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# PROPOSED LEGISLATION TO IMPLEMENT THE CONVENTION METHOD OF AMENDING THE CONSTITUTION

*Sam J. Ervin, Jr.\**

## I. INTRODUCTION

ARTICLE V of the Constitution of the United States<sup>1</sup> provides that constitutional amendments may be proposed in either of two ways—by two-thirds of both houses of the Congress or by a convention called by the Congress in response to the applications of two-thirds of the state legislatures. Although the framers of the Constitution evidently contemplated that the two methods of initiating amendments would operate as parallel procedures, neither superior to the other, this has not been the case historically. Each of the twenty-five constitutional amendments ratified to date was proposed by the Congress under the first alternative. As a result, although the mechanics and limitations of congressional power under the first alternative are generally understood, very little exists in the way of precedent or learning relating to the unused alternative method in article V. This became distressingly clear recently, following the disclosure that thirty-two state legislatures had, in one form or another, petitioned the Congress to call a convention to propose a constitutional amendment permitting states to apportion their legislatures on the basis of some standard other than the Supreme Court's "one man-one vote" requirement. The scant information and considerable misinformation and even outright ignorance displayed on the subject of constitutional amendment, both within the Congress and outside of it—and particularly the dangerous precedents threatened by acceptance of some of the constitutional misconceptions put forth—prompted me to introduce in the Senate a legislative proposal designed to implement the convention amendment provision in article V. This article will discuss that provision of the Constitution,

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\* United States Senator from North Carolina.—Ed.

1. 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.

U.S. CONST. art. V.

the major questions involved in its implementation, and the answers to those questions supplied by the provisions of the bill, Senate Bill No. 2307.<sup>2</sup>

## II. BACKGROUND

On March 26, 1962, the United States Supreme Court, in the landmark case of *Baker v. Carr*,<sup>3</sup> held that state legislative apportionment is subject to judicial review in federal courts, thus overruling a long line of earlier decisions to the contrary. Two years later, on June 15, 1964, in *Reynolds v. Sims*,<sup>4</sup> the controversial "one man-one vote" decision, the Court held that the equal protection clause of the fourteenth amendment requires that both houses of bicameral state legislatures be apportioned on a population basis.

The two decisions evoked a storm of controversy. In the Congress, dissatisfaction with the Court's intrusion into the hitherto nonjusticiable political thicket resulted in attempts in both houses to reverse the rulings by legislation or constitutional amendment. On August 19, 1964, the House of Representatives passed a bill introduced by Representative Tuck of Virginia which would have stripped federal district courts of jurisdiction over state apportionment cases and denied the Supreme Court appellate jurisdiction over such cases. The Senate declined to invoke that extreme remedy, passing instead a "sense of Congress" resolution that the state legislatures should be given time to reapportion before the federal judiciary intervened further. In both 1965 and 1966, however, a majority of the Senate voted to propose the so-called "Dirksen amendment" to the Constitution, which would permit a state to apportion one house of its bicameral legislature on some standard other than population. But the amendment failed both times to get the required two-thirds vote, failing fifty-seven to thirty-nine in 1965 and fifty-five to thirty-eight in 1966.

A more extraordinary effect of the rulings in *Baker v. Carr* and *Reynolds v. Sims* was the activity generated in the state legislatures designed to reverse the Court's rulings by means of a constitutional amendment proposed by a convention convened under the second clause of article V. In December 1962, following *Baker v. Carr*, the Council of State Governments, at its Sixteenth Biennial General Assembly of the States, recommended that the state legislatures peti-

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2. The text of the bill, as amended, is set forth as an appendix to this Article. As of this writing, the amended bill has not been approved by the Committee on the Judiciary. The reported bill may include additional amendments.

3. 369 U.S. 186 (1962).

4. 377 U.S. 533 (1964).

tion the Congress for a constitutional convention to propose three amendments, including an amendment to accomplish essentially the same purpose as the Tuck bill, that is, the denial to federal courts of original and appellate jurisdiction over state legislative apportionment cases. In response to this call, twelve state petitions were sent to the Congress during 1963 requesting a constitutional convention to propose such an amendment.<sup>5</sup> Although this was the largest number of petitions on the same subject ever received by the Congress in any one year, the total was far below the required thirty-four, and their receipt caused no excitement in the Congress and attracted no public attention.

In December 1964, following the decision in *Reynolds v. Sims*, the Seventeenth Biennial General Assembly of the States recommended that the state legislatures petition the Congress to convene a constitutional convention to propose an amendment along the lines of the Dirksen amendment, permitting the states to apportion one house of a bicameral legislature on some standard other than population. The response to this call was even greater than in 1963. Twenty-two states submitted constitutional convention petitions to Congress during the Eighty-ninth Congress (1965 and 1966) and four more during the first session of the Ninetieth Congress (1967). If one counted the petitions adopted by four other states, questionable in regard to their proper receipt by Congress,<sup>6</sup> this brought the total number of state petitions on the subject of state legislative apportionment to thirty-two.

At this point, March 1967, the situation attracted the first attention in the press. A *New York Times* story on March 18, 1967,<sup>7</sup> reported that only two more petitions were necessary to invoke the convention amendment procedure. The immediate reaction was a rash of newspaper editorials and articles, almost uniformly critical of the effort to obtain a convention, and a flurry of speeches on the subject in the Congress. Whether favorable or unfavorable to the efforts by the states, all of these press items and all of the congressional speeches had one common denominator. They all bore the obvious imprint of the authors' feelings about the merits of state legislative apportionment. Those newspapers that had editorially supported the Supreme Court's decisions now decried the states'

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5. Copies of the applications referred to herein are on file in the offices of the Committees on the Judiciary of the United States Senate and House of Representatives.

6. New Hampshire, Colorado, Utah, and Georgia have adopted applications, but copies are not on file with the Senate and House Judiciary Committees.

7. *The New York Times*, March 18, 1967 (city ed.), at 1, col. 6.

