1 of 1 DOCUMENT

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ARTICLE: A New Constitutional Convention? Critical Look at Questions Answered, and Not Answered, by Article Five of the United States Constitution

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SUMMARY:
... The Great Convention of 1787 reenacted? The Framers of the Constitution returned in session to evaluate and update their work? ... But a new constitutional convention could take place at any time. ... To many Americans, the prospect of a new constitutional convention may seem almost as farfetched as the spectral scene described above. ... Regardless of what happens to the balanced budget amendment, the possibility of a constitutional convention will be with us so long as Article V remains in its present form. ... That check was to be a new constitutional convention, or the threat of such a convention, to be called by the people. ... Concon proponents insist that the prospect of a new constitutional convention actually taking place is really very remote. ... All of the 32 calls to date for a Constitutional Convention on the subject of the Balanced Budget Amendment are written conditionally. ... The analogy to Congress as a continuing constitutional convention is imperfect for several reasons. ... As we have seen, the first convention calls for a balanced budget amendment came in 1975. ... It is possible that a constitutional convention could take place and none of these drastic consequences would come to pass. ... As Senator Orrin Hatch (R-Utah) has stated, "If you don't believe in calling a constitutional convention, you don't believe in the Constitution." ...

TEXT:
[*35] As the visitor walks past Independence Hall in Philadelphia late at night, his eye is drawn to a dim light in the windows. Drawing closer, he sees the spectral shades of Washington, of Hamilton, of Madison, of Sherman and others. All eyes seem focused on Gouverneur Morris of Pennsylvania and Luther Martin of Maryland as they earnestly debate a constitutional point.

The Great Convention of 1787 reenacted? The Framers of the Constitution returned in session to evaluate and update their work?

Not a likely occurrence, perhaps. But a new constitutional convention could take place at any time. The Framers themselves made this possible through Article V of the Constitution:

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

To many Americans, the prospect of a new constitutional convention may seem almost as farfetched as the spectral scene described above. But in fact, a new convention might not be that far off. Two-thirds of fifty states is thirty-four. And since 1975, the legislatures of thirty-two states -- only two short of the required two-thirds -- have called for a new constitutional convention for the purpose of **[*36]** adopting an amendment which would require that Congress balance the budget. These states, and the dates they passed resolutions calling for a new convention, are:

1975	Mississippi (February 25)
	Louisiana (July 23)
	Alabama (September 10)
1976	Georgia (February 6)
	South Carolina (February 23)
	Delaware (February 25)
	Virginia (March 25)
1977	Maryland (January 28)
	Tennessee (June 10)
1978	Colorado (April 5)
	Tennessee (April 25) (2nd call)
	Oklahoma (May 3)
	Kansas (May 17)
	Wyoming (May 17)
	South Carolina (May 22) (2nd call)
	Louisiana (July 14) (2nd call)
1979	Texas (January 15)
	North Carolina (February 6)
	Florida (February 22)
	New Mexico (February 26)
	South Dakota (February 27)
	Idaho (February 28)
	Arkansas (March 5)

	Nebraska (March 7)
	Utah (March 7)
	Pennsylvania (March 12)
	Alabama (March 13) (2nd call)
	Oregon (March 15)
	Arizona(April 10)
	Indiana (May 1)
	New Hampshire (May 1)
	North Dakota (May 3)
	Maryland (June 5) (2nd call)
	Iowa (June 18)
	Louisiana (July 18) (3rd call)
1980	Nevada (February 28)
1982	Alaska (February 3)
1983	Missouri (July 11)

[*37] Not all of these thirty-four states have remained steadfast in their calls for a constitutional convention, or "Concon," as it is commonly called. In 1988 Alabama and Florida rescinded their calls for a Concon, and Louisiana rescinded its call in 1990. In 1989 the Nevada legislature, alleging fraud at the time of passage in 1980, expunged its call from the Assembly record. [n1]

The announced goal of those who have been calling for a Concon has been a balanced budget amendment. In general, at least until recently, the need for a balanced budget has been a theme of political conservatives. It is not surprising, therefore, that the drive for a Concon had its initial successes in more conservative southern states, followed by conservative western states and then the Midwest. It is also interesting that the drive seems to have been more successful in smaller states than in larger states, with the notable exceptions of Texas and Pennsylvania. Ironically, the drive to rescind Concon resolutions also has enjoyed its initial successes in the more conservative South (Alabama, Florida, Louisiana) and West (Nevada). The reason may be that, initially, the Concon drive was led by conservatives who wanted to limit spending and opposed by liberals who feared that a Concon could lead to repeal of key civil rights. But in the 1980s several liberal organizations became convinced that the Constitution needs at minimum a major overhaul, while certain key conservative leaders, perhaps most notably Phyllis Schlafly of Eagle Forum, became convinced that a Concon could jeopardize the American form of constitutional government.

At present the most influential and effective organizations working for a Concon are two conservative groups, the National Tax-Limitation Committee led by Lewis K. Uhler of Roseville, California, and the National Taxpayers Union led by James Davidson. Liberal groups calling for constitutional revision, such as the Committee on the Constitutional System, the Center for the Study of Democratic Institutions and the Brookings Institute, have not overtly joined in the Concon drive but might be expected to use a Concon to press for their proposed constitutional changes should a new convention take place.

A leading opposition group is Citizens to Protect the Constitution, a coalition led by Linda Rogers-Kingsbury and consisting of many prominent and mostly liberal organizations, including: the American Civil Liberties Union, the

American Federation of Teachers, Americans for Democratic Action, the American Jewish Committee, Americans United for Separation of Church and State, the American Federation of State, County and Municipal Employees, the NAACP, the National Consumers League, the National Organization of Women, the National Urban League, and People for the American Way. The coalition includes also, however, more conservative groups like the General Conference of Seventh-Day Adventists and the Veterans of Foreign Wars of the United States. Linda Rogers-Kingsbury has told this author that at the time she formed this coalition the liberal organizations seemed most willing to join, but that the coalition itself is neither conservative nor liberal and that she herself does not see the issue as primarily liberal or conservative. [n2]

[*38] It seems likely that many liberal organizations initially opposed the drive for a Concon, because they perceived it as a threat to the freedoms guaranteed by the Bill of Rights and the Fourteenth Amendment, as interpreted by the Supreme Court.

During the 1980s many Americans of conservative persuasion became increasingly concerned that a new constitutional convention could become a tool of leftist and internationalist groups to force a new constitution upon the American people that would not contain the separation of powers, checks and balances, and protection of basic rights like freedom of religion. As a result, many had second thoughts about a Concon and swung around to the opposition. Among the conservative groups currently opposing a Concon are Eagle Forum, Concerned Women for America, Pro-America, the Sons of the American Revolution, the Daughters of the American Revolution, the John Birch Society, the Veterans of Foreign Wars, the American Legion, the Southern Baptist Convention, and the Conservative Caucus.

On March 25-26, 1988, the National Center for Constitutional Studies, a conservative study group, held a meeting called the National Conference on a Balanced Budget Amendment in Salt Lake City, Utah. Among the many speakers at this conference were Senator Orrin Hatch (R-Utah), John Sununu (then Governor of New Hampshire), Utah Governor Norman H. Bangerter, Congressman William Dannemeyer (R-California), Congressman Larry Craig (R-Idaho), Lewis Uhler of the National Tax Limitation Committee, and James Davidson of the National Taxpayers Union. The three speakers who were given time to present the case against a Concon were Congressman Mickey Edwards (R-Oklahoma) of the American Conservative Union, Don Fotheringham of the John Birch Society, and this writer. Straw polls taken at the close of the conference showed that the roughly 700 attendees strongly favored a balanced budget amendment but were about evenly divided on whether a Concon was a wise route for securing such an amendment. [n3]

This writer has also observed that those who are politically conservative for mostly economic reasons tend to support a Concon, while those who are conservative for mostly moral or social reasons tend to be opposed to it. This writer has also observed that the drive for a Concon seems somewhat weaker today than it was several years ago, but that it is far from dead. It appears, further, that there is a growing movement to call for a Concon to secure passage of another constitutional amendment, one which would limit the number of terms a person may serve in Congress. Others, of various ideologies, might push for a new convention to secure passage of a school prayer amendment, a right to life amendment, an equal rights amendment, or many others. Regardless of what happens to the balanced budget amendment, the possibility of a constitutional convention will be with us so long as Article V remains in its present form.

