigious efforts to alter the Constitution as interpreted by the United States Supreme Court in recent years. In less than a month, 83 bills to amend the Constitution were introduced. In the first four months of its First Session, 145 Constitutional amendments were offered, including proposals for a balanced federal budget, school busing to achieve racial integration, prayer in public schools, abortion, and banning racial quotas. Concurrently, certain factions within Congress have attempted to strip the jurisdiction of the Supreme Court in five general areas: prayer in the schools, abortion, school busing, a males-only draft and state court rulings.

Amid this barrage S.J. Res. 58 proposes that the Constitution be amended

101 See supra note 8.
102 Georgia, Idaho, Iowa, Kansas, New Hampshire and South Dakota. See App. at 750, infra. Cf. supra note 9 for states using general language to the same effect in their applications at p. 750, infra.
103 Mississippi, Nevada, North Carolina and Oregon. See App. at p. 750, infra.
104 See supra note 17.
107 Wicker, Court-Stripping, N.Y. Times, Apr. 24, 1981, at A31, col. 1. Wicker feels that some legislators are pursuing the jurisdictional court-stripping plan because they do not have sufficient votes to pass a constitutional amendment on any of these issues.
to require a balanced federal budget and to limit taxing and spending.\textsuperscript{108} One of its sponsors and a longtime proponent of this type of measure, Senator Strom Thurmond, observed that this measure was riding the momentum when it was successfully voted from subcommittee to full committee.\textsuperscript{109} In a letter to the editor of the Washington Post, Senator Thurmond explained his position on the need for such an amendment: Congress has not shown the necessary budgetary restraint in the past, and public opinion favors it.\textsuperscript{110} He made reference to the states' drive for a convention on this issue.\textsuperscript{111} But the proposed amendment has met with opposition both in Congress and in the press.\textsuperscript{112}

S.J. Res. 58 was designed to remedy the alleged "spending bias" in the present system of federal expenditures. According to the committee report, Congress has no incentive for balancing the budget. In fact, the argument continues, Congress is subject to two contradictory political forces which together tend to increase the federal deficit. These forces are the inducement to spend in response to the demands of their constituency and political pressure groups, and the countervailing pressure not to raise taxes to offset these expenditures at the expense of their political well-being.\textsuperscript{113}

Section 1 was intended to establish a norm of a balanced federal budget by requiring that for any fiscal year the "total outlays [be] no greater

\textsuperscript{108} S.J. Res. 58 states:

Section 1. Prior to each fiscal year, the Congress shall adopt a statement of receipts and outlays for that year in which total outlays are no greater than total receipts. The Congress may amend such statement provided revised outlays are no greater than revised receipts. Whenever three-fifths of the whole number of both Houses shall deem it necessary, Congress in such statement may provide for a specific excess of outlays over receipts by a vote directed solely to that subject. The Congress and the President shall ensure that actual outlays do not exceed the outlays set forth in such statement.

Section 2. Total receipts for any fiscal year set forth in the statement adopted pursuant to this article shall not increase by a rate greater than the rate of increase in national income in the last calendar year ending before such fiscal year, unless a majority of the whole number of both Houses of Congress shall have passed a bill directed solely to approving specific additional receipts and such bill has become law.

Section 3. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect.

Section 4. The Congress may not require that the States engage in additional activities without compensation equal to the additional costs.

Section 5. Total receipts shall include all receipts of the United States except those derived from borrowing and total outlays shall include all outlays of the United States except those for repayment of debt principal.


\textsuperscript{111} \textit{Id}.


\textsuperscript{113} S. Rep. No. 151, 97th Cong., 1st Sess., 10. This statement is attributed to Professor Roger Freeman of the Hoover Institute.
than total receipts." However, even under this proposed scheme Congress could continue to engage in deficit spending upon a three-fifths vote of both Houses approving a specific level of deficit. In addition to establishing a balanced federal budget as the norm, S.J. Res. 58 also attempts to eliminate "tax bracket creep," another "spending bias" resulting from Congressional access to annual, automatic tax increases. Section 2 provides a tax indexing by which the level of receipts for any fiscal year would be no greater proportionally than that of the prior fiscal year. However, this ceiling on federal receipts could be overcome by a majority vote of both Houses.

Section 3 authorizes Congress to waive the requirements of this scheme for any year in which a declaration of war is in effect. Of the eight state applications which offer a text for a balanced budget amendment, all include some provision for a suspension of the requirements in the event of a national emergency and/or declaration of war. However, the similarity ends there. One state would vest this authority in the President of the United States. Others would vest the authority for the intial determination of a national emergency in the President but would require the affirmance of Congress by a two-thirds vote. Still others would vest this authority in Congress, either by a majority vote or by a three-fourths vote of both Houses.

S.J. Res. 58 includes a provision not found in the state applications. Section 4 precludes Congress from passing on the costs of any new, unreimbursed programs to the states. This provision was designed to prevent Congress from circumventing "the limitation imposed by this amendment upon its spending and taxing authority."

S.J. Res. 58 has recently cleared committee and is ready for floor debate in the Senate. It must be passed by a two-thirds vote of both Houses before it can be referred to the states for ratification. If this occurs, at least twenty of the state applications will no longer be of any effect, if the

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115 Id.
116 Id. at § 2.
117 Delaware, Louisiana, Maryland, Mississippi, North Dakota, South Carolina, Tennessee and Wyoming. See App. at p. 750, infra.
118 But see 125 CONG. REC. S1307 (daily ed. Feb. 8, 1979). The application of Delaware is identical to § 3 in this respect.
120 Maryland, Tennessee and Wyoming. See App. at p. 750, infra.
122 Louisiana and Mississippi. See App. at p. 750, infra.
123 See supra note 113, at 11.
124 U.S. CONST. art. V.
plain-meaning of their words is accepted.125 These include the applications asking for a constitutional convention in the event that Congress does not propose an amendment, and applications containing a "self-destruct" provision upon Congress proposing the desired amendment. However, some states have not conditioned their call on Congressional action; presumably, those applications will continue even if Congress does pass S.J. Res. 58.126 With twenty states dropped from the tally, those applications would effectively be nullified as well.