"back-door assault on the Constitution."<sup>8</sup> Those newspapers that had criticized one man-one vote now applauded the effort by the state legislatures to overrule the new principle by constitutional amendment. Much more disturbing to me was the fact that many of my colleagues in the Senate seemed to be influenced more by their views on the reapportionment issue than by concern for the need to answer objectively some of the perplexing constitutional questions raised by the states' action. Those Senators who had been critical of the "one man-one vote" decision and were eager to undo it now expressed the conviction that the Congress was obligated to call a convention when thirty-four petitions were on hand and that it had little power to judge the validity of state petitions. Those senators who agreed with the Supreme Court's ruling were now contending that some or all of the petitions were invalid for a variety of reasons and should be discounted, and that, in any case, Congress did not have to call a convention if it did not wish to. Most distressing of all was the apparent readiness of everyone to concede that any convention, once convened, would be unlimited in the scope of its authority and empowered to run rampant over the Constitution, proposing any amendment or amendments that happened to strike its fancy. That interpretation, supported neither by logic nor constitutional history, served the convenience of both sides in the apportionment controversy. Those who did not want to call a convention that might propose a reapportionment amendment pointed out that an open convention would surely be a constitutional nightmare. Opponents of one man-one vote cited the horrors of an open convention as an additional reason for proposal of a reapportionment amendment by the Congress.

My conviction was that the constitutional questions involved were far more important than the reapportionment issue that had brought them to light, and that they should receive more orderly and objective consideration than they had so far been accorded. Certainly it would be grossly unfortunate if the partisanship over state legislative apportionment—and I am admittedly a partisan on that issue—should be allowed to distort an attempt at clarification of the amendment process, which in the long run must command a higher obligation and duty than any single issue that might be the subject of that process. Any congressional action on this subject would be a precedent for the future, and the unseemly squabble that had already erupted was to me a certain indication that only

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8. Editorial, *The Washington Post*, March 21, 1967, at A-10, col. 1.

bad precedents could result from an effort to settle questions of procedure under article V simultaneously with the presentation of a substantive issue by two-thirds of the states. Although it is not easy to anticipate all of the problems that may develop in the convention amendment process, nor to deal with those problems wisely in the abstract, I nevertheless felt that the wisest course would be to consider and enact permanent legislation to implement the convention amendment provision in article V.

I introduced S. 2307 on August 17, 1967. In my statement accompanying introduction, I stressed that I was not committed to the provisions of the bill as then drafted. I was convinced only of the necessity for action on the subject, action that might forestall a congressional choice between chaos on the one hand and refusal to abide the commands of article V on the other. Open hearings on the bill were held on October 30 and 31, 1967, before the Senate Subcommittee on Separation of Powers. The testimony revealed deficiencies in the bill and suggested modifications and additions. As a result, I have subsequently amended the bill in several respects. In discussing specific questions raised by the bill, I shall describe the relevant provision of the original draft and note the amendments made since the hearings.

### III. QUESTIONS RAISED BY THE BILL

Before going to specific issues and matters of detail, it seems appropriate to discuss briefly two threshold problems posed by the bill: whether the Congress has the power to enact such legislation, and, if it does, what policy considerations should guide it in exercising such power.

I have no doubt that the Congress has the power to legislate about the process of amendment by convention. The Congress is made the agency for calling the convention, and it is hard to see why the Congress should have been involved in this alternative method of proposal at all unless it was expected to determine such questions as when sufficient appropriate applications had been received and to provide for the membership and procedures of the convention and for review and ratification of its proposals. Obviously the fifty state legislatures cannot themselves legislate on this subject. The constitutional convention cannot do so for it must first be brought into being. All that is left, therefore, is the Congress, which, in respect to this and other issues not specifically settled by the Constitution, has the residual power to legislate on

matters that require uniform settlement. Add to this the weight of such decisions as *Coleman v. Miller*,<sup>9</sup> to the effect that questions arising in the amending process are nonjusticiable political questions exclusively in the congressional domain, and the conclusion seems inescapable that the Congress has plenary power to legislate on the subject of amendment by convention and to settle every point not actually settled by article V of the Constitution itself.

With respect to the second problem, within what general policy limitations that power should be exercised, I think the Congress should be extremely careful to close as few doors as possible. Any legislation on this subject will be what might be called "quasi-organic" legislation; in England it would be recognized as a constitutional statute. When dealing with such a measure, it is wise to bear in mind Marshall's well-worn aphorism that it is a Constitution we are expounding and not get involved in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must [be] seen dimly, and which can best be provided for as they occur."<sup>10</sup> This approach is reflected at several points in the bill, notably in its failure to try to anticipate and enumerate the various grounds on which Congress might justifiably rule a state petition invalid, and its failure to prescribe rigid rules of procedure for the convention. In addition, I think the Congress, in exercising its power under article V, should bear in mind that the Framers meant the convention method of amendment to be an attainable means of constitutional change. This legislation can be drawn so as to place as many hurdles as possible in the way of effective use of the process; or it can be drawn in a manner that will make such a process a possible, however improbable, method of amendment. The first alternative would be a flagrant disavowal of the clear language and intended function of article V. I have assumed that the Congress will wish to take the second road, and the bill is drawn with that principle in mind.

#### A. *Open or Limited Convention?*

Perhaps the most important issue raised by the bill is the question of the power of the Congress to limit the scope and authority of a convention convened under article V in accordance with the desires of the states as set forth in their applications. This was, as I have noted, one of the issues that most troubled me when I first heard of the efforts by the states to call a convention.

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9. 307 U.S. 433 (1939).

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

It has been argued that the subject matter of a convention convened under article V cannot be limited, since a constitutional convention is a premier assembly of the people, exercising all the power that the people themselves possess, and therefore supreme to all other governmental branches or agencies. Certainly, according to this argument, the states may not themselves, in their applications, dictate limitations on the convention's deliberations. They may not require the Congress to submit to the convention a given text of an amendment, nor even a single subject or idea. For the convention must be free to "propose" amendments, which suggests the freedom to canvass matters afresh and to weigh all possibilities and alternatives rather than ratify a single text or idea. The states may in their applications specify the amendment or amendments they would hope the convention would propose. But once the Congress calls the convention, those specifications would not control its deliberations. The convention could not be restricted to the consideration of certain topics and forbidden to consider certain other topics, nor could it be forbidden to write a new constitution if it should choose to do so.