THE PHILADELPHIA CONVENTION AND ARTICLE V

To understand why the Framers of our Constitution included the Concon route as a means of amending the Constitution, we must understand the mindset of 1787 **[*39]** America. While Deism and rationalism had made considerable headway in France and other parts of Europe, they had received little acceptance in America. [n4]

The European colonists who settled America's Atlantic seaboard in the 1600s and early 1700s were, with few exceptions, professing Christians. More particularly, most of them were children of the Protestant Reformation, and specifically, most held to Calvinistic forms of Protestantism. [n5] Dr. Sidney Ahlstrom, Professor of Church History at

Yale University, acknowledges that "Puritanism provided the moral and religious background of fully seventy-five percent of the people who declared their independence in 1776." [n6] Education took place mostly at home and in the church, and children learned to read with the Bible and the sternly Calvinistic New England Primer as their basic texts. [n7] Dr. Donald S. Lutz and Dr. Charles S. Hyneman, in their detailed study of the writings of leading Americans from 1760-1805, sought to identify quotations in the writings of that period to find out where the Founding Fathers got their ideas, what sources they quoted, what authorities they respected. They found that the Bible was by far the most widely quoted source, accounting for 34% of all quotations. When the Bible is eliminated and only human authors are considered, the most widely quoted sources were Christian writers: Baron Montesquieu of France, a Roman Catholic, the most widely quoted source, accounting for 8.3% of all quotations; Sir William Blackstone of England, a devout Anglican, a close second with 7.9%; and John Locke, a professing Christian though not entirely orthodox, third with 2.9%. [n8] Dr. M.E. Bradford of the University of Dallas, in his book *A Worthy Company: Brief Lives of the Framers of the United States Constitution*, [n9] reveals that nearly all of the delegates to the Constitutional Convention were active churchmen; 28 were Episcopalian, 8 were Presbyterian, 7 were Congregationalist, 2 were Lutheran, 2 were Reformed, 2 were Methodist, 2 were Roman Catholic, and at most 3 were Deists. [n10] Even Ben Franklin, who is commonly called a Deist and who was certainly among the least orthodox of the Founding Fathers, appears to have rejected Deism as he grew older. In his much-quoted speech to the Convention on June 28, 1787, he declared:

> I have lived, Sir, a long time; and the longer I live, the more convincing proofs I see of this truth, that GOD GOVERNS IN THE AFFAIRS OF MEN. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings that "except the Lord build the house, they labor in vain that build it." I firmly believe this; and I also believe that, without his concurring aid, we shall succeed in this political building no better than the builders of Babel. . . . [n11]

While these sentiments do not necessarily mean that Franklin embraced Christianity in the orthodox sense of the term, the statement "God governs in the affairs of men" -- capitalized because Madison capitalizes the statement in his Notes on the Convention -- appears to be a clear repudiation of Deism.

[*40] It is not surprising, then, that George Bancroft, the eminent American historian of the nineteenth century, would call John Calvin the "father of America." Though far from being a Calvinist himself, Bancroft adds, "He who will not honor the memory and respect the influence of Calvin knows but little of the history of American liberty." [n12]

Without necessarily accepting every point of Calvinist theology, the Framers of the American Constitution were steeped in Calvin's world view, Calvin's morality, and Calvin's view of human nature. The Calvinist doctrine of total depravity, shared by Lutherans and to a slightly lesser extent by Christians generally, taught that man, because of original sin, is totally corrupted by the Fall and is totally unable to please God apart from the sovereign grace of God made available to man through the atoning death of His Son Jesus Christ. This meant, first, that men cannot live in a state of anarchy; strong government is necessary to restrain the sinful nature of man. But the doctrine of total depravity was also a great leveler; it meant that princes, governors, constables and judges are just as depraved as the rest of us, and therefore cannot be trusted with unlimited power.

The basic problem the Framers wrestled with at the Philadelphia Convention, then, was this: Given the fallen nature of man, how can government be given enough power to govern effectively, without giving government so much power that it becomes tyrannical and oppressive? James Madison, who had studied for the ministry at the sternly Presbyterian College of New Jersey (now Princeton) under its president the Rev. John Witherspoon and who stayed at the College of New Jersey a full semester after graduation so he could study Hebrew and understand the Old Testament better, wrote in *Federalist No. 51*,

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men

> were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. [n13]

This sentiment is expressed over and over again in the writings of the Founding Fathers. [n14] Their solution was to make sure that no one individual, and no one group of individuals, including even the majority of the people, ever had unlimited power. They accomplished this by establishing a government of limited, delegated powers in which certain powers were delegated to the federal government and other powers were reserved to the states and the people; by separating the powers of government among legislative, executive, and judicial branches; by providing checks and balances among the various branches and levels of government; and by protecting the rights of man so that even the majority was required to respect the rights of the minority.

[*41] It was with this view of human nature in mind that the delegates to the Philadelphia Convention considered the complex problem of constitutional amendments. They knew the Constitution would have to be amended occasionally to adapt to changing conditions, but they wanted to make the amendment process relatively difficult so that a temporary majority could not adopt a rash amendment in the heat of emotion. So Article V provided that the Constitution could be amended by two-thirds of both houses of Congress, followed by ratification by three-fourths of the states, acting through either their legislatures or through state conventions, as Congress could determine. Then, on Saturday the 15th of September, just two days before the signing of the Constitution on Monday September 17, George Mason of Virginia -- a man who feared government power and ultimately opposed ratification of the Constitution because it gave too much power to the federal government and did not contain a bill of rights -- questioned the amendment process. He correctly pointed out that there was no safeguard for the people if Congress were unreceptive to the people's need or desire for an amendment. As Madison records the debate,

> Col. MASON thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.
>
> Mr. Govr. MORRIS & Mr. GERRY moved to amend the article so as to require a Convention on application of 2/3 of the Sts.
>
> Mr. MADISON did not see why Congress would not be as much bound to propose amendments applied for by two thirds of the States as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to form, the quorum, & c. which in Constitutional regulations ought to be as much as possible avoided.
>
> The motion of Mr. Govr. MORRIS & Mr. GERRY was agreed to nem. con: [n15]

The Concon provision, then, arose as a result of the Framers' view of the fallen nature of man. Not willing to entrust unlimited government power to the hands of any group of men, they concluded that a check was needed to guard against an unresponsive Congress. That check was to be a new constitutional convention, or the threat of such a convention, to be called by the people.

It is noteworthy that current calls for a new constitutional convention are largely based upon a similar perception -- that Congress is out of control, unresponsive, and irresponsible. Those who call for a Concon to secure a balanced budget amendment argue that Congress is financially irresponsible, with each congressman seeking more pork barrel projects for his own district but with most unwilling to take the politically **[*42]** dangerous stand of either cutting pork

barrel projects or voting for new taxes to pay for such projects. Since Congress refuses to restrain its spendthrift habits, the people must force Congress to do so, either through a Concon or by means of the threat of a Concon.

Likewise, those who favor an amendment to limit the number of terms a person may serve in Congress, argue with some merit that the average congressman is unlikely to vote for such an amendment, because in doing so he would be voting himself out of a job. Faced with the refusal of congressmen to limit their own terms, the people must use the check the Framers gave them -- a new convention under Article V.

