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ROLL NUMBER

DESCRIPTION

4028

2001 SENATE JUDICIARY

SCR 4028

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4028

Senate Judiciary Committee

❑ Conference Committee

Hearing Date February 13th, 2001

Tape Number	Side A	Side B	Meter #
1	x		41.4-51

Committee Clerk Signature

Minutes: **Senator Watne** opened the hearing on SCR 4028: A CONCURRENT RESOLUTION RESCINDING ALL APPLICATIONS MADE BY THE LEGISLATIVE ASSEMBLY TO THE CONGRESS OF THE UNITED STATES TO CALL A CONVENTION PURSUANT TO THE TERMS OF ARTICLE V OF THE UNITED STATES CONSTITUTION FOR PROPOSING AMENDMENTS TO THAT CONSTITUTION AND URGING THE LEGISLATIVE BODIES IN OTHER STATES TO TAKE SIMILAR ACTION.

Senator Mutch, testified in Favor of SB 4028.

Senator Watne closed the hearing on SB 4028.

SENATOR DEVER MOTIONED TO DO PASS, SECONDED BY SENATOR TRENBEATH. VOTE INDICTED 6 YEAS, 0 NAYS AND 1 ABSENT AND NOT VOTING. SENATOR DEVER VOLUNTEERED TO CARRY THE BILL.

Date: 2/13/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 4028

Senate Judiciary Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Dever Seconded By Trenbeath

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman			Bercier, D.	X	
Watne, D. Vice Chairman	X		Nelson, C.	X	
Dever, D.	X				
Lyson, S.	X				
Trenbeath, T.	X				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Dever

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 13, 2001 2:13 p.m.

Module No: SR-26-3228
Carrier: Dever
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4028: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SCR 4028 was placed on the Eleventh order on the calendar.

2001 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SCR 4028

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SCR 4028

House Government and Veterans Affairs Committee

☐ Conference Committee

Hearing Date 3/08/01

Tape Number	Side A	Side B	Meter #
1	X		253-1317
3/09/01 (1)	X		2321-2570
Committee Clerk Signature			

Minutes:

REP. M. KLEIN called the hearing to order, with all committee members present.

In favor:

GEORGE DETWEILER, SELF

DETWEILER talks about states limiting the convention. Urges the committee a do pass. Please see attached testimony.

REP. KASPER asks how would the delegates be determined? DETWEILER states that there is no provision for that at all, deciding how they would be selected. KASPER asks who would decide that, congress? DETWEILER replies that it is both the house and the senate.

REP. KLEMIN asks how many states are calling for this? DETWEILER replies that 32 out of 34 required states are. Two short of the necessary. REP. KLEMIN asks where are we standing right now? DETWEILER replies that they are in the high twenties.

REP. BELLEW doesn't understand why our founding fathers would put this in here if they didn't want us to use it.

Being no further testimony the hearing was then closed. Action was taken on March 9th, 2001.

REP. HAAS motioned for a DO PASS, seconded by REP. GRANDE. The roll call was taken with 13 YES, 2 NO and 0 ABSENT AND NOT VOTING. The motion carries. The CARRIER of the bill is REP. M. KLEIN.

SCR 4028: DO PASS 13-2

CARRIER: REP. M. KLEIN

Date: 3/9/01

Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SCR 4028

House GOVERNMENT AND VETERANS AFFAIRS Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Haas Seconded By Grande

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN KLEIN	✓		REP KROEBER	✓	
VICE CHAIR GRANDE	✓	✓			
REP BELLEW					
REP BRUSEGAARD	✓				
REP CLARK	✓				
REP DEVLIN		✓			
REP HAAS	✓				
REP KASPER	✓				
REP KLEMIN	✓				
REP MEIER	✓				
REP WIKENHEISER	✓				
REP CLEARY	✓				
REP HUNSKOR	✓				
REP METCALF	✓				

Total (Yes) 13 No 2

Absent 0

Floor Assignment Rep. M. Klein

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 9, 2001 12:29 p.m.

Module No: HR-41-5216
Carrier: M. Klein
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SCR 4028: Government and Veterans Affairs Committee (Rep. M. Klein, Chairman) recommends **DO PASS** (13 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SCR 4028 was placed on the Fourteenth order on the calendar.

