

# Michigan Law Review

---

Volume 66 | Issue 5

---

1968

## The Alternative Amendment Process: Some Observations

Paul G. Kauper

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Paul G. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903 (1968).

Available at: <https://repository.law.umich.edu/mlr/vol66/iss5/4>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## THE ALTERNATIVE AMENDMENT PROCESS: SOME OBSERVATIONS

*Paul G. Kauper\**

THE alternative method of formal amendment of the Constitution raises unresolved questions of interpretation. As a contribution to the formulation of procedures for the implementation of this method Senator Ervin has introduced a bill dealing with the matter in considerable detail.<sup>1</sup> In dealing with the subject I propose to discuss not only the convention procedure provided in article V, and in this connection point up some considerations respecting Senator Ervin's bill, but also some basic questions relating to the formal amendment process and the role assumed by the Supreme Court in the process of constitutional change.

Senator Ervin is to be commended for submitting a proposal designed to clarify and regularize the procedures for constitutional amendment via the convention method upon application of the legislatures of two-thirds of the states. His proposal points up the problems and questions which must be faced in any recourse to this method and opens up for debate and discussion some very basic questions on which controversy may be expected.

While it is not my purpose to examine Senator Ervin's bill in detail, attention will be called to some basic assumptions underlying it and to those features of the procedures embodied in the bill which raise fundamental questions respecting the formal processes of constitutional amendment in a federal system.

Senator Ervin's bill proceeds on certain assumptions: that the alternative method of proposing amendments to the Constitution by means of a constitutional convention is to be taken seriously, that Congress is under a duty to call a convention when the prerequisites are satisfied, that Congress has a broad supervisory and regulatory power in prescribing the procedures to govern this method of constitutional amendment, and that it may exclude the courts from examining the validity of practices followed and determinations made in accordance with the terms of the bill.

There can be no quarrel with the assumption that Congress and,

---

\* Henry M. Butzel Professor of Law, University of Michigan. A.B. 1929, Earlham College; J.D. 1932, University of Michigan.—Ed.

1. S. 2307, 90th Cong., 1st Sess. (1967). The bill was amended by Senator Ervin after its introduction. For the text of the bill as amended, see appx. I to Senator Ervin's article in this symposium, 66 MICH. L. REV. 875, 896 (1968).

indeed, the nation should take seriously the method of constitutional amendment to which this proposal is directed. Article V prescribes two methods for amendment. Only the first method, whereby Congress proposes amendments and the states ratify, has been employed to date. Here the initiative lies with Congress, and two-thirds of both houses of Congress must concur before a proposal is submitted to the states. The alternative method, here under discussion, gives the initiative to the states in making proposals at a constitutional convention and subjects the process to congressional supervision. This method gives to the states the greater voice in the amending process. The convention called by Congress in response to the applications of two-thirds of the states assumes the same role in initiating amendments as does Congress by two-thirds vote of both its houses under the method followed to date.

It was no accident that the drafters included this alternative method. While the records of the 1787 Convention are fragmentary in showing the history of article V,<sup>2</sup> it is interesting to note that the

---

2. Examination of Farrand's *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (M. Farrand ed. 1937) [hereinafter cited as Farrand], yields the following picture relative to the proposals respecting constitutional amendment procedures:

Apparently the problem first came under consideration when the Committee on the Whole took up proposition 13, "that provision ought to be made for [hereafter] amending the system now to be established, without requiring the assent of the Natl. Legislature." I Farrand at 121. On the later consideration of resolution 13, several members did not see any need at all for the resolution nor the propriety of making the consent of the National Legislature unnecessary. Mason urged the necessity of such a provision, arguing that amendments would be necessary and that it "would be improper to require the consent of the Natl. Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment." I *id.* at 203. Randolph supported these arguments. Resolution 13 passed but consideration of the words "without requiring the consent of the Natl. Legislature" was postponed. I *id.* at 202-03. The proposal that Congress call a convention to revise or alter the Articles of Union, on application of two-thirds of the state legislatures, first appears in proceedings of the Committee of Detail. II *id.* at 148-49. This was formalized in Document IX of the Committee of Detail. II *id.* at 174. The text of the proposed constitution as reported by the Committee of Detail, Aug. 6, 1787, included the following article XIX: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United Sates shall call a Convention for that purpose." II *id.* at 188. The Convention agreed to this article, although Morris had suggested that the Congress should be left at liberty to call a convention whenever it pleased. II *id.* at 468.