It is the opinion of this writer that the Framers were correct in their pessimistic view of human nature and in their belief in the need to limit government power. This author believes, further, that George Mason was right in his contention that Congress should not be given the sole authority to decide whether or not the Constitution should be amended, and that as a check on congressional abuse of power, an alternate means of amendment was needed.

But it also appears to this writer that, in contrast to the meticulous care the Framers exercised in deliberating on various other provisions of the Constitution, the Concon provision of Article V was added rather hastily, at a time when the delegates were preparing to close their deliberations; and this provision did not receive the careful attention given to most other provisions of the Constitution. Perhaps for that reason, there are many unanswered questions about the nature and effect of an Article V convention. These questions will be the subject of the rest of this article.

MUST CONGRESS CALL A CONVENTION?

Concon proponents insist that the prospect of a new constitutional convention actually taking place is really very remote. Rather, it is much more likely that if thirty-four states call for a convention, Congress will simply pass the balanced budget amendment, and the need for a convention will thereby be eliminated. The reason they are calling for a Concon, they say, is to force a reluctant Congress to act. James Clark, a founder of the National Taxpayers' Union and leading Concon proponent, puts it this way: "This is just a way of getting attention -- something akin to batting a mule with a board." n16

But does Congress have that option? Can Congress pass the amendment and then decide the convention is no longer needed? The language of Article V gives no hint of any such alternative: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."

Note the choice of words: "The Congress . . . shall call a Convention . . . ." Article V doesn't say Congress may call a convention, or Congress may at its discretion either call a convention or pass the proposed amendment. It says Congress shall call a convention -- no ifs, ands, or buts.

Alexander Hamilton interpreted Article V as requiring Congress to call a convention. Arguing to persuade a skeptical New York constituency that Article V did **[*43]** indeed give them a check against an unresponsive Congress, Hamilton wrote in *Federalist No. 85*:

> By the Fifth Article of the Plan the Congress will be obliged on the application of the legislatures of two-thirds of the states (which at present amounts to nine) to call a convention for proposing amendments, which shall be valid to all intents and purposes as part of the Constitution, when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof. *The words of this article are preemptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body*. And of consequence all the declamation about their disinclination to a change, vanishes in air." n17

Constitutional attorney John C. Armor, in his book *The Right of Peaceful Change: Article of the Constitution*, asks whether a convention is mandatory if thirty-four states call for one, and answers:

> The answer to that question is in the hands of the states. If they pass absolute calls for a convention,

> then the answer is yes. But, if they issue conditional calls for a convention, the answer is no. The choice of which applies, however, must remain solely in the hands of the state legislatures.
>
> All of the 32 calls to date for a Constitutional Convention on the subject of the Balanced Budget Amendment are written conditionally. There are differences in terms and language, but on this point they all agree. Each state has asked Congress to propose a Balanced Budget Amendment. And each state has said, if Congress fails to act, then the call for a convention is operative.
>
> Some of the states have set deadlines by which Congress must act. Others have not set a specific date, which means that a reasonable time to act would be implied. But the fact that the states have been prudent, and made their calls conditional, means that the event which would trigger the necessity for holding a convention would not be the action of the 34th state. It would be the failure of Congress to act on the amendment. [n18]

However, as persuasive as this argument sounds, the conditional call for a convention must be classified with Bigfoot and the Loch Ness Monster: There is no firm proof that any such animal exists. Article V does not mention any such possibility. There is no case law recognizing conditional calls (or not recognizing them). Congress has never passed any legislation authorizing (or prohibiting) conditional calls. If thirty-four states called for a convention, and some or all of these were conditional calls, the Supreme Court would probably be asked to rule upon the validity and effect of these calls, and there is no way of knowing what the Supreme Court would do. The Court might possibly accept these conditional calls at face value and rule that Congress does indeed have the option of passing the amendment or calling the convention. Or, more likely in my opinion, the Court might rule that the **[*44]** Constitution does not provide for conditional calls, and either (1) treat these calls as regular calls for a convention, or (2) rule them invalid, in which case the Concon proponents' efforts will have been wasted. Or, the Court might simply decline to rule on the question, using the "political question" doctrine as a basis for ducking the issue. [n19] For example, the Court might rule that since Article V provides that Congress shall call a convention, it is the responsibility of Congress, not the Court, to determine the validity and meaning of convention calls.

I therefore find Concon proponents' assurances that there will be no convention unconvincing. If thirty-four states call for a convention, there is at least a strong likelihood that there will be a convention.

Concon proponents insist that things need not go that far. Once the thirty-third state calls for a convention, Congress will realize that the nation is only one state short of the two-thirds needed for a convention and will therefore pass the balanced budget amendment. They note that in the early years of the twentieth century, public sentiment increasingly favored popular election of United States Senators, who until 1912 were chosen by the legislatures of their respective states. Proposed constitutional amendments to require direct popular election of senators repeatedly passed the House of Representatives but died in committee in the Senate. The senators, it seemed, liked things the way they were and did not relish having to campaign for reelection every six years. But when thirty-one of the then-required thirty-two states had called for a convention, the Senate finally saw the handwriting on the wall and passed the Seventeenth Amendment. [n20]

On the other hand, there was widespread popular dissatisfaction with *Baker v. Carr* (369 U.S. 186), the 1962 case in which the Supreme Court mandated the reapportionment of state legislatures according to the principle of "one man, one vote." State legislators and U.S. congressmen fumed over this decision, contending that the apportionment of state legislatures was a matter of states' rights and not the business of the federal courts (and four dissenting Supreme Court justices agreed with that view). But since the Supreme Court majority had based its decision upon the equal protection clause of the Fourteenth Amendment, the dissatisfied parties' only remedy was to amend the Constitution. Attempts to pass a constitutional amendment failed in Congress, so proponents tried the Concon route, thinking this might force Congress's hand. Thirty-three of the necessary thirty-four states called for a Concon, but Congress still refused to act. The thirty-fourth state never materialized. [n21]

It is possible that the threat of a new convention could force Congress to act, but history gives no assurance that that will happen.

CAN THE SCOPE OF A CONVENTION BE LIMITED?

Concon opponents raise the spectre of a runaway convention. Thirty-four states, sincerely concerned about Congress's fiscal irresponsibility, call for a convention to consider a balanced budget amendment. But the convention doesn't stop there. It goes on to consider right to life amendments, school prayer amendments, equal rights amendments, limitation of congressional terms amendments, gun control **[*45]** amendments, flag desecration amendments, and even considers entirely new constitutions.

Concon proponents answer that these fears are totally unfounded. States may limit the convention to a single issue by calling for a convention for that limited purpose. Likewise, Congress, in calling the convention, may in its statutory call limit the convention's authority and purposes. The late Senator Everett Dirksen (R-Ill) believed a convention could be limited:

> I apprehend that when the applications are for a stated purpose or amendment . . . then in effect the state legislatures, which alone possess the initiative in convening a convention, have by their own action taken the first step toward limiting the scope of the convention. It would then remain for the Congress to implement this attempt to limit the convention by making appropriate provision in its call. [n22]

The late Senator Sam Ervin (D-NC), regarded as one of the leading constitutional experts ever to serve in the U.S. Senate, also believed the states and Congress can limit the scope of a convention. [n23] The American Bar Association conducted a detailed study of the issue and reached the same conclusion in 1973. [n24]

But other constitutional scholars have reached the opposite conclusion. Warren Burger, former Chief Justice of the U.S. Supreme Court and Chairman of the U.S. Bicentennial Commission, recently declared,

> Should we have another Constitutional Convention? There may be one coming up soon; theoretically limited to certain subjects like a debt limit. There is no way, any more than the Continental Congress could control the convention in Philadelphia, to put a muzzle on a Constitutional Convention. Once it meets, it will do whatever the majority wants to do. I would not favor it. [n25]

The Chief Justice is referring to the fact that the Constitutional Convention of 1787 -- the only real precedent we have -- was called by Congress

> ...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 [a reference to the Articles of Confederation] adequate to the exigencies of government and the preservation of the Union. [n26]

The Philadelphia Convention of 1787 was called, not to write a new constitution, but "for the sole and express purpose of revising the Articles of Confederation." But the Convention went beyond that call and drafted not just a new constitution but a new form of government. General Charles Cotesworth Pinckney of South Carolina and Elbridge Gerry of Massachusetts raised concerns on the convention floor about whether they were authorized to propose such sweeping changes. As Madison says in his *Notes*,

> **[*46]** Gen. PINCKNEY expressed a doubt whether the act of Cong recommending the Convention, or the Commissions of the Deputies to it, could authorise a discussion of a System founded on different principles from the federal Constitution.