2001 TESTIMONY

SCR 4028

UNIVERSITY OF MARYLAND SCHOOL OF LAW
500 WEST BALTIMORE STREET • BALTIMORE, MARYLAND 21201-1786

November 25, 1991

STATEMENT OF PROFESSOR CHRISTOPHER BROWN

The most alarming aspect of the fact that 32 of the necessary 34 states have called for a constitutional convention is the threat this development poses to a system that has worked so well for nearly 200 years. In spite of the fact that 3 states have rescinded their calls for a constitutional convention in recent years, convention supporters have clearly stated their intent to lull the final 2 states into passing convention requests, thereby forcing the U.S. Supreme Court into either upholding the state rescissions or mandating the first federal constitutional convention since 1787. We are on the brink of encountering the risks of radical surgery at a time when the patient is showing no unusual signs of difficulty. If this country were faced with an uncontrollable constitutional crisis, such risks might be necessary; but surely they have no place in the relatively placid state of present day constitutional affairs. Now is not the time for the intrusion of a fourth unknown power into our tripartite system of government.

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. The appropriate scope of a convention's agenda is but one of numerous uncertainties now looming on the horizon: Need petitions be uniform, limited or general? By whom and in what proportion are the delegates to be chosen? Who will finance the convention? What role could the judiciary play in resolving these problems? The resolution of these issues would inevitably embroil the government in prolonged discord.

Assembling a convention and thereby encountering and attempting to resolve these questions would surely have a major effect upon the ongoing operations of our government. Unlike the threats posed by Richard Nixon's near impeachment, the convening of a convention could not necessarily be compromised to avoid disaster. It would surely create a major distraction to ordinary concerns, imposing a disabling effect on this country's domestic and foreign policies. Only the existence of an actual breakdown in our existing governing structure warrants such a risk-prone tinkering with out constitutional underpinnings. Now is not the time to take such chances.

PRESIDENT OF BYU

2840 Iroquois Drive
Provo, UT 84604
December 18, 1989

Representative Reese Hunter
4577 Wellington Street
Salt Lake City, UT 84117

Dear Mr. Hunter:

This is in response to your letter of December 12 in which you asked for my opinion concerning whether under Article V of the United States Constitution, a constitutional convention called to consider a particular issue could be limited either by congressional directive or otherwise to that single issue.

The only safe statement that could be made on this subject is that no one knows, but the only relevant precedent would indicate that the convention could not be so limited. Anyone who purports to express a definitive view on this subject is either deluded or deluding. As a result, in determining the steps you should take as a responsible representative of the people of Utah, you and other members of the legislature should realize that the risks are very real that (1) just as happened in 1787, the convention might not in fact limit itself as instructed by Congress and (2) the convention's forays into areas forbidden them by Congress might eventually be upheld.

In short, if the question is whether a runaway convention is assured, the answer is no, but if the question is whether it is a real and serious possibility, the answer is yes. In our history we have had only one experience with a constitutional convention, and while the end result was good, the convention itself was definitely a runaway.

I hope this is helpful to you.

Sincerely,

Rex E. Lee

REL:jn

Professor says constitutional review would be 'catastrophe'

By IRVIN MOLOTSKY
cr1987 N.Y. Times

WASHINGTON – As the Constitution approaches its 200th anniversary, Professor Forrest McDonald, a leading constitutional scholar, wonders why anyone would want to tinker with it, either now or any time soon.

"I think it would be a catastrophe," he said the other day, as he prepared to deliver the annual Jefferson Lecture sponsored by the National Endowment for the Humanities.

Thirty-two states, just two [illegible] of those needed, have [illegible]ved calling a convention [illegible]scuss changes in the constitution. The immediate issue is a proposed constitutional amendment requiring that the federal budget be balanced, but the convention could call for any other changes it wishes, hence McDonald's concern over its becoming a runaway.

"Certainly it would be a runaway," he said. "There would be no way it wouldn't be a runaway."

But even if the convention approves changes in the Constitution, McDonald is confident that the states would fail to ratify them by a three-fourths majority, as required. What exists is better than anything anyone can come up with now, he said.