I will concede that such an interpretation can be wrenched from article V—but only through a mechanical and literal reading of the words of the article, totally removed from the context of their promulgation and history. My reading of the debates on article V at the Philadelphia Convention and the other historical materials bearing on the intended function of the amendment process<sup>11</sup> leads me to the opposite conclusion. As I understand the debates, the Founders were concerned, first, that they not place the new government in the same straitjacket that inhibited the Confederation, unable to change fundamental law without the consent of every state. The amendment process, rather a novelty for the time, was therefore included in the Constitution itself. Second, the final form of article V was dictated by a major compromise between those delegates who would utilize the state legislatures as the sole means of initiating amendments and those who would lodge that power exclusively in the national legislature. The forces at the convention that sought to limit the power of originating amendments to the

11. E.g., LEGISLATIVE REFERENCE SERV., LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 135-36 (1964); THE FEDERALIST Nos. 43 & 85 (J. Cooke ed. 1961); L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION (1942); THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1937). The relevant excerpts from these and other sources are printed as an appendix to the *Hearings on the Federal Constitutional Convention Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, United States Senate, Oct. 30 and 31, 1967.

states were at first dominant. The original Virginia Plan, first approved by the convention, excluded the national legislature from participation in the amendment process. On reconsideration, the forces that would limit the power of origination of amendments to the national legislature became prevalent. The arguments on both sides were persuasive: the improprieties or excesses of power in the national government would not likely be corrected except by state initiative, while improprieties by the state governments or deficiencies in national power would not likely be corrected except by national initiative. In the spirit that typified the 1787 Convention, the result was acceptance of a Madison compromise proposal which read, as the final article was to read, in terms of alternative methods.

It is clear that neither of the two methods of amendment was expected by the Framers to be superior to the other or easier of accomplishment. There is certainly no indication that the national legislature was intended to promote individual amendments while the state legislatures were to be concerned with more extensive revisions. On the contrary, there is strong evidence that what the members of the convention were concerned with in both cases was the power to make specific amendments. They did not appear to anticipate a need for a general revision of the Constitution. And certainly this was understandable, in light of the difficulties that they had in finding the compromises to satisfy the divergent interests needed for ratification of their efforts. Provision in article V for two exceptions to the amendment power<sup>12</sup> underlines the notion that the convention anticipated specific amendment or amendments rather than general revision. For it is doubtful that these exceptions could have been expected to control a later general revision.

This construction is supported by references to the amendment process in the *Federalist Papers*. In *Federalist No. 43*, James Madison explained the need and function of article V as follows:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.

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12. See the text of art. V quoted in note 1 *supra*.

Hamilton, in *Federalist No. 85*, was even more emphatic in pointing out the possibility of specific as well as general amendment of the Constitution on the initiative of the state legislatures:

But every amendment to the constitution, if once established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point, no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently whenever nine or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place.

Apart from being inconsistent with the language and history of article V, the contention that any constitutional convention must be a wide open one is neither a practicable nor a desirable one. If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the states to call for a convention in the absence of a general discontent with the existing constitutional system. This construction would effectively destroy the power of the states to originate the amendment of errors pointed out by experience, as Madison expected them to do. Alternatively, under that construction, applications for a limited convention deriving in some states from a dissatisfaction with the school desegregation cases, in others because of the school prayer cases, and in still others by reason of objection to the *Miranda* rule, could all be combined to make up the requisite two-thirds of the states needed to meet the requirements of article V. I find it hard to believe that this is the type of consensus that was thought to be appropriate to calling for a convention. For if such disparate demands were sufficient, all the applications to date—and there are a large number of them—should be added up to see whether, in what is considered an appropriate span of time, two-thirds of the states have made demands for a constitutional convention to propose amendments, no matter the cause for applications or the specifications contained in them. Moreover, once such a convention were convened, it could refuse to consider any of the problems or subjects specified in the states' applications, and instead propose amendments on other subjects or rewrite the Constitution in a manner unacceptable to any of the applicant states.

My construction of article V, with reference to the initiation of the amendment procedure by the state legislatures, is consistent with the literal language of the article as well as its history, and is more desirable and practicable than the alternative construction. As I see

it, the intention of article V was to place the power of initiation of amendments in the state legislatures. The function of the convention was to provide a mechanism for effectuating this initiative. The role of the states in filing their applications would be to identify the problem or problems that they believed to call for resolution by way of amendment. The role of the convention that would be called by reason of such action by the states would then be to decide whether the problem called for correction by constitutional amendment and, if so, to frame the amendment itself and propose it for ratification as provided in article V. The bill carries out this intention in keeping not only with the letter but also with the spirit of article V.

The bill provides that state petitions to the Congress which request the calling of a convention under article V shall state the nature of the amendment or amendments to be proposed by such convention. Upon receipt of valid applications from two-thirds or more of the states requesting a convention on the same subject or subjects, the Congress is required to call a convention by concurrent resolution, specifying in the resolution the nature of the amendment or amendments for the consideration of which the convention is being called. The convention may not propose amendments on other subjects and, if it does, the Congress may refuse to submit them to the states for ratification.