> Mr. GERRY seemed to entertain the same doubt. [n27]

The general consensus, however, seemed to be that the convention was free to propose whatever it chose, so long as their proposals were subject to ultimate ratification by the states. In fact, General Pinckney himself expressed that sentiment after the Convention. [n28]

Chief Justice Burger's point is that if the Framers of our Constitution disregarded the limitations placed upon them by the Continental Congress, what reason do we have to believe the delegates to a new convention would respect such limitations today?

Lewis K. Uhler dismisses the notion of a runaway convention, noting that well over two hundred state constitutional conventions have taken place in our nation's history. "A recent study," he says, "reveals that over our entire history, only three or four conventions have sought to exceed the scope of their call, and they were disciplined by the convening authority or the court." [n29] Furthermore, he says, Congress has the authority to pass constitutional amendments (subject to state ratification) whenever it chooses; Congress is, he says, a continuing "general constitutional convention." [n30]

While Uhler makes a significant point, these state constitutional conventions are different from a federal convention in that they are subject to the review of the federal judiciary, and state constitutions are to some extent limited by the federal constitution. Given the Court's current incorporation doctrine, coupled with the supremacy clause of Article VI, Section Two, state governments are bound to respect and honor many of the rights guaranteed by the U.S. Constitution. Furthermore, the Constitution, Article IV, Section Four, guarantees to each state a "Republican Form of Government," so again state constitutional provisions which are contrary to basic republican principles would be struck down by the Court.

The analogy to Congress as a continuing constitutional convention is imperfect for several reasons. First, congressmen are directly responsible to the people, both for election and for reelection; the method of choosing convention delegates is unclear, and once their deliberations are complete they will no longer be responsible to anyone. Second, Congress has two houses to check one another; a Concon would not. Third, amendments must secure the support of two-thirds of both houses of Congress; that probably would not be true of a Concon. And fourth, deliberations of Congress are subject to close public scrutiny through the media. There is no assurance that deliberations of a Concon would be open to the public; in fact, the deliberations of the Philadelphia Convention of 1787 were closed.

Other constitutional scholars share the Chief Justice's concern about an "unmuzzled" convention. Gerald Gunther, Professor of Constitutional Law at Stanford whose constitutional law textbook is used in more law schools than any other, calls the assurances that a convention may be limited "unfounded." He continues, "In **[*47]** my view, a convention cannot be effectively limited . . . . The assurance about the ease with which a single issue convention can be had are unsupportable assurances." [n31]

Professor Christopher Brown of the University of Maryland School of Law says,

> After 34 states have issued their call, Congress must call "a convention for proposing amendments." In my view the plurality of "amendments" opens the door to constitutional change far beyond merely requiring a balanced federal budget. [n32]

Professor Neil H. Cogan of Southern Methodist University School of Law says,

> My understanding of the Federal Convention is that it is a general convention; that neither the Congress nor the States may limit the amendments to be considered and proposed by the Convention . . . ." [n33]

Considering the fact that nothing in Article V limits the scope of a Concon or provides for a conditional or limited

call, noting the plural form "amendments" used in Article V, and given the precedent of the 1787 Convention which went far beyond the call of the Continental Congress, there is no assurance that a new constitutional convention could be limited in scope, or that limitations could be enforced if they were placed upon the Convention. It is, of course, possible that the delegates might choose to restrain themselves, but we must not risk our constitutional freedoms upon mere possibilities -- especially where human nature is concerned?

AN ALTERNATE RATIFICATION PROCESS?

Proponents of a new constitutional convention insist that a runaway convention is not a realistic threat to our system of government, because nothing proposed by the convention can have force and effect unless and until it is ratified by three-fourths of the states. The delegates themselves must realize that there is little point in proposing anything that the people won't accept. The ratification requirement should keep conventions from exceeding their authority, or if they do exceed their authority, the ratification requirement will prevent any lasting harm to the nation.

Concon opponents are not assuaged by this safeguard. They note that the report of a new constitutional convention, especially if it involves many amendments or an entirely new constitution, may involve some very complex and technical provisions. These might be difficult for people to understand, and the result might be a constitution ratified through ignorance and apathy, spurred on by media hype.

Opponents note, further, that according to Article V, amendments may be ratified by three-fourths of the states, in one of two ways -- either through state legislatures, or through state ratifying conventions, as Congress shall direct. If Congress favors the changes adopted by the convention but knows these changes will have difficulty passing the state legislatures, Congress might decide to circumvent the state legislatures and direct that the states shall ratify the constitutional changes through state ratifying conventions.

[*48] Article V says nothing about how state ratifying conventions shall take place: who shall serve as delegates, how delegates shall be elected or appointed, what procedures shall be followed at the ratifying conventions, whether the convention shall listen to testimony from the community, etc. Since according to Article V Congress determines whether ratification shall take place by state legislatures or state ratifying conventions, it seems likely that Congress would also set the rules and procedures by which these conventions will take place. In making these rules for the selection of delegates and the conduct of the convention, Congress could do a lot to "stack" the convention one way or the other.

Concon opponents also point out that the Philadelphia Convention was faced with a similar ratification problem, except that the problem there was almost insurmountable: According to the then-operative Articles of Confederation, no amendment would be effective unless and until it received the ratification of all thirteen states. This was a practical impossibility, as Rhode Island was adamantly opposed to any changes which would result in a stronger national government.

So the delegates to the Philadelphia Convention did an "end run" around the Articles of Confederation. In Article VII they set forth an entirely new system of ratification:

> The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

The proponents of the new Constitution still faced stiff opposition, but they had several significant advantages over their opponents. The timing was in their favor; the nation was in the midst of economic chaos and turmoil, and many were ready to accept any way out. Furthermore, the Federalists had a head start over their opponents. Unlike the AntiFederalists, who hadn't seen the Constitution until it was signed and released September 17, 1787, the Federalists had spent the previous four months in Independence Hall carefully going over every argument, every issue, and every phrase. They also had time to organize ahead of their opponents. They took their campaign to the media, and less than a

year later, on June 21, 1988, they were successful in getting the ninth state, New Hampshire, to ratify. Virginia and New York ratified shortly thereafter; but North Carolina did not ratify until November 29, 1789. Rhode Island refused to even hold a convention until neighboring states threatened to begin treating "Rogue Island" (as other states began calling her) as a foreign nation. Rhode Island finally ratified on May 29, 1790 -- by a vote of 34 to 32!

The requirement of state ratification is a powerful check on convention excesses. But could a convention circumvent state opposition by providing an alternative means of ratification? The possibility cannot be ignored.

PROCEDURAL QUESTIONS

As noted earlier, Article V provides two means by which the Constitution may be amended: by two-thirds of both houses of Congress (the Congress route), or by **[*49]** convention called by the legislatures of two-thirds of the states (the convention route). Since 1789 the people of this nation have amended our Constitution twenty-six times using the Congress route. The convention route has been tried many times but never successfully, though on several occasions proponents came close to success.