VII. CONCLUSION

If S.J. Res. 58 fails to be passed by Congress, the current thirty applications for constitutional convention will continue to have effect. The prospect of a constitutional convention, shrouded with doubt and confusion as to its scope and authority, draws nearer. In 1981, state resolutions applying for a constitutional convention have been adopted in one house of four states, and Vermont is on the verge of passing a joint resolution.127 Equally uncertain is the fate of S. 817. If it becomes law in 1982, and if it can withstand a constitutional attack, an implementing procedure will be established for a convention. Four current state applications will have expired in 1982, however, and under S. 817 there will be no duty to call the convention unless these applications are renewed, or four others are tendered in their place.128 But if four separate and additional state applications are tendered to Congress in 1982 to bring the tally to the necessary two-thirds (thirty-four states) as required under Article V, then these four otherwise-expired applications will be given new life and will be counted in the tally.129 At that point Congress must put into motion the implementing procedure for a political assembly, the likes of which were last seen in 1787. "Before the next convention is called, perhaps someone will explain who will play the demanding role of James Madison. Who will play Alexander Hamilton, who Benjamin Franklin?"130

VIII. ADDENDUM

The Reagan administration is still struggling with the federal budget. It has projected that another $345 billion will be added to the $1 trillion

125 Alabama, Arizona, Arkansas, Georgia, Idaho, Iowa, Kansas, Maryland, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Wyoming. See App. at p. 750, infra.

126 Colorado, Delaware, Florida, Indiana, Louisiana, Nevada, North Dakota and Oregon. The resolution of Mississippi requires that for it to abandon its application, Congress must propose an amendment identical to the text of the amendment within the application. S.J. Res. 58 is not identical. See App. at p. 750, infra.

127 See Moynihan, supra note 112, at 28.


129 Id.

national debt over fiscal years 1982 to 1985. The proponents of the balanced budget amendment have been aided by the scope of the projected federal deficit in their efforts to secure passage of the amendment. In mid-January of this year, Alaska became the thirty-first state to apply to Congress for a constitutional convention. Its legislature passed a joint resolution petitioning Congress to either propose a balanced budget amendment or call a constitutional convention. In March, the state of Washington was close to passing a convention call, but it was removed by the state Senate. The Ohio Senate has passed a resolution, but it still awaits approval by the House. According to some observers, similar resolutions have a good likelihood of passage this year by the Kentucky and Missouri legislatures. At the time of this printing, a total of nine states have approved a resolution in one house of their respective legislatures.

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135 S.J. Res. No. 1. S.J. Mem. No. 1 included the convention call, but on March 11, 1982, the Senate passed S.J. Res. No. 1 with the convention call omitted. Telephone interview with David Keating, Legislative Director of the National Taxpayers Union, Washington, D.C. (Apr. 12, 1982).
136 Grant, Editorial Commentary: Pass the 27th Amendment, and Make a Balanced Budget the Law of the Land, Barron's, Feb. 22, 1982, at 11, col. 1. The Ohio Senate adopted S.J. Res. No. 1 on February 10, 1981; the resolution was referred to committee in the House on March 11, 1981, where it remains. Telephone interview with Frances Haney, Legislative Information Office, State Building, Columbus, Ohio (Apr. 12, 1982).
138 See Grant, supra note 136, at col. 4.
## APPENDIX

State Legislatures Which Have Passed Applications for a Balanced Budget Amendment*

<table>
<thead>
<tr>
<th>State</th>
<th>Measure</th>
<th>Year Adopted</th>
<th>Text**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>H.J. Res. 1</td>
<td>1979</td>
<td>125 CONG. REC. S2363 (daily ed. Mar. 8, 1979)</td>
</tr>
<tr>
<td>Delaware</td>
<td>H.C. Res. 36</td>
<td>1975</td>
<td>125 CONG. REC. S1307 (daily ed. Feb. 8, 1979)</td>
</tr>
<tr>
<td>Indiana</td>
<td>S.J. Res. 8</td>
<td>1979</td>
<td>125 CONG. REC. S5017 (daily ed. May 1, 1979)</td>
</tr>
<tr>
<td>Iowa</td>
<td>S.J. Res. 1</td>
<td>1979</td>
<td>125 CONG. REC. S7879 (daily ed. June 18, 1979)</td>
</tr>
<tr>
<td>Maryland</td>
<td>S.J. Res. 4, Md. J. Res. 77</td>
<td>1975</td>
<td>125 CONG. REC. S1308 (daily ed. Feb. 8, 1979)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>H.C. Res. 51</td>
<td>1975</td>
<td>125 CONG. REC. S1308 (daily ed. Feb. 8, 1979)</td>
</tr>
</tbody>
</table>

*Unless otherwise indicated, applications were from the 96th Congress to date.*
<table>
<thead>
<tr>
<th>State</th>
<th>Resolution/Document</th>
<th>Year(s)</th>
<th>Congressional Record</th>
</tr>
</thead>
</table>

*Adapted from Table 1 of S. Rep. No. 151, 97th Cong., 1st Sess. 13 (1981).

**Appreciation is extended to Professor Dellinger who located the texts of these applications within the Congressional Record. See Dellinger, supra note 30, at 1623 n.2.