Under these provisions, the states could not require the Congress to submit to a convention a given text of an amendment, demanding an up or down vote on it alone. But they could require the Congress to submit a single subject or problem, demanding action on it alone. They could not, however, define the subject so narrowly as to deprive the convention of all deliberative freedom. To use the reapportionment issue as an example, the states could not require the Congress to call a convention to accept or reject the exact text of the reapportionment amendment recommended by the Council of State Governments, for then the convention would be merely a ratifying body. But they could properly petition for a convention to consider the propriety of proposing a constitutional amendment to deal with the reapportionment problems raised by the Supreme Court decisions, defining those problems in specific terms. The convention would then be confined to that subject, but it would be free to consider the propriety of proposing any amendment and the form the amendment should take—that of the Dirksen proposal, the Tuck proposal, or some other form. To take another example, those states which might desire a convention to deal with the *Escobedo-Miranda*

issue could phrase their petitions generally in terms of the problem of federal control over the criminal processes of the states. The convention would then be confined to that subject, but would nevertheless have great deliberative freedom to canvass all possible solutions and propose whatever amendment or amendments it deemed appropriate to respond to the problems identified by the states.

I am convinced that these provisions of the bill fully accord with the mandate of article V, its history, and intended function.

#### B. *May Congress Refuse To Call a Convention?*

Perhaps the next most important question raised by the bill is whether the Congress has any discretion to refuse to call a convention in the face of appropriate applications from a sufficient number of states.

Article V states that Congress "shall" call a convention upon the applications of the legislatures of two-thirds of the states. I have absolutely no doubt that the article is peremptory and that the duty is mandatory, leaving no discretion to the Congress to review the wisdom of the state applications. Certainly this is the more desirable construction, consonant with the intended arrangement of article V as described in the preceding section of this article. The founders included the convention alternative in the amending article to enable the states to initiate constitutional reform in the event the national legislature refused to do so. To concede to the Congress any discretion to consider the wisdom and necessity of a particular convention call would in effect destroy the role of the states.

The comments of both Madison and Hamilton, subsequent to the 1787 Convention, sustain this construction. In a letter on the subject, Madison observed that the question concerning the calling of a convention "will not belong to the Federal Legislature. If two-thirds of the states apply for one, Congress cannot refuse to call it: if not, the other mode of amendments must be pursued."<sup>13</sup> Hamilton, in the *Federalist No. 85*, stated:

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."

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13. U.S. BUREAU OF ROLLS AND LIBRARY, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA V, 141, 143, quoting Madison's letter to Mr. Eve, dated Jan. 2, 1789.

The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion.

It has been argued forcefully that, notwithstanding the language of article V, the Congress need not call a convention if it does not wish to do so, and that, in any event no legislation such as this can commit a future Congress to call a convention against its judgment. This argument is based on the premise that although article V provides that Congress "*shall*" call a convention if enough states apply, this word may be interpreted to mean "*may*" for all practical purposes, since the courts are not apt to try to enforce the obligation if Congress wishes to evade it. I cannot accept such a flagrant disregard of clear language and purpose.

Although it may be true that no legislation by one Congress can bind a subsequent Congress to vote for a convention, and that the courts will not intervene, it is my strong feeling that the bill should recognize the fact that the Congress has a strict constitutional duty to call a convention if a sufficient number of proper applications are received. The bill does this by providing that it shall be the duty of both houses to agree to a concurrent resolution calling a convention whenever it shall be determined that two-thirds of the state legislatures have properly petitioned for a convention to propose an amendment or amendments on the same subject. Concededly, the Congress cannot be forced by the courts or by the provisions of this bill to vote for a particular convention. However, every member has taken an oath to support the Constitution, and I cannot believe a majority of the Congress will choose to ignore its clear obligation. I would hope, moreover, that this bill will facilitate the path to congressional action by underlining the obligation of the Congress to act.

### C. *Sufficiency of State Applications*

Assuming the Congress may not weigh the wisdom and necessity of state applications requesting the calling of a constitutional convention, does it have the power to judge the validity of state applications and state legislative procedures adopting such applications? Clearly the Congress has some such power. The fact alone that Congress is made the agency for convening the convention upon the receipt of the requisite number of state applications suggests that it must exercise some power to judge the validity of those applications. The impotence or withdrawal of the courts underlines the

necessity for lodging some such power in the Congress. The relevant question, then, concerns the extent of that power.

It has been contended that Congress must have broad powers to judge the validity of state applications and that such power must include the authority to look beyond the content of an application, and its formal compliance with article V, to the legislative procedures followed in adopting the application. The counterargument is that to grant Congress the power to reject applications, particularly if that power is not carefully circumscribed, would be to supply it with a means of avoiding altogether the obligation to call a convention. The result would be that the Congress could arbitrarily reject all applications on subjects it did not considerate appropriate for amendment, leaving us in effect with only one amendment process.

In drafting the bill I was mainly concerned with limiting the power of the Congress to frustrate the initiative of the states, particularly since the debate on the Senate floor at that time indicated that some Senators were inclined to seize on any slight irregularity in a petition as a basis for not counting it. My bill, as introduced, therefore set forth only requirements as to the content of state applications, leaving questions of legislative procedure for determination solely by the individual states, with their decisions made binding on the Congress and the courts. However, I think the hearings amply demonstrated the danger of disabling the Congress from reviewing the procedural validity of state petitions. In general, state legislatures ought to be masters of their own procedures. But this is a federal function that they would be performing, and the Congress should retain some power uniformly to settle the questions of irregularity that might arise. The bill has therefore been amended to remove the disability of the Congress to review legislative procedures. Under the amended bill, Congress would retain broad powers in this respect, indeterminate and unforeseeable in nature, but to be exercised, I would hope, rarely and with restraint.

It might be well to say something at this point on a question that is much debated: whether a legislature that has been held to be malapportioned, or that is under a decree requiring it to reapportion and perhaps qualifying its powers in some measure before reapportionment, can validly pass a resolution for a constitutional convention. I should think in general that it could, unless an outstanding decree forbids it to do so, either specifically or by mention

of some analogous forbidden function. To open to congressional review the question of the propriety of state legislative composition would be to open a Pandora's box of constitutional doubts about the validity even of the fourteenth amendment.

However, the bill does not expressly answer this question. This is one of the many questions of irregularity on which the Congress will have to work its will should the question be squarely presented in the form of thirty-four state applications including some passed by malapportioned legislatures.