What would happen if a convention were called? There are many unanswered questions, and in most instances no case law to rely upon. Since the required two-thirds was never reached, no case has yet become ripe for adjudication. In order to require Congress to call a convention, two-thirds of the states must pass resolutions calling for a convention. Must these convention calls agree on every detail?

What if twenty-five states issue conditional calls asking Congress to either pass a balanced budget amendment or call a convention, and nine states simply call for a convention? Must Congress call the convention, or may Congress pass the amendment instead?

Or suppose twenty states issue limited calls for a convention to consider the sole issue of a balanced budget amendment, and fourteen states issue general calls for a convention. Do we have the required thirty-four states, and if so, will the convention be general or limited?

Or suppose eighteen states call for a convention to consider a balanced budget amendment while sixteen states call for a convention to consider a congressional term limitation amendment. May we combine these states to reach the required thirty-four? If so, what may the convention consider?

The time limits of a convention call are likewise unclear. As we have seen, the first convention calls for a balanced budget amendment came in 1975. These are now seventeen years old. Are they still valid? Typically, when Congress passes an amendment and submits it to the states for ratification, Congress requires that the ratifications must take place within a certain time period (typically seven years) to be valid. But Congress is in no position to limit the time frame within which two-thirds of the states request a convention, because this action is initiated by the states rather than by Congress.

I noted earlier that in the late 1960s and early 1970s a large number of states sought an amendment that would overturn the Supreme Court's decision in *Baker v. Carr*, supra, and return reapportionment decisions to the states. Thirty-three states called for a convention, but the thirty-fourth state never materialized. What if another state, or perhaps several states, called for a convention to consider a reapportionment amendment today? Convention proponents, counting these plus the thirty-three states that had called for a convention in the 60s and 70s, could claim they now have more than the required two-thirds. Would Congress have to call a convention? Or could Congress determine that the earlier calls are too old to be recognized as valid today? Whatever Congress decided, its decision would undoubtedly be appealed to the Supreme Court. Could (or would) the Supreme Court intervene, or would the Court consider this a "political question" within the province of Congress and not the Court?

What happens if three more states call for a convention to consider a balanced budget amendment? This would make thirty-five states, except for the four that have **[*50]** rescinded or expunged their convention calls. Does Article

V allow a state to rescind its call, or is that call irrevocable? It will be recalled that shortly after the Civil War, the fourteenth amendment was submitted to the states for ratification. The eleven states which had constituted the Confederacy, with the exception of Tennessee, refused to ratify the fourteenth amendment, and were not readmitted to the Union until they did so. (Tennessee did ratify and was therefore readmitted years earlier than the rest.) In this instance subsequent ratifications by states that had previously rejected an amendment were accepted as valid.

On the other hand, in *Wise v. Chandler,* 108 S.W.2d 1024, 270 Ky. 1, *cert. granted* 303 U.S. 634, c*ert. dismissed* 307 U.S. 474 (1937), the court ruled that if a proposed amendment to the U.S. Constitution has been rejected by one-fourth of the states (thereby precluding three-fourths from ratifying), the amendment is legally "dead," and a state that had rejected the amendment could not then change its position and ratify. However, the court left open the question whether a state could change its mind and ratify before fully one-fourth of the states had rejected the amendment.

This history and case law is sparse and of questionable legal effect. And even this history and case law applies to ratification of an amendment after it has been adopted by Congress. It is entirely speculative whether the same or similar reasoning would be applied to state calls for a convention. One important difference is that a call for a convention is less final than ratification of an amendment. Another is that Congress usually has by legislation required that ratifications must take place within a certain time frame. As our discussion above indicates, it is not clear whether any such time limit applies to convention calls.

Once it is determined that a convention is going to take place, how will the delegates be chosen? Some suggest that the makeup of the convention should be the same as the electoral college. The American Bar Association, noting the possibility that this may run afoul of the equal protection clause and several Supreme Court reapportionment cases, suggests that delegates should be elected from congressional districts and should reflect the makeup of the U.S. House of Representatives. But there is no guarantee that either of these systems would be used. Delegates could be appointed by the various governors, or selected by agreement of each state's congressional delegation, or many other means. Article V is silent on this question. Presumably, however, since Article V provides that Congress shall call the convention, Congress also has the authority to determine the means of delegate selection. One Missouri case supports this position, *State ex. rel. Tate v. Sevier*, 62 S.W.2d 895 (1933). An Ohio case, *State ex. rel. Donnelly v. Myers*, 186 N.E. 918 (1933), held that if Congress fails to provide this kind of direction, the state legislature has authority to do so.

However, one could imagine the politics, the jockeying for position, the trade-offs, etc., that would take place as each state prepared to select its delegation. Sensing that the very fabric and future of the nation is at stake, Americans of all political stripes and interests would work for the selection of delegates favorable to their positions. One could easily imagine "I'll support your amendment if you'll support mine" deals **[*51]** being made between right-to-life forces, school prayer forces, and balanced budget forces, and perhaps similar deals between equal rights amendment advocates and gun control advocates.

Once the convention is assembled, what rules are to be followed? Does Congress make the rules, or do the delegates simply follow *Robert's Rules of Order, Newly Revised?* Or do they make their own rules as they go along? Does Congress designate who shall preside over the convention and who shall serve as convention officers? What if most delegates are dissatisfied with Congress's choice and want someone else? Will the proceedings be open to the public and the press, or will they be closed like the Convention of 1787? If people believe the convention is acting unwisely or illegally or in excess of its authority, may they petition to Congress or to the courts to bring the convention back in line? Which of these bodies -- Congress or the courts -- would have final authority over the convention? And what if the convention ignores orders from the Congress or the courts?

It is no wonder, then, that Lawrence Tribe, Professor of Constitutional Law at Harvard, warns that a new constitutional convention could lead to domestic political confrontations of "nightmarish dimension" between Congress and the Convention, between Congress and the Supreme Court, and between Congress and the states -- not to mention between the Supreme Court and the Convention. Tribe continues,

> Particularly in a period of recovery from a decade ruptured by war, political assassination, near impeachment and economic upheaval, and particularly in a time when such recovery has already been interrupted by new domestic and international crises, it is vital that the means we choose for amending the Constitution be generally understood and, above all, widely understood as legitimate. An Article V convention, however, would today provoke controversy and debate unparalleled in recent constitutional history. For the device is shrouded in legal mysteries of the most fundamental sort, mysteries yielding to no ready mechanism of solution. [n34]

Given the significance of the United States Constitution both for our nation and for others, it would not be surprising if a convention of this magnitude were to result in serious economic instability at home and abroad, as well as substantial disruption of America's relations abroad.

A NEW CONSTITUTION -- A FARFETCHED THREAT?

In this country, political leaders on both the Left and the Right have expressed fears that basic civil liberties could be in jeopardy if a new constitutional convention takes place. Liberals fear conservatives might dominate the convention and use it to eliminate certain rights that liberals hold dear, such as the right to an abortion, certain rights of criminal defendants, and the requirement of separation of church and state. Conservatives fear the convention may be dominated by Left-leaning forces that would secure the adoption of a new constitution that would eliminate or weaken the separation of powers and the checks and balances among these branches, weaken **[*52]** states' rights to such an extent that states become mere administrative subdivisions of the federal government, and weaken such rights as free exercise of religion, the right to own and use property, and the right to bear arms.

Are these fears realistic? If in fact a convention cannot be limited to a single issue, and if in fact *Roe v. Wade*, 410 U.S. 113 (1973), has not been overturned by the time the Concon meets, it is conceivable that pro-life forces might try to secure passage of a right-to-life amendment at the convention. In fact, it is possible that economic conservatives working for a balanced budget amendment and moral conservatives working for a right-to-life amendment might join forces and become a working majority at the convention. As for the rights of criminal defendants, many conservatives have never fully reconciled themselves to the exclusionary rule, but in general conservatives recognize that our criminal justice system is infinitely superior to that of totalitarian regimes where the basic rights of criminal defendants are abrogated. And while many moral and religious conservatives believe the Court has gone too far toward an absolute or radical separation of church and state, few would tamper with the first amendment. Rather, most believe the problem is not the first amendment but the way it has been misinterpreted by the courts.