In his speech Wednesday, before 1,100 people in the old Pension Building, McDonald said that the Constitution was approved in 1787 by men who were the products of "America's golden age, the likes of which we will not see again."

[illegible] for the suggestion that people today are more sophisticated, more knowledgeable than those who wrote the Constitution, McDonald said: "That assumption is as presumptuous as it is uninformed. To put it bluntly, it would be impossible in America today to assemble a group of people with anything near the combined experience, learning and wisdom that the 55 authors of the Constitution took with them to Philadelphia in the summer of 1787."

McDonald noted that 35 of the 55 delegates had attended college. Then he quoted from the requirements for admission to King's College (now Columbia University) in the 18th century: the ability to read and translate from the original Latin into English the first three of Tully's "Select Orations" and the first three books of Virgil's "Aeneid"; to translate the first 10 chapters of the Gospel of John from Greek into Latin; to be "expert in arithmetic," and to have a "blameless moral character."

Jefferson Lecturer

"I ask you," McDonald said, "how many Americans today could even get into college, given those requirements?"

McDonald was given a $10,000 award for having been selected the Jefferson Lecturer, the highest honor for achievement in the humanities conveyed by the federal government, an instrumentality of whose authority he is wary. He will repeat the lecture this Wednesday at the University of Kansas at Lawrence.

The chairman of the endowment, Lynne V. Cheney, also presented McDonald with an engraving of a Gilbert Stuart painting of Thomas Jefferson.

The audience of historians, writers and others enjoyed the irony: They were aware of McDonald's reputation as perhaps the nation's leading advocate of the policies of Alexander Hamilton, the Federalist who favored a strong role in government by men of wealth, and here the professor was being given a portrait of Hamilton's great rival, Jefferson, the more egalitarian Democratic-Republican.

In his speech, McDonald did not touch on the way in which the Constitution treated slaves, an issue that is being debated today even as it was 200 years ago.

'To put it bluntly, it would be impossible in America today to assemble a group of people with anything near the combined experience, learning and wisdom that the 55 authors of the Constitution took with them to Philadelphia in the summer of 1787.'

Forrest McDonald, constitutional scholar

Dr. Charles E. Rice is Professor of Law at Notre Dame University.

THE LAW

Courting Constitutional Crisis

Balance-the-budget convention could result in constitutional upset

Members of The John Birch Society, Eagle Forum, and others are organizing to prevent the calling of a constitutional convention to propose a balanced budget amendment to the Constitution. They fear that a constitutional convention would propose revisions in basic features of the Constitution.

There are two ways to amend the Constitution. One way, the only one used thus far, is for two-thirds of both houses of Congress to approve an amendment that would become part of the Constitution when approved by three-fourths (38) of the states. The other way is for the legislatures of two-thirds (34) of the states to compel Congress to call a convention to propose amendments that would become part of the Constitution when ratified by 38 states. Petitions for [redacted]tion will suffice if they seek a [redacted]on to propose an[redacted]dments on the same subject, as 32 states have done with regard to the balanced budget. If two more followed suit, Congress would be obliged to call the convention and would probably do so, although there is no legal mechanism to force Congress to act.

It is doubtful that Congress has the power to limit the convention to the proposal of amendments only on a single subject. The only convention in our history, the original one of 1787, was called for the limited purpose of amending the Articles of Confederation. It proposed a new constitution. The framers of the Constitution chose not to guard against a similar "runaway" convention in the future. Rather, Article V provides only that a convention is "for proposing Amendments." A mandate by state legislatures or Congress, or both, limiting a convention to the subject proposed to it, would have a strong moral effect, but its legal efficacy is doubtful. Suppose a convention disobeyed Congress and pro[redacted]n amendment on a new subject, [redacted]t amendment were ratified by 38 states. Could anyone doubt that it would be accepted as part of the Constitution?

If the convention were to overstep its mandate and draft radical proposals, the state-ratification requirement would provide a strong safeguard against their adoption. Nevertheless, that safeguard would be weakened if the U.S. Congress chose special state conventions as the mode of ratification instead of state legislatures as it traditionally has done. Not only does Congress have the authority to choose the convention mode, but there is an historical precedent for doing so: The Constitution drafted by the original convention of 1787 was ratified by state conventions, not by the legislatures, as was the 21st Amendment in 1933.