One further important point should be mentioned. Most of the states obviously do not now understand their role in designating subjects or problems for resolution by amendment, and many of them do not even know where to send their applications. By setting forth the formal requirements with respect to content of state applications and designating the congressional officers to whom they must be transmitted, the bill furnishes guidance to the states on these questions and promises to avert in the future some of the problems that have arisen in the current effort to convene a convention. The bill also requires that all applications received by the Congress be printed in the *Congressional Record* and that copies be sent to all members of Congress and to the legislature of each of the other states. In this way, the element of congressional surprise can be eliminated, and each state can be given prompt and full opportunity to join in any call for a convention in which it concurs.

#### D. *The Role of State Governors*

The argument has been made that a state application for a constitutional convention must be approved by both the legislature and the governor of the state to be effective. This argument rests on the claim that article V intended state participation in the process to involve the whole legislative process of the state as defined in the state constitution. I do not agree with that argument. We do not have here any question about the exercise of the lawmaking process by a state legislature in combination with whatever executive participation might be called for by state law. We have rather a question of heeding the voice of the people of a state in expressing the possible need for a change in the fundamental document. It seems clear to me that the Founders properly viewed the state legislatures as the sole representative of the people on such a matter, since the executive veto, a carryover from the requirement of royal assent, was not regarded as the expression of popular opinion at the time

of the 1787 Convention. And, to resort to the kind of literalism invoked by others as appropriate for construction of other provisions of article V, the language of the article definitely asserts that the appropriate applications are to come from "the Legislatures."

Closely analogous court decisions support this interpretation. The Supreme Court in *Hawke v. Smith, No. I*<sup>14</sup> interpreted the term "legislatures" in the ratification clause of article V to mean the representative lawmaking bodies of the states, since ratification of a constitutional amendment "is not an act of legislation within the proper sense of the word."<sup>15</sup> Certainly the term "legislature" should have the same meaning in both the application clause and the ratification clause of article V. Further support is found in the decision in *Hollingsworth v. Virginia*,<sup>16</sup> in which the Court held that a constitutional amendment approved for proposal to the states by a two-thirds vote of Congress need not be submitted to the President for his signature or veto.

The bill therefore provides specifically that a state application need not be approved by the state's governor in order to be effective.

#### E. May a State Rescind Its Application?

The question of whether a state should be allowed to rescind an application previously forwarded to the Congress is another of the political questions to which the courts have not supplied answers and presumably cannot. The Supreme Court has held that questions concerning the rescission of prior ratifications or rejections of amendments proposed by the Congress are determinable solely by Congress.<sup>17</sup> Presumably, then, the question of rescission of an application for a convention is also political and nonjusticiable. Although the Congress has previously taken the position that a state may not rescind its prior ratification of an amendment, it has taken no position concerning rescission of applications. My strong conviction is that rescission should be permitted. Since a two-thirds consensus among the states at some point in time is necessary in order for the Congress to call a convention, the Congress should consider whether there has been a change of mind among some states that have earlier applied. Moreover, an application is not a final action, since it serves merely to initiate a convention, and does not commit even the ap-

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14. 253 U.S. 221 (1920).

15. *Id.* at 229.

16. 3 U.S. (3 Dall.) 378 (1798).

17. *Coleman v. Miller*, 307 U.S. 433, 448-49 (1939).

plicant state to any substantive amendment that might eventually be proposed.

The bill therefore provides that a state may rescind at any time before its application is included among an accumulation of applications from two-thirds of the states, at which time the obligation of the Congress to call a convention becomes fixed. Incidentally, the bill also provides that a state may rescind its prior ratification of an amendment proposed by the convention up until the time there are existing valid ratifications by three-fourths of the states, and that a state may change its mind and ratify a proposed amendment that it previously has rejected.

#### *F. How Long Does an Application Remain Valid?*

Another much debated point concerning state applications for a constitutional convention is timing. In order to be effective to mandate the Congress to act, within how long a period must applications be received from two-thirds of the state legislatures? Article V is silent on this question, and neither the Congress nor the courts has supplied an answer.

The Congress and the courts have agreed that constitutional amendments proposed by the Congress and submitted to the states for ratification can properly remain valid for ratification for a period of seven years. It has been felt that there should be a "reasonably contemporaneous" expression by three-fourths of the states that an amendment is acceptable in order for the Congress to conclude that a consensus in favor of the amendment exists among the people, and that ratification within a seven-year period satisfies this requirement.<sup>18</sup> Presumably, the same principle should govern the application stage of the constitutional amendment process. If so, the Congress would not be required, nor empowered, to call a convention unless it received "relatively contemporaneous" valid applications from the necessary number of states. This rule seems sensible. The Constitution contemplates a concurrent desire for a convention on the part of the legislatures of a sufficient number of states, and such a concurrent desire can scarcely be said to exist, or to reflect in each state the will of the people, if too long a period of time has passed from the date of enactment of the first application to the date of enactment of the last. It is true that legislatures are free under the bill to change their minds and rescind their applications; but the passage of a repealer is a different and more difficult political act

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18. Dillon v. Gloss, 256 U.S. 368 (1921).

than the defeat, starting fresh, of an application calling for a constitutional convention. The fact, therefore, that a legislature has not rescinded an application calling for a convention is an insufficient indication that the state in question, after the passage of a long period of time, still favors the calling of a convention.

What, then, is a proper period during which tendered applications are sufficiently contemporaneous to be counted together? Some Senators and scholars have suggested that two years, the lifetime of a Congress, would be a reasonable period. Others have suggested that petitions should remain valid for a generation. My feeling when I drafted the bill was that six years would be a reasonable compromise. However, the hearings revealed a general disposition among the witnesses to agree on a four-year period. Since this would be long enough to afford ample opportunity to all the state legislatures to join in the call for a convention—particularly in view of the requirement in the bill that all other states be given immediate notice of any application received by the Congress—I have concluded that a four-year period is preferable.