As for conservative fears of a new constitution, it is difficult to tell how much support exists in the liberal community for proposals for a new constitution. Certainly, however, such proposals do exist.

An organization called the Committee on the Constitutional System (CCS) has produced a detailed analysis of the American political structure, complete with recommendations for fundamental changes in the U.S. Constitution. The CCS includes among its leadership: Lloyd N. Cutler, Washington, D.C. lawyer and former counsel to President Carter; C. Douglas Dillon, Secretary of the Treasury under Presidents Kennedy and Johnson; Robert S. McNamara, former Secretary of Defense and World Bank President under Presidents Kennedy and Johnson; former Senator J. William Fulbright; and representatives from the Rockefeller Foundation, the Woodrow Wilson Center, the Brookings Institute, and other liberal-leaning organizations.

In January 1987 CCS produced a 20-page document entitled "A Bicentennial Analysis of the American Political Structure: Report and Recommendations of the Committee on the Constitutional System." [n35] In this document CCS concludes that one of the most basic problems with the American constitutional system is that it has resulted in Divided Government:

> We have had divided government (one party winning the White House and the other a majority in one or both houses of Congress) 60 percent of the time since 1956 and 80 percent of the time since 1968, compared to less than 25 percent of the time from the adoption of the Constitution until World War II. n36

The result, CCS says, is "inconsistency, incoherence and even stagnation in national policy." n37 To reduce this "divided government," CCS recommends several changes:

> **[*53]** (1) Allowing the President to select cabinet members from among Congress while allowing those congressmen selected to retain their seats in Congress (thus weakening the separation of powers between legislative and executive branches);
>
> (2) Allowing all winners of party nominations for the House and Senate, plus holdover Senators, to hold seats as uncommitted delegates at party nominating conventions (thereby giving Congress greater control over who is nominated for President, again reducing the separation of powers);
>
> (3) Adoption of federal policy requiring all states to allow straight-party voting (thereby increasing the likelihood that the same party will control both branches of government);
>
> (4) Public financing of congressional campaigns;
>
> (5) Four-year terms for congressmen and eight-year terms for Senators, to coincide with presidential elections (thereby reducing the possibility of the opposing party gaining power in an off-year election); and
>
> (6) Relaxing the requirement that two-thirds of the Senate confirm a treaty, making the requirement a constitutional majority of both houses or sixty percent of the Senate (thereby weakening this check on executive power); and others. n38

The CCS proposals would have the effect of making the American constitutional system more like the European parliamentary democracies. They reflect a disdain for the Framers' concept of separation of powers. President Woodrow Wilson expressed a similar view in his book *The New Freedom*:

> In every generation all sorts of speculation and thinking tend to fall under the formula of the dominant thought of the age. For example, after the Newtonian Theory of the Universe had been developed, almost all thinking tended to express itself in the analogies of the Newtonian Theory and since the Darwinian Theory has reigned amongst us, everybody is likely to express whatever he wishes to expound in terms of development and accommodation to environment.
> . . . the Constitution of the United States had been made under the dominion of the Newtonian Theory. You have only to read the papers of The Federalist to see that fact written on every page. They speak of the "checks and balances" of the Constitution, and use to express their idea the simile of the organization of the universe, and particularly of the solar system, how by the attraction of gravitation the various parts are held in their orbits; and then they proceed to represent Congress, the Judiciary, and the President as a sort of imitation of the solar system.
>
> They were only following the English Whigs, who gave Great Britain its modern Constitution. Not that those Englishmen analyzed the matter, or had any theory about it; Englishmen care little for theories. It was a **[*54]** Frenchman, Montesquieu, who pointed out to them how faithfully they had copied Newton's description of the mechanism of the heavens.

> The makers of our Federal Constitution read Montesquieu with true scientific enthusiasm. They were scientists in their way -- the best way of their age -- those fathers of the nation. Jefferson wrote "the laws of Nature" -- and then by way of after thought -- "and of Nature's God." And they constructed a government as they would have constructed an orrery -- to display the laws of Nature. Politics in their thought was a variety of mechanics. The Constitution was founded on the law of gravitation. The government was to exist and move by virtue of the efficacy of "checks and balances."
>
> *The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton*. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. *No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their amicable community of purpose*. Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day, of specialization, with a common task and purpose. Their co-operation is indispensable, their warfare fatal. There can be no successful government without the intimate, instinctive co-ordination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track. Living political constitutions must be Darwinian in structure and in practice. Society is a living organism and must obey the laws of Life, not of mechanics; it must develop.
>
> All that progressives ask or desire is permission -- in an era when "development," "evolution," is the scientific word -- to interpret the Constitution according to the Darwinian principle; all they ask is recognition of the fact that a nation is a living thing and not a machine. [n39]

Wilson's point is that the checks and balances the Framers placed in the Constitution make our system of government inefficient. Rather than working together toward a common goal, the various branches and levels of government work against one another. Wilson argues, as does the CCS, that these checks and balances must be modified or eliminated so that various branches and levels of government can coordinate together and become more efficient.

But the Framers valued liberty more highly than they valued efficiency. They knew that efficiency can pave the way for tyranny, and unchecked power inevitably will be abused. To provide a safeguard against tyranny, the Framers separated the powers of government and provided checks and balances among them. With these checks and balances in mind, Madison declared in *Federalist No. 51*, "Ambition must be made to counteract ambition." [n40] As Justice Louis Brandeis observed half a century ago,

> **[*55]** The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. [n41]

The CCS document is not the only proposal for a new constitution. In 1974, the Center for the Study of Democratic Institutions published a book entitled *The Emerging Constitution* [n42] which contains a "Constitution for the Newstates of America." This constitution replaces the present fifty states with ten (or, as an alternative, twenty) regional "Newstates" which are basically; administrative subdivisions of the federal government. It adds to the current legislative, executive and judicial branches of government three new branches: electoral, planning, and regulatory. It would authorize the government to abridge freedom of expression, movement, communication, assembly and petition in a "declared emergency," downgrades freedom of religion to a mere "privilege" rather than a right, provides that property can be taken only with "compensation" but, unlike our fifth amendment, does not require that compensation be "just," and provides for an equal rights amendment. It establishes senators with lifetime tenure, most of whom are appointed by the President, and it provides that congressmen shall be elected on a single ticket with the President. Treaties proposed

by the President shall automatically become effective unless a majority of the Senate (many of whom are presidential appointees) objects within ninety days. [n43] Like the CCS proposal, this Constitution for the Newstates of America would greatly weaken the separation of powers that is a hallmark of our present constitutional system. A serious question exists as to whether this constitution could be adopted under the current amendment process, since Article V provides in part, as an exception to the normal power to amend the Constitution, that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Another proposal is the "Declaration of Interdependence," published on United Nations Day, October 25, 1975, and signed by one hundred four senators and congressmen. Promoted by the World Affairs Council of Philadelphia, the document begins with words reminiscent of the Declaration of Independence:

> When, in the course of history, the threat of extinction confronts mankind, it is necessary for the people of the United States to declare their interdependence with the people of all nations and to embrace those principles and build those institutions which will enable mankind to survive and civilization to flourish . . . . [n44]

The Declaration then establishes international control of natural resources, calls for worldwide redistribution of wealth, denounces nationalism as "chauvinistic," and advocates strengthening the United Nations and the World Court. [n45]

[*56] Still another proposed alternative is the "Constitution for the Federation of Earth," adopted in plenary sessions of the World Constituent Assembly at Innsbruck, Austria, 23-27 June 1977 and signed by approximately one hundred thirty-five participants from twenty-five countries and promoted by the World Constitution and Parliament Association. The document provides for a world government complete with a "World Parliament," a "World Executive," a "World Administration," a "World Judiciary," and even a "World Police." [n46]

This writer is unable to accurately gauge the degree of support these proposed constitutional revisions currently enjoy. The prospect of a constitutional convention controlled by well-organized and well-financed groups, aided by well-orchestrated media hype, adopting a proposal supported by a highly motivated few in the face of widespread ignorance and apathy, must not be totally discounted.