The prospect that the convention might expand its agenda is cause for concern, especially if the convention were to propose amendments strongly supported by the media. While the Equal Rights Amendment shows that it can be difficult to achieve ratification by 38 states, other important amendments have been ratified despite controversy and strong opposition.

Constitutional conventions have been unsuccessfully sought in recent years on several topics, including abortion and the apportionment of state legislatures. Abortion, because of its life-and-death urgency, presented the most compelling case for a convention. In the aftermath of *Roe v. Wade*, the 1973 abortion ruling, it was a sound tactic to urge a constitutional convention to propose a Human Life Amendment. The drive for a convention, as with the balanced budget proposal, put pressure on Congress to propose an amendment itself, thereby heading off the constitutional crisis that such a convention would cause. And the abortion issue was important enough to accept the risk of a "runaway" convention. The drive for a convention focused attention on the need to reverse *Roe* on its basic holding, that the unborn child is a non-person who has no constitutional rights.

In recent years, however, major elements of the right-to-life movement have abandoned the insistence on the restoration of personhood. There is not one vote on the Supreme Court for the restoration of personhood, and it is likely that the Court in the near future will adopt some variant of the states' rights approach. And public opinion polls consistently show a strong majority in favor of some legalized abortion. It is predictable, therefore, that if a convention were called now to deal with abortion, it would propose, at best, a states' rights amendment, which would be like fighting World War II for the proposition that each locality in Germany should have the option of having its own death camp. A convention on abortion today would be counterproductive.

Moreover, a convention called on the budget issue could deal with abortion only by disregarding its limitation to the budget; if so, it could hardly be expected to limit its activity only to the budget and abortion. And thus we would have the potential for a "runaway" convention.

Therefore, it does not make sense today to push the balanced budget convention as a device to get an abortion amendment. Rather, the issue of whether or not to adopt an amendment to balance the federal budget should be considered on its own merits, through the traditional amendment process that we have used for the last 200 years.

Today, we have a liberal Congress, a public uninformed enoug.. to elect it, and a Bicentennial mood in the media and the academy that is receptive to "updating" the Constitution. Can anyone seriously contend that we have a pool of potential delegates who approach the competency level of the delegates to the founding convention in 1787? A convention would probably be elected with one delegate from each Congressional district and two at large from each state. It, therefore, could be similar in philosophy as well as competence to the Congress itself. Instead of chancing the dangers of a constitutional convention, the ultimate answer to run-away federal spending is to turn the spenders out of office. ■

— CHARLES E. RICE

ROBERT H. BORK

SUITE 700
1150 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036

January 16, 1990

BY FAX

Representative Reese Hunter
House of Representatives
318 State Capitol
Salt Lake City, Utah 84114

Dear Representative Hunter:

This is in response to your letter of January 11, 1990, and your telephone call to me concerning constitutional conventions. Specifically, you asked for my opinion on the question: "Can a constitutional convention be limited by Congress or the states to a single issue?"

As I mentioned to you on the telephone, this is a question about which serious constitutional scholars have disagreed. It is my view, however, that a federal constitutional convention could not be limited to a single issue. Article V provides that "on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments, which . . . shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified . . . ." The text thus seems quite clear: Congress' only option upon application of the states is to call a convention "for proposing Amendments" in the plural. The power of a simple majority of Congress to call a convention to propose a single amendment on a specified topic has not been granted.

In any event, even if Congress could specify that a convention was called as to a single issue, that limitation would seem unenforceable. I doubt that the Supreme Court would declare a ratified amendment void on the ground that the convention had gone beyond Congress' instructions. The original Philadelphia convention went well beyond the purposes for which it was called and nobody has suggested the Constitution is a nullity for that reason.

Accordingly, I do not see how a convention could be limited to one topic once it had been called. If Congress wishes to put a single amendment on a specified topic before the states, it must do so by a two-thirds vote of both Houses.

I hope this response is helpful to you.