The bill has therefore been amended to provide that an application shall remain valid for four years after receipt by the Congress unless sooner rescinded. The bill also provides that rescission must be accomplished by means of the same legislative procedures followed in adopting the application in question, and that the Congress retains power to judge the validity of those proceedings.

#### *G. Calling the Convention*

The bill provides that the Secretary of the Senate and the Clerk of the House of Representatives shall keep a record of the number of state applications received, according to subject matter. Whenever two-thirds of the states have submitted applications on the same subject or subjects, the presiding officer of each house shall be notified and shall announce the same on the floor. Each house is left free to adopt its own rules for determining the validity of the applications, presumably by reference to a committee followed by floor action. Once a determination has been made that there are valid applications from two-thirds or more of the state legislatures on the same subject or subjects, each house must agree to a concurrent resolution providing for the convening of a constitutional convention on such subject or subjects. The concurrent resolution would designate the place and time of meeting of the convention, set forth the nature of the amendment or amendments the convention is empowered to

consider and propose, and provide for such other things as the provision of funds to pay the expenses of the convention and to compensate the delegates. The convention would be required to be convened not later than one year after adoption of the resolution.

As introduced, the bill required the Congress to designate in the concurrent resolution convening a convention the manner in which any amendments proposed by the convention must be ratified by the states and the period within which they must be ratified or deemed inoperative. Testimony at the hearings suggested that these determinations might properly be influenced by the nature of the amendments proposed and that they should therefore not be required to be made at the time the convention is called. For example, certain proposed amendments might call for ratification by state conventions rather than state legislatures, and certain circumstances might indicate a shorter or longer period than usual during which ratification should take place. The Congress should be able to make those decisions after it has the convention's proposals. The bill therefore has been amended to so provide.

#### *H. Selection and Apportionment of Delegates*

The bill as introduced provided that each state should have as many delegates as it is entitled to representatives in Congress, to be elected or appointed as provided by state law. However, the hearings revealed a general feeling that the national interest is too closely affected to permit each state to decide how its delegates to a national constitutional convention shall be elected, or, indeed, appointed. For this reason, the bill has been amended to require that delegates be elected—not appointed—and that they be elected by the same constituency that elects the states' representatives in Congress. Under the amended bill, each state will be entitled to as many delegates as it is entitled to Senators and Representatives in Congress. Two delegates in each state will be elected at large and one delegate will be elected from each congressional district in the manner provided by state law. Vacancies in a state's delegation will be filled by appointment of the governor.

#### *I. Convention Procedure and Voting*

The bill provides that the Vice President of the United States shall convene the constitutional convention, administer the oath of office of the delegates and preside until a presiding officer is elected. The presiding officer will then preside over the election of other

officers and thereafter. Further proceedings of the convention will be in accordance with rules adopted by the convention. A daily record of all convention proceedings, including the votes of delegates, shall be kept, and shall be transmitted to the Archivist of the United States within thirty days after the convention terminates. The convention must terminate its proceedings within one year of its opening unless the period is extended by the Congress by concurrent resolution.

As introduced, the bill provided that each state should have one vote on all matters before the convention, including the proposal of amendments. This was decided upon in deference to the method followed in the 1787 Convention rather than from a conviction that this would be the necessarily proper procedure in conventions called under article V. On the basis of the testimony presented at the hearings, I have decided that unit voting would not be appropriate for such conventions. The reasons for unit voting in the 1787 Convention were peculiar to the background against which that convention worked and are not valid today. Moreover, the states, as units, will have equal say in the ratification process. It seems appropriate, therefore, to recognize the interests of majority rule in the method of proposing amendments. Hence, the bill has been amended to provide that each state delegate shall have one vote so that the voting strength of each state will be in proportion to its population.

Finally, the bill provides that amendments may be proposed by the convention by a vote of a majority of the total number of delegates to the convention. The alternative would be to impose a two-thirds voting requirement analogous to the requirement for congressional proposal of amendments. However, article V does not call for this, and I think that such a requirement would place an undue and unnecessary obstacle in the way of effective utilization of the convention amendment process.

#### *J. Ratification of Proposed Amendments*

The bill provides that any amendment proposed by the convention must be transmitted to the Congress within the thirty days after the convention terminates its proceedings. The Congress must then transmit the proposed amendment to the Administrator of General Services for submission to the states. However, the Congress may, by concurrent resolution, refuse to approve an amendment for submission to the states for ratification, on the grounds of procedural irregularities in the convention or failure of the amendment to con-

form to the limitations on subject matter imposed by the Congress in the concurrent resolution calling the convention. The intent is to provide a means of remedying a refusal by the convention to abide by the limitations on its authority to amend the Constitution. Of course, unlimited power in the Congress to refuse to submit proposed amendments for ratification would destroy the independence of the second alternative amending process. Therefore, the Congress is explicitly forbidden to refuse to submit a proposed amendment for ratification because of doubts about the merits of its substantive provisions. The power is reserved for use only with respect to amendments outside the scope of the convention's authority or in the case of serious procedural irregularities.

Ratification by the states must be by state legislative action or convention, as the Congress may direct, and within the time period specified by the Congress. The Congress retains the power to review the validity of ratification procedures. As noted earlier, any state may rescind its prior ratification of an amendment by the same processes by which it ratified it, except that no state may rescind after that amendment has been validly ratified by three-fourths of the states. When three-fourths of the states have ratified a proposed amendment, the Administrator of General Services shall issue a proclamation that the amendment is a part of the Constitution, effective from the date of the last necessary ratification.

#### IV. CONCLUSION

There is some evidence that the current effort to require the Congress to call a convention to propose a reapportionment amendment has failed and that the danger of a constitutional crisis has passed. The two additional applications needed to bring the total to thirty-four have not been received and there is a strong likelihood that some applicant states will rescind their applications. Even if this is the case, however, the need for legislation to implement article V remains. There may well be other attempts to utilize the convention amendment process and, in the absence of legislation, the same unanswered questions will return to plague us. The legislation therefore is still timely, and the Congress may now have the opportunity to deal with the sensitive constitutional issues objectively, uninfluenced by competing views on state apportionment or any other substantive issue.