CONCLUSION AND RECOMMENDATION

The Framers of our present Constitution would have been shocked by these proposals. As we have seen, most of them came from a Christian, and mostly Calvinist, background, and that background shaped their world view. They believed in the higher law of God, and they believed God had endowed man with certain inalienable rights. They believed, further, that human nature is corrupted by the fall, and for this reason government in the hands of fallen men must be carefully controlled to prevent the abuse of power. Even those few who leaned toward Deism and skepticism believed in a world governed by the "laws of nature and of nature's God." [n47] For this reason they separated the powers of government and placed checks and balances among the various branches and levels of government. Proposals which would concentrate power in the hands of one man or group of men, or which weaken the checks and balances among the branches of government, would have met with strong disapproval in 1787.

Herein lies this writer's most fundamental concern about a new constitutional convention: There is little reason to believe that a constitutional convention today would be composed of people who share the Framers' view of God and man, of God's law and man's law, and their concomitant fear of excessive government power. Testifying against a Concon resolution before the Montana legislature in 1987, Phyllis Schlafly said, "We haven't noticed that we have any George Washingtons, Alexander Hamiltons, James Madisons, and Ben Franklins around today, and we are very leery of the people who think they are George Washingtons, Alexander Hamiltons, and all the rest." [n48]

James Madison's words of 1788 therefore become especially relevant for today. Warning that "the prospect of a second Convention would be viewed by all Europe as a dark and threatening cloud ranging over the Constitution just

established and perhaps over the Union itself[,]" [n49] Madison admonished:

> If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and **[*57]** support as well as to amend the system; it would consequently give greater agitation to the public mind; an election into it would be courted by the most violent partizans on both sides; it would probably consist of the most heterogeneous characters, would be the very focus of that flame which had already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumable that the deliberations of the body could be conducted in harmony, or terminate in the general good. *Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a second. . . .* [n50]

This writer suggests that if James Madison could see some of the proposals for constitutional change that are presently being considered, and the currently prevailing views of human nature and law, he would have even more cause to tremble today.

Concon proponents insist that these dangers are minuscule compared with the destabilization and unrest that would result from an economic collapse, which they believe is imminent if the deficit is not brought under control. [n51] But serious questions must be raised as to whether a balanced budget would restrain an irresponsible spendthrift Congress any more effectively that current statutes requiring that the budget be balanced, statutes which Congress routinely ignores. But over and above this concern, let us remember the timeless words of Daniel Webster:

> Other misfortunes may be borne, or their effects overcome. If disastrous war should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still under a new cultivation, they will grow green again, and ripen to future harvests. It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these might be rebuilt. *But who shall reconstruct the fabric of demolished government? Who shall rear again the wellproportioned columns of constitutional liberty*? Who shall frame together the skilful architecture which united national sovereignty with State rights, individual security, and public prosperity? No, if these columns fall, they will be raised not again. Like the Coliseum and the Parthenon, they will be destined to a mournful, a melancholy immortality. Bitterer tears, however, will flow over them, than were ever shed over the remnants of a more glorious edifice than Greece or Rome ever saw, the edifice of constitutional American liberty. [n52]

It is possible that a constitutional convention could take place and none of these drastic consequences would come to pass. It is possible to play Russian roulette and **[*58]** emerge without a scratch; in fact, with only one bullet in the chamber, the odds of being shot are only one in six. But when the stakes are as high as one's life, or the constitutional system that has shaped this nation into what it is today, these odds are too great to take the risk.

Since there is no assurance that convention calls could be recognized as conditional or limited, since there is no guarantee that either the states or the Congress or the courts could effectively restrain a convention, since there are no procedures established to govern the convening or conduct of a convention, and since even the requirement of state ratification could be "railroaded" or circumvented, this writer concludes that the risks involved in calling a new constitutional convention are too great to take at this time.

But Concon proponents do have a legitimate point: The Framers of our Constitution did include the Concon route for constitutional amendments as the states' check upon an arrogant, unresponsive, or irresponsible Congress. As

Senator Orrin Hatch (R-Utah) has stated, "If you don't believe in calling a constitutional convention, you don't believe in the Constitution." n53

This writer does believe in the Constitution. This writer believes the men who gathered in Philadelphia in 1787 to write the Constitution were men of outstanding intellect, learning, experience, judgment and character. This writer believes, further, that the Constitution they drafted is the best document yet devised by the hand of mortal men for the governance of a nation, in large part because it is based upon a realistic view of God, of man, and of law, a view that was derived from the Judeo-Christian tradition and its sourcebook, the Bible.

But the very fact that the Framers provided for an amendment process in Article V is proof that they recognized that the Constitution is capable of improvement. This writer suggests that when, on September 15, the Framers included the Concon process as an alternate means of amending the Constitution, they did not give this proposal the thorough consideration that was given to other parts of the Constitution. Since the Concon alternative was offered at the last minute, as the Convention was preparing to adjourn, this is understandable, but nevertheless regrettable.

A Concon alternative could be a useful check upon Congress if it is coupled with the proper procedures and safeguards to make sure it does not get out of hand and exceed its authorized powers. This writer therefore proposes the following constitutional amendment -- to be adopted by the usual channel of approval by two-thirds of both houses of Congress and ratification by three-fourths of the states, of course -- which would revise Article V to provide for a Concon alternative with suitable safeguards:

> ARTICLE V OF THIS CONSTITUTION IS HEREBY AMENDED TO READ AS FOLLOWS:
> This Constitution may be amended in either of the following ways:
>
> **[*59]** (1) By two-thirds vote of both houses of Congress, followed within seven years by ratification by majority vote of the legislatures of three fourths of the several states; or
>
> (2) By Convention duly called and conducted according to the following procedures:
>
> (a) Said Convention shall be convened upon a call duly passed by a majority vote of the legislatures of two-thirds of the several states. Said states must substantially agree upon the nature of the amendment for which a convention is to be called; however, precise agreement on the wording of said amendment shall not be required. Said calls for a Convention shall be separated in time by no more than ten (10) years from the adoption of the first call to the adoption of the last.
>
> (b) When a Convention has been duly called as in (a) above, Congress shall set a time and date for said Convention to be held within one (1) year of the date of the call passed by the last of the legislatures necessary to constitute two-thirds of the states.
>
> (c) Each state shall be allocated a number of delegates to said Convention equal to the total number of that state's senators and representatives in Congress. The legislature of each state shall determine the method by which that state's delegates shall be selected and the compensation to be paid to that state's delegates.
>
> (d) Said Convention shall have no authority to consider any amendment other than that for which said Convention was called. However, said Convention may vary the wording of said amendment provided said variance does not alter the fundamental purpose and effect of said amendment.
>
> (e) Congress shall establish rules and procedures for the governance of the Convention. The Convention may adopt rules and procedures which are not inconsistent with the rules and procedures established by Congress.

(f) Congress shall provide funding for said Convention except as provided in (c) above.

(g) An amendment adopted by majority vote of the delegates present and voting at said Convention shall be submitted to the legislatures of the several states for ratification. If ratified within seven (7) years of the date of adjournment of the Convention by majority vote of the legislatures of three-fourths of the States, said Amendment shall be valid to all intents and purposes as part of this Constitution.

(h) All proceedings of the Convention or committees thereof shall be open to the public.

(i) The United States Supreme Court shall have original jurisdiction over any question concerning the call for a Convention, the proceedings of a Convention, or the ratification of amendments approved by a Convention.