Sincerely,

Robert H. Bork

Robert H. Bork

RHB/jac

PAGE 2

THE UNIVERSITY OF UTAH

January 19, 1990

FAX No. 538-1692

The Honorable Reese Hunter
Utah House of Representatives
State Capitol Building
Salt Lake City, UT 84114

Dear Representative Hunter:

Unfortunately I will be unable to testify personally with regard to your bill proposing to rescind the 1979 Utah call for a Federal Constitutional Convention. I fully support your bill, primarily because once a Convention is called, its powers are unlimited. This is because a Constitutional Convention is considered to be sovereign. Indeed, the original federal Constitutional Convention greatly exceeded the limitations contained in its call. Hence, ever since, courts, scholars, and delegates to Constitutional Conventions have all expressed approval of the idea that a Constitutional Convention is sovereign and cannot be restricted by limitations in the call for the Convention or by any limitations that Congress might seek to impose.

A further problem with the State call for a Constitutional Convention is that several of them are limited to different topics. Consequently, even if a Convention could be limited, it is highly doubtful that there is a sufficient number of states all pleading the same limitations. I recall several debates when I was working with the Senate Judiciary Committee of how one should count the number of states which have called for a Convention. Should the call of one state be included if it was seeking a Convention for a purpose different from another. Others claimed that once the legislative session of the state had expired, its particular call for a Convention had expired. Needless to say, the complexities generated by these existing calls for a federal Constitutional Convention can well generate a potential nightmare.

For all of the above reasons, I think the Utah Legislature would be wise and responsible if it adopted a bill repealing Utah's call for a federal Constitutional Convention. There are

simply too many risks and potential controversy entailed by following this procedure. Even those seeking a federal constitutional convention to remedy a particular problem should be well aware that they may not be able to control the agenda of the Convention. Indeed, a Convention would be free to not only reject the proposal that the state wished to see them adopt but it would also be free to propose any number of other changes in the Constitution that the proponents of a Convention might not like to see adopted. If one wishes to amend the federal Constitution on a specific topic, they should follow the amending process and not run the grave risks posed by seeking a Constitutional Convention.

Very truly yours,

John J. Flynn
Hugh B. Brown Professor of Law

JJF:bm

Walter E. Dellinger is Professor of Law at Duke University

The Recurring Question of the "Limited" Constitutional Convention

Walter E. Dellinger†

Article V of the United States Constitution requires Congress to call "a Convention for proposing Amendments" upon application of two-thirds of the states.[1] Amendments proposed by such a convention, if subsequently ratified by three-fourths of the states, become part of the Constitution. Thus far in the history of the republic, no such convention has been called. In the last few years, however, thirty states[2] have submitted applications to Congress calling for a convention restricted to consideration of an amendment requiring a balanced federal budget. Only four more applications are necessary to reach the total of two-thirds specified by Article V; Congress is said to have been brought "to the brink of calling a constitutional convention."[3]

For a century following the Constitutional Convention in 1787, the only applications submitted by state legislatures under Article V contemplated conventions that would be free to determine their own agendas.[4] Only in this century have legislatures begun to submit applications reflecting a different view. These applications are premised upon three assumptions: (1) Congress may limit in advance the subject matter authority of any convention called for proposing amendments; (2) it is valid for states to specify in their applications that the convention be formally limited; and (3) Congress, in response to these requests for a "limited subject matter" convention, must call a limited convention, define the scope of the matters that may be considered in accordance with the state applications, and require that the convention stay within those limits.[5]

This article, however, argues that any new constitutional convention must have authority to study, debate, and submit to the states for ratification whatever amendments it considers appropriate. Although such a convention might well decide to focus upon one issue, it cannot be required to do so by Congress or the state legislatures. This article also concludes that any state convention applications that are premised on the erroneous view that a convention can be limited in advance must be treated by Congress as invalid.

I. Evolution of Article V at the Philadelphia Convention

An examination of the debates over Article V at the Philadelphia Convention establishes that the framers were concerned about the role constitutional amendments might play in the allocation of power between the state legislatures and the federal government. An analysis of the evolution of Article V illuminates the framers' intentions with respect to the role constitutional conventions should play, and supports the conclusion that the subject matter of such conventions cannot be limited.

The delegates in Philadelphia generally agreed that provision should

† Professor of Law, Duke University.