Some have argued that the convention method of amendment is an anomaly in the law, out of step with modern notions of majority

rule and the relationship between the states and the federal government. If so, that part of article V should be stricken from the Constitution by the appropriate amendment process. It should not, however, be undermined by erecting every possible barrier in the way of its effective use. Such a course would be a disavowal of the clear language and history of article V. The Constitution made the amendment process difficult, and properly so. It certainly was not the intention of the original Convention to make it impossible. Nor is it possible to conclude that the Founders intended that amendments originating in the states should have so much harder a time of it than those proposed by Congress. As I have pointed out, that issue was fought out in 1787 Convention and resolved in favor of two originating sources, both difficult of achievement, but neither impossible and neither more difficult than the other. My bill seeks to preserve the symmetry of article V by implementing the convention alternative so as to make it a practicable but not easy method of constitutional amendment.

## APPENDIX

S. 2307

## IN THE SENATE OF THE UNITED STATES

## A BILL

To provide procedures for calling constitutional conventions for proposing amendments to the Constitution of the United States, on application of the legislatures of two-thirds of the States, pursuant to article V of the Constitution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Federal Constitution Convention Amendment Act."

## APPLICATIONS FOR CONSTITUTIONAL CONVENTION

SEC. 2. The legislature of a State, in making application to the Congress for a constitutional convention under article V of the Constitution of the United States, shall adopt a resolution pursuant to this Act stating, in substance, that the legislature requests the calling of a convention for the purpose of proposing one or more amendments to the Constitution of the United States and stating the nature of the amendment or amendments to be proposed.

## APPLICATION PROCEDURE

SEC. 3(a) For the purpose of adopting or rescinding a resolution pursuant to section 2, the State legislature shall follow the rules of procedure that govern the enactment of a statute by that legislature, but without the need for approval of the legislature's action by the governor of the State.

(b) Questions concerning the State legislative procedure and the validity of the adoption of a State resolution cognizable under this Act shall be determinable by the Congress of the United States and its decisions thereon shall be binding on all others, including State and Federal courts.

## TRANSMITTAL OF APPLICATIONS

SEC. 4(a) Within thirty days after the adoption by the legislature of a State of a resolution to apply for the calling of a constitutional convention, the secretary of state of the State, or if there be

no such officer, the person who is charged by the State law with such function, shall transmit to the Congress of the United States two copies of the application, one addressed to the President of the Senate, and one to the Speaker of the House of Representatives.

(b) Each copy of the application so made by any State shall contain—

(1) the title of the resolution,

(2) the exact text of the resolution, signed by the presiding officer of each house of the State legislature, and

(3) the date on which the legislature adopted the resolution; and shall be accompanied by a certificate of the secretary of state of the State, or such other person as is charged by the State law with such function, certifying that the application accurately sets forth the text of the resolution.

(c) Within ten days after receipt of a copy of any such application, the President of the Senate and Speaker of the House of Representatives shall report to the House of which he is presiding officer, identifying the State making application, the subject of the application, and the number of States then having made application on such subject. The President of the Senate and Speaker of the House of Representatives shall cause copies of such application to be sent to the presiding officer of each House of the legislature of every other State and to each member of the Senate and House of Representatives of the Congress of the United States.

#### EFFECTIVE PERIOD OF APPLICATIONS

SEC. 5(a) An application submitted to the Congress by a State pursuant to this Act, unless sooner rescinded by the State legislature, shall remain effective for four calendar years after the date it is received by the Congress, except that whenever the Congress determines that within a period of four calendar years two-thirds or more of the several States have each submitted a valid application calling for a constitutional convention on the same subject all such applications shall remain in effect until the Congress has taken action on a concurrent resolution, pursuant to section 8, calling for a constitutional convention.

(b) A State may rescind its application calling for a constitutional convention by adopting and transmitting to the Congress a resolution of rescission in conformity with the procedure specified in sections 3 and 4, except that no such rescission shall be effective as

to any valid application made for a constitutional convention upon any subject after the date on which two-thirds or more of the State legislatures have valid applications pending before the Congress seeking amendments on the same subject.

(c) Questions concerning the rescission of a State's application shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including State and Federal courts.

#### CALLING OF A CONSTITUTIONAL CONVENTION

SEC. 6(a) It shall be the duty of the Secretary of the Senate and the Clerk of the House of Representatives to maintain a record of all applications received by the President of the Senate and Speaker of the House of Representatives from States for the calling of a constitutional convention upon each subject. Whenever the Secretary or the Clerk has reason to believe that valid applications made by two-thirds or more of the States with respect to the same subject are in effect, he shall so report in writing to the officer to whom those applications were transmitted, and such officer thereupon shall announce upon the floor of the House of which he is an officer the substance of such report. Pursuant to such rules as such House may adopt, it shall be the duty of such House to determine whether the recitation contained in any such report is correct. If either House of the Congress determines, upon a consideration of any such report or of a concurrent resolution agreed to by the other House of the Congress, that there are in effect valid applications made by two-thirds or more of the States for the calling of a constitutional convention upon the same subject, it shall be the duty of that House to agree to a concurrent resolution calling for the convening of a Federal constitutional convention upon that subject. Each such concurrent resolution shall (1) designate the place and time of meeting of the convention; (2) set forth the nature of the amendment or amendments for the consideration of which the convention is called; and (3) authorize the appropriation of moneys for the payment of all expenses of the convention, including the compensation of delegates and employees. A copy of each such concurrent resolution agreed to by both Houses of the Congress shall be transmitted forthwith to the presiding officer of each House of the Legislature of each State.

(b) The convention shall be convened not later than one year after the adoption of the resolution.

**DELEGATES**

SEC. 7(a) A convention called under this Act shall be composed of as many delegates from each State as it is entitled to Senators and Representatives in Congress. In each State two delegates shall be elected at large and one delegate shall be elected from each Congressional district in the manner provided by State law. Any vacancy occurring in a State delegation shall be filled by appointment of the Governor of that State.