[*60] This writer submits this proposed amendment for public consideration, not because he believes it is flawless, but rather in the hope that it can be refined into an amendment which will provide for a constitutional convention as a check upon Congress while eliminating the risks associated therewith.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSeparation of PowersConstitutional LawAmendment ProcessEducation LawFundingFiscal Management

FOOTNOTES:

n1 Linda Rogers-Kingsbury, "A Federal Constitutional Convention: Potential Crisis?" *Liberty*, March/April 1991, p. 5.

n2 Linda Rogers-Kingsbury, telephone conversations with John Eidsmoe, March and April 1988.

n3 Based upon this writer's own observations as a participant in the National Conference on a Balanced Budget Amendment March 25-26, 1988, at Symphony Hall, Salt Lake City, Utah, and upon subsequent telephone conversations with National Center for Constitutional Studies personnel in March and April 1988.

n4 For a detailed discussion of Deism and its influence upon eighteenth century America, see John Eidsmoe, *Christianity and the Constitution* (Grand Rapids: Baker Book House, 1987, 1989), pp. 39-45. (Note: This writer cites himself several times in these endnotes, not because he considers himself to be the authoritative source, but because he has covered these subjects thoroughly and with good documentation therein.)

n5 *Id.*, pp. 51-73; 81-342.

n6 Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven: Yale University Press, 1972), p. 124.

n7 *See generally*, Eidsmoe, *Christianity and the Constitution*, pp. 21-23, 259-60ff.

n8 Donald S. Lutz, "The Relative Influence of European Writers on late Eighteenth-Century American Political Thought," *American Political Science Review* 189 (1984), pp. 189-97. *See also generally*, Charles S. Hyneman and Donald S. Lutz, *American Political Writing During the Founding Era 1760-1805*, Vols. I & II (Indianapolis: Liberty Press, 1983).

n9 M. E. Bradford, *A Worthy Company: Brief Lives of the Framers of the United States Constitution* (Marlborough, New Hampshire: Plymouth Rock Foundation, 1982).

n10 *Id.*, pp. v-vi.

n11 Benjamin Franklin, Speech to Constitutional Convention, June 28, 1787; quoted in *Notes of Debates in the Federal Convention of 1787* reported by James Madison (Athens, Ohio: Ohio University Press, 1966, 1985), pp. 209-10 (emphasis supplied by Madison).

n12 George Bancroft, quoted by Loraine Boettner, *The Reformed Doctrine of Predestination* (Philadelphia: Presbyterian & Reformed Publishing Co., 1972), pp. 389-90.

n13 James Madison, *The Federalist No. 51* (Springfield, Virginia: Global Affairs Publishing Co., 1987), p. 281.

n14 *See generally*, Eidsmoe, *Christianity and the Constitution*.

n15 James Madison, *Notes*, pp. 648-50.

n16 James Clark, *Baltimore Evening Sun*, March 11, 1983; quoted by Citizens to Protect the Constitution, *A Federal Constitutional Convention: Problems and Precedents* (Washington, D.C. Citizens to Protect the Constitution;, 1984), p. 13.

n17 Alexander Hamilton, *The Federalist No. 85*, p. 475 (emphasis added).

n18 John C. Armor, *The Right of Peaceful Change: Article V of the Constitution* (Washington, D.C. Tax Limitation Research Foundation, 1984), p. 13.

n19 For a general discussion of the "political question" doctrine, *see* Lawrence H. Tribe, *American Constitutional Law* (Mineola, New York: Foundation Press, 1978, 1981), pp. 71-79. Occasionally the Court declines to hear a case by designating it a "political question." The mere fact that a case has political repercussions does not make it a political question. Generally, four criteria are used to determine whether a case is a political question: (1) whether the case lacks judicially manageable standards; (2) whether the case could be better handled by another branch or level of government; (3) whether the case involves technical matters outside the competence of the court; or (4) whether the case could embarrass the U.S. Government in its relations with other nations. It is this writer's observation that the criteria for a political question are so vague that the courts can and do use the doctrine to reject any case they don't want to hear and circumvent the doctrine whenever they do want to hear the case. As to legal issues involving a constitutional convention, if the Court is inclined to take jurisdiction over the case, it will probably do so; if not, the Court may well use the political question doctrine as an excuse for declining the case.

n20 Armor, pp. 13-14.

n21 Rogers-Kingsbury, *Liberty*, p. 5.

n22 Everett Dirksen, quoted by Armor, pp. 22-23.

n23 Sam Ervin, cited by Armor, p. 23.

n24 *Amendment of the Constitution by the Convention Method Under Article V*, Special Constitutional Convention Study Committee, American Bar Association, Chicago, 1974; cited by Armor, pp. 19-22.

n25 Warren Burger, Remarks in Detroit, Michigan, January 30, 1987.

n26 Act of Continental Congress, May 14, 1787; quoted in *A Federal Constitutional Convention*, p. 8.

n27 Madison, *Notes*, p. 35.

n28 Rogers-Kingsbury, *Liberty*, p. 5.

n29 Lewis K. Uhler, "The Runaway Convention Bogeyman," *Liberty*, March/April 1991, p. 6.

n30 *Id.*

n31 Gerald Gunther, Letter, November 17, 1983; reprinted in *A Federal Constitutional Convention*, p. 32.

n32 Christopher Brown, undated letter, reprinted in *id.*, p. 33.

n33 Neil H. Cogan, *Letter*, December 2, 1983; reprinted in *id.*, p. 34.

n34 Lawrence H. Tribe, Prepared statement submitted to United States Senate Subcommittee on the Constitution, November 29, 1979.

n35 " A Bicentennial Analysis of the American Political Structure: Report and Recommendations of the Committee on the Constitutional System" (Washington, D.C.: Committee on the Constitutional System, 1987).

n36 *Id.*, p. 5.

n37 *Id.*

n38 *Id.*, pp. 8-13.

n39 Woodrow Wilson, *The New Freedom* (New York: 1914), pp. 44-48 (emphasis supplied).

n40 Madison, *The Federalist No. 51*, p. 281.

n41 Justice Louis Brandeis, *Meyers v. United States*, 272 U.S. 52 (1926)(dissent).

n42 W. Cleon Skousen, *What Is Behind the Frantic Drive for a New Constitution: Full Text and Analysis* (Salt Lake City: National Center for Constitutional Studies, n.d.); *see also* Phyllis Schlafly, "Con Con Threat to the U.S. Constitution," *DAR Magazine*, January 1985 (reprint).

n43 Skousen, *id.*, pp. 9-31; Schlafly, *id.*

n44 Declaration of Interdependence, 1975.

n45 *Id.*

n46 *A Constitution for the Federation of Earth* (Lakewood, Colorado: World Constitution and Parliament Association, 1977).

n47 Phrase quoted from Declaration of Independence. For a detailed discussion of the religious and philosophical mindset of eighteenth century America, *see generally*, Eidsmoe, *Christianity and the Constitution*.

n48 Phyllis Schlafly, Testimony before Montana State Senate Committee on State Administration, March 26, 1987; reprinted in *Should We Have a Constitutional Convention to Enact a Balanced Budget Amendment? Testimony Before the Montana Legislature* (Washington, D.C.: Citizens to Protect the Constitution, 1987), p. 16.

n49 James Madison, Letter to George Lee Thurberville, November 2, 1788, reprinted in *The Papers of James Madison*, R. Rutland, Ed., Vol. 11 (University of Virginia Press, 1977), p. 330; cited in *A Federal Constitutional Convention*, p. 23.

n50 *Id.* (emphasis added).

n51 Lewis K. Uhler, *Liberty*, pp. 19-20.

n52 Daniel Webster, February 22, 1832 (emphasis added).

n53 Orrin Hatch, Speech, March 26, 1988, National Conference on a Balanced Budget Amendment, Salt Lake City, Utah.