1. Article V reads as follows:

> 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 State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

2. As of May 31, 1979, twenty-nine of these state resolutions had been printed in the *Congressional Record*: 125 CONG. REC. S6085 (daily ed. May 16, 1979) (New Hampshire); *id.* at S5017 (daily ed. May 1, 1979) (Indiana); *id.* at S2363 (daily ed. Mar. 8, 1979) (Arizona and Utah); *id.* at S1951 (daily ed. Mar. 1, 1979) (South Dakota); *id.* at S1952 (Idaho); *id.* at S1306 (daily ed. Feb. 9, 1979) (Alabama, Arizona, and Colorado); *id.* at S1307 (Delaware, Florida, Georgia, Kansas, and Louisiana); *id.* at S1308 (Maryland and Mississippi); *id.* at S1309 (Nebraska and Nevada); *id.* at S1310 (New Mexico, North Dakota, Oklahoma, and Oregon); *id.* at S1311 (Pennsylvania and South Carolina); *id.* at S1312 (Tennessee, Texas, and Virginia); *id.* at S1313 (Wyoming); *id.* at S1123 (daily ed. Feb. 6, 1979) (North Carolina). As of May 31, 1979, the resolution by Iowa, S. J. Res. 1 (1979), had not been printed in the *Congressional Record*. For a discussion of the validity of these applications, see p. 1636 *infra*.

3. National Law Journal, Mar. 5, 1979, at 1, col. 2.

4. *See* Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 202-03 (1972).

5. The most insightful piece supporting the state legislatures' position is a recent article by Professor William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295. For earlier arguments supporting the position that mandatory limits can be imposed on a convention, see Rhodes, *A Limited Federal Constitutional Convention*, 26 U. FLA. L. REV. 1 (1973); Bonfield, *The Dirksen Amendment and The Article V Convention Process*, 66 MICH. L. REV. 949 (1968); Note, *Proposed Legislation on the Convention Method of Amending the United States Constitution*, 85 HARV. L. REV. 1612, 1629 (1972). Other arguments defending the validity of limited applications are included in Memorandum from J. Anthony Kline, Legal Affairs Secretary, to Edmund G. Brown, Jr., Governor of California (Jan. 31, 1979) (on file with *Yale Law Journal*) [hereinafter cited as California Memorandum]; SPECIAL CONSTITUTIONAL CONVENTION STUDY COMM., AMERICAN BAR ASSOC., AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (1974) [hereinafter cited as ABA REPORT].

Professor Charles Black has been the leading advocate of the view that Article V conventions cannot be limited in scope by either Congress or the state legislatures and that state requests for the limited convention are invalid. *See* Black, *supra* note 4, at 189.

THE UNIVERSITY OF UTAH

COLLEGE OF LAW
SALT LAKE CITY, UTAH 84112

November 29, 1983

I here offer brief comments of my own. The proponents are trying to blend the two methods of constitutional change made available by Article Five. They are saying that they do not trust a convention, so they propose to resort to such a body. That is incongruous. They may not have it both ways.

It is to be noted that in the American tradition a constitutional convention is not a constituent assembly -- a body competent both to draft and to adopt a constitution. In such an assembly is reposed sovereignty. The state antecedents of the Federal Constitution of 1787 all contemplated voter ratification. In this context it is not unreasonable to conclude that the members of the 1787 federal convention perceived such a convention to be competent to have the widest range of action in proposing amendments. Of course the very text confirms this by use of the plural "amendments." A convention might propose a single amendment but it would clearly have a wider range.

If what proponents desire is a particular change, the state legislative initiation method is adapted to the purpose. If more general review and possible changes are contemplated the convention method is plainly indicated.

Jefferson B. Fordham

STANFORD LAW SCHOOL

January 16, 1992

Representative Reese Hunter
House of Representatives, State of Utah

FAX: 801/538-1908

Dear Representative Hunter:

I am sorry that your FAX of January 13 arrived here while I was away on a brief out-of-town trip. I have just returned, and I am glad to give you my comments on Senator Hatch's column.