(b) The secretary of state of each State, or, if there be no such officer, the person charged by State law to perform such function shall certify to the Vice President of the United States the name of each delegate elected or appointed by the Governor pursuant to this section.

(c) Delegates shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at a session of the convention, and in going to and returning from the same; and for any speech or debate in the convention they shall not be questioned in any other place.

(d) Each delegate shall receive compensation for each day of service and shall be compensated for traveling and related expenses. Provision shall be made therefore in the concurrent resolution calling the convention. The convention shall fix the compensation of employees of the convention.

**CONVENING THE CONVENTION**

SEC. 8(a) The Vice President of the United States shall convene the constitutional convention. He shall administer the oath of office of the delegates to the convention and shall preside until the delegates elect a presiding officer who shall preside thereafter. Before taking his seat each delegate shall subscribe an oath not to attempt to change or alter any section, clause or article of the Constitution or propose additions thereto except in conformity with the concurrent resolution calling the convention. Upon the election of permanent officers of the convention, the names of such officers shall be transmitted to the President of the Senate and the Speaker of the House of Representatives by the elected presiding officer of the convention. Further proceedings of the convention shall be conducted in accordance with such rules, not inconsistent with this Act, as the convention may adopt.

(b) The Congress shall appropriate moneys for the payment of all expenses of the convention.

(c) Under such regulations as the President shall prescribe, the Administrator of General Services shall provide such facilities, and each executive department and agency shall provide such information, as the convention may require, upon written request made by the elected presiding officer of the convention.

#### PROCEDURES OF THE CONVENTION

SEC. 9(a) In voting on any question before the convention, including the proposal of amendments, each delegate shall have one vote.

(b) The convention shall keep a daily verbatim record of its proceedings and publish the same. The votes of the delegates on any question shall be entered on the record.

(c) The convention shall terminate its proceedings within one year after the date of its first meeting unless the period is extended by the Congress by concurrent resolution.

(d) Within thirty days after the termination of the proceedings of the convention, the presiding officer shall transmit to the Archivist of the United States all records of official proceedings of the convention.

#### PROPOSAL OF AMENDMENTS

SEC. 10(a) Except as provided in subsection (b) of this section, a convention called under this Act may propose amendments to the Constitution by a vote of a majority of the total number of delegates to the convention.

(b) No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention. Questions arising under this subsection shall be determined solely by the Congress of the United States and its decisions shall be binding on all others, including state and Federal courts.

#### APPROVAL BY THE CONGRESS AND TRANSMITTAL TO THE STATES FOR RATIFICATION

SEC. 11(a) The presiding officer of the convention shall, within thirty days after the termination of its proceedings, submit the exact text of any amendment or amendments agreed upon by the con-

vention to the Congress for approval and transmittal to the several States for their ratification.

(b) The Congress, before the expiration of the first period of three months of continuous session following receipt of any proposed amendment, shall, by concurrent resolution, transmit such proposed amendment to the States for ratification, prescribing the time within which such amendment shall be ratified or deemed inoperative and the manner in which such amendment shall be ratified in accordance with Article V of the Constitution: *Provided*, That, within such period, the Congress may, by concurrent resolution, disapprove the submission of the proposed amendment to the States for ratification on the ground that its general nature is different from that stated in the concurrent resolution calling the convention or that the proposal of the amendment by the convention was not in conformity with the provisions of this Act: *Provided* further, that the Congress shall not disapprove the submission of a proposed amendment for ratification by the States because of its substantive provisions.

(c) If, upon the expiration of the period prescribed in the preceding subsection, the Congress has not adopted a concurrent resolution transmitting or disapproving the transmittal of a proposed amendment to the States for ratification, the President of the Senate and the Speaker of the House of Representatives, acting jointly, shall transmit such proposed amendment to the Administrator of General Services for submission to the States. The Administrator of General Services shall transmit exact copies of the same, together with his certification thereof, to the legislatures of the several States.

#### RATIFICATION OF PROPOSED AMENDMENTS

SEC. 12(a) Any amendment proposed by the convention and submitted to the States in accordance with the provisions of this Act shall be valid for all intents and purposes as part of the Constitution of the United States when duly ratified by three-fourths of the States in the manner and within the time specified.

(b) Acts of ratification shall be by convention or by State legislative action as the Congress may direct or as specified in subsection (c) of this section. For the purpose of ratifying proposed amendments transmitted to the States pursuant to this Act the State legislatures shall adopt their own rules of procedure. Any State action ratifying a proposed amendment to the Constitution shall be valid without the assent of the Governor of the State.

(c) Any proposed amendment transmitted to the States pursuant to the provisions of section 11(c) of this Act shall be ratified by the legislatures of three-fourths of the several States within seven years of the date of transmittal or be deemed inoperative.

(d) The secretary of state of the State, or if there be no such officer, the person who is charged by State law with such function, shall transmit a certified copy of the State action ratifying any proposed amendment to the Administrator of General Services.

#### RESCISSON OF RATIFICATIONS

SEC. 13(a) Any State may rescind its ratification of a proposed amendment by the same processes by which it ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.

(c) Questions concerning State ratification or rejection of amendments proposed to the Constitution of the United States shall be determined solely by the Congress of the United States, and its decisions shall be binding on all others, including State and Federal courts.

#### PROCLAMATION OF CONSTITUTIONAL AMENDMENTS

SEC. 14. The Administrator of General Services, when three-fourths of the several States have ratified a proposed amendment to the Constitution of the United States, shall issue a proclamation that the amendment is a part of the Constitution of the United States.

#### EFFECTIVE DATE OF AMENDMENTS

SEC. 15. An amendment proposed to the Constitution of the United States shall be effective from the date specified therein or, if no date is specified, then on the date on which the last State necessary to constitute three-fourths of the States of the United States, as provided for in article V, has ratified the same.