The fear that a constitutional convention could become a "runaway" convention and propose wholesale changes in our Constitution is by no means unfounded. Rather, this broad view of the authority of a convention reflects the consensus of most constitutional scholars who have commented on the issue. Senator Hatch, in asserting that the "most skittish constitutional scholars agree that Article V prevents any chance of a runaway crises," is simply wrong. While an ABA Committee some years ago did endorse the view that a limited convention is possible, the weight of the scholarship is clearly the other way. A convention, once called, would be in the same position as the only other convention of this kind that we have had in our history--the 1787 Constitutional Convention that proposed the Constitution that we live under today and whose Bicentennial we celebrated so recently. The Philadelphia Convention, too, was in effect a runaway convention.

I have developed lengthy arguments, legal and practical, that support the case that there is no effective way to limit the agenda of a convention, as have many other scholars. My own article appears in 14 Georgia Law Review 1 (1979). For another elaborate argument to the same effect, see Professor Walter Dellinger's article in 88 Yale Law Journal 1623 (1979). Both Professor Dellinger and I, as well as a number of other constitutional scholars, have testified in state and congressional hearings to the same effect. I am therefore sorry to see that Senator Hatch continues to insist, as the advocates of a balanced budget amendment have so long insisted, that the consensus among constitutional scholars is the other way. The facts are otherwise.

With high regard,

Yours,

[redacted] Gunther,
Nelson Cromwell Professor of Law
Crown Quadrangle
Stanford, California

Notre Dame Law School
Notre Dame, Indiana 46556

Direct Dial Number
219-239-5667

December 7, 1987

Mr. Don Fotheringham
Save the Constitution Committee
Box 4582
Boise, ID 83704

Dear Mr. Fotheringham:

You have asked my opinion the effort to rescind the Idaho legislature's approval of the proposed constitutional amendment to require a balanced federal budget. It would be within the power of the legislature, in my opinion, to rescind its approval. The courts could possibly regard the efficacy of that rescission as a political question committed by the Constitution to the discretion of Congress. Nevertheless, even if it were not judicially enforceable, such a rescission would be within the power of the Idaho legislature and it ought to be regarded by Congress as binding.

On the merits of the rescission, I support it for the reasons stated in the enclosed article from the April 22, 1987, issue of The New American.

I hope this will be helpful. If there is any further information I can provide, please let me know.

Sincerely,

Charles E. Rice
Professor of Law

Enclosure

Statement of Professor Neil H. Cogan

I agree almost entirely with the foregoing memorandum.

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; that the Convention may be controlled in subject matter only by itself and by the people, the latter through the ratification process. My understanding is further that the States and Congress may suggest amendments and the people give instructions, but that such suggestions and instructions are not binding. Thus, I believe that should the Congress receive thirty-four applications that clearly and convincingly are read as applications for a general convention (whether or not accompanied by suggested amendments), then Congress must call a Federal Convention.

While it is plainly appropriate to examine the traditional historical sources -- text, debates, papers and pamphlets, correspondence and diaries -- it is plain too that these sources must be examined, and other sources chosen, within the context of our evolving theory of government. As I understand that theory, the Federal Convention is the people by delegates assembled, convened to consider and possibly propose changes in our fundamental structures and relationships -- indeed, in our theory of government itself --, and controlled only by the people and certainly not by other bodies the tasks and views of which may disqualify them from fundamental change and which themselves may be the subjects and objects of fundamental change.

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April 16, 1987

The Honorable Clint Hackney
House of Representatives
Box 2910
Austin, Texas 78769

Dear Representative Hackney:

The Law Library has provided me with a copy of H.C.R. 69, which you introduced in the Legislature in order to have the Legislature rescind the petition by the 65th Legislature asking Congress either to adopt a balanced budget amendment or to call a constitutional convention for the purpose of proposing such an amendment. I enthusiastically support your resolution.

A balanced budget is something devoutly to be wished. I doubt very much, however, whether amending the Constitution is the way to get it. I feel quite certain that even opening the door to the possibility of a constitutional convention would be a tragedy for the country.

We celebrate this year the Bicentennial of the Constitution of the United States. For 200 years it has served us well. I start with a strong presumption against any amendment to it and with an absolutely conclusive belief that we should not have a constitutional convention. Your resolution correctly says that scholarly legal opinion is divided on the potential scope of a constitutional convention's deliberations. I think that is an accurate statement. My own belief, however, is that a constitutional convention cannot be confined to a particular subject, and that anything it adopts and that the states ratify will be valid and will take effect. We have only one precedent, the Convention in Philadelphia in 1787. It was summoned "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." From the very beginning it did not feel confined by the call and gave us a totally new Constitution that completely replaced the Articles of Confederation. I see no reason to believe that a constitutional convention 200 years later could be more narrowly circumscribed.

We will have a balanced budget when we have a President and Congress with the determination to adopt such a budget. I hope that day comes soon, but I hope even more that the day never comes when the country is exposed to the divisiveness and the possible untoward results of a constitutional convention.

I hope you are successful in persuading your colleagues in the House and Senate to adopt H.C.R. 69.

Sincerely,

Charles Alan Wright

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

June 22, 1988

Dear Phyllis:

I am glad to respond to your inquiry about a proposed Article V Constitutional Convention. I have been asked questions about this topic many times during my news conferences and at college meetings since I became Chairman of the Commission on the Bicentennial of the U.S. Constitution, and I have repeatedly replied that such a convention would be a grand waste of time.

I have also repeatedly given my opinion that there is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda. The meeting in 1787 ignored the limit placed by the Confederation Congress "for the sole and express purpose."

With George Washington as chairman, they were able to deliberate in total secrecy, with no press coverage and no leaks. A Constitutional Convention today would be a free-for-all for special interest groups, television coverage, and press speculation.

Our 1787 Constitution was referred to by several of its authors as a "miracle." Whatever gain might be hoped for from a new Constitutional Convention could not be worth the risks involved. A new Convention could plunge our Nation into constitutional confusion and confrontation at every turn, with no assurance that focus would be on the subjects needing attention. I have discouraged the idea of a Constitutional Convention, and I am glad to see states rescinding their previous resolutions requesting a Convention. In these Bicentennial years, we should be celebrating its long life, not challenging its very existence. Whatever may need repair on our Constitution can be dealt with by specific amendments.

Cordially,

WEB

Mrs. Phyllis Schlafly
68 Fairmount
Alton, IL 62002

STANFORD LAW SCHOOL

Personal Statement, Professor Gerald Gunther

My major concern is with constitutional processes. The convention method of amending the Constitution is a legitimate one under Article V: it is an appropriate method for proposing amendments when two-thirds of the state legislatures, with appropriate awareness of and deliberation about the uncertainties and risks of the convention route, choose to apply to Congress to call a convention. But the ongoing balanced budget convention campaign has not been a responsible invocation of that method. Instead, between 1976 and 1979, about half of the state legislatures adopted applications without any serious attention to the method they were using, in an atmosphere permeated with wholly unfounded assurances by those who lobbied for the convention route that a constitutional convention could easily and effectively be limited to consideration of a single issue, the budget issue. In my view, a convention cannot be effectively limited. But whether or not I am right, it is entirely clear that we have never tried the convention route, that scholars are divided about what, if any, limitations can be imposed on a convention, and that the assurances about the ease with which a single issue convention can be had are unsupportable assurances.

I find it impossible to believe that it is deliberate, conscientious constitution-making to engage in a process that began in 1976 with a mix of inattention, ignorance and narrow, single-issue focus; that might well expand to a broader focus during the campaigns for electing convention delegates; and that would not blossom fully into a potentially broad constitutional revision process until the convention delegates are elected and meet. There is no denying the fact that, if the present balanced budget convention campaign succeeds in eliciting the necessary applications from 34 state legislatures, the convention call will be triggered by inadequately considered state applications, for the vast preponderance of the legislative applications rest on an entire absence of consideration of the risks of a convention route. In my view, that constitutes a palpable misuse of the Article V convention process. The convention route, as I have said, is legitimate when deliberately and knowingly invoked. The ongoing campaign, by contrast, has produced a situation where inattentive, ignorant, at times cynically manipulated state legislative action threatens to trigger a congressional convention call. I cannot support so irresponsible an invocation of constitutional processes.

Gerald Gunther,
William Nelson Cromwell Professor of Law

Crown Quadrangle
Stanford California
94305

Gerald Gunther

Nov. 17, 1983