The questions relating to the amendment procedure appear to have received the most extended discussion at the Convention on September 10, 1787. Article XIX was amended to authorize Congress to propose amendments to the several states. Gerry moved to reconsider the proposal that Congress be required to call a convention to propose amendments on application of two-thirds of the legislatures. He expressed the fear that thereby a majority could bind the Union to innovation that might subvert the state constitutions altogether. Hamilton supported his proposal but for the reason that the state legislatures would not apply for alterations other than with a view to increasing their own power. Hamilton said that the National Legislature

early discussions and proposals centered on the question of excluding Congress from a significant role in the amendment process. As discussion of the problem continued, the desirability if not the necessity of giving the central government an important role in the amendment process became apparent. What finally emerged from the convention was what may be described as the compromise set forth in article V, whereby a power of initiative was to reside in both Congress and the states pursuant to the two alternative methods, with the final authority of ratification under both methods in the states. It is evident from the discussion at the time that the alternative method recognizing state initiative was considered an important safety valve to guard against abuses of federal power which would not be corrected if the power to initiate amendments was vested solely in Congress.<sup>3</sup> Such an alternative makes sense in a system which in all other respects represents a deep commitment to the principle of federalism.

Not much need be said about the duty of Congress to call a convention to propose amendments after two-thirds of the states have petitioned Congress to do so. The constitutional language is plain. The language "[t]he Congress . . . shall call a convention" is imperative.<sup>4</sup> Whether any legal procedure would be available to

---

would be the most sensitive to the necessity of amendments and ought to be so empowered when two-thirds of each House agreed to call a convention. Madison agreed that article XIX should be reconsidered because of the vagueness of the term "call a Convention for the purpose." After further amendment proposals were made, the Convention adopted Madison's proposal, seconded by Hamilton, that the national legislature "whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution . . ." II *id.* at 559. This proposal was then incorporated in article V of the text of the proposed Constitution as referred to the Committee of Style. II *id.* at 602.

In the debates that followed, Mason stated his objection to article V on the ground that both modes of amendment in the end depended on Congress, so that "no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case." II *id.* at 629. The proposal was then made to amend article V so as to require a convention on application of two-thirds of the states. Madison said that he "did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the States as to call a convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, etc.," matters which he thought ought to be possibly avoided in constitutional regulation. The amendment was adopted. II *id.* at 629-30. As so amended and subject to the further amendment that no state without its consent should be deprived of its equal suffrage in the Senate, article V was carried over into the final text of the Constitution. II *id.* at 662-63.

3. See note 2 *supra* for the statements of Colonel Mason who apparently was the chief spokesman at the 1787 Convention in support of the view that the states should have a voice in the amendment process free from congressional control.

4. The earlier proposal in the Convention as embodied in the text referred to the

compel it to perform its duty is another question. Even conceding the reach of the judicial power as exercised these days, I find it difficult to believe that the Supreme Court would issue an order compelling Congress to carry out a duty which can hardly be called a simple ministerial duty or would, in the alternative, take it upon itself to prescribe the procedures for a convention. I much prefer to rely on the integrity of Congress in carrying out a constitutional duty. A great merit of Senator Ervin's proposal is that it recognizes the duty. This in itself would operate as a substantial moral compulsion.

Senator Ervin's bill rests on the broad assumption that Congress has a large voice in supervising this method of constitutional amendment. It prescribes the rules to be followed in determining when there are valid applications by two-thirds of the states to initiate the machinery for calling a convention, and the procedure to be followed in the calling of a convention, including the steps to be taken by Congress in the designation of the place and time of meeting of the convention, its duration, and the compensation to be paid the delegates. It prescribes the number of delegates to be elected in each state and declares that each delegate will have one vote and that any proposal to be adopted by the convention must receive a majority of all the delegates.

This assumption that Congress has a broad power to fashion the ground rules for the calling of the convention and to prescribe basic procedures to be followed is well founded. The national legislature is obviously the most appropriate body for exercising a supervisory authority, for the duty to call a convention necessarily embraces the authority to determine whether the conditions which create the duty

---

Committee on Style was that Congress "on the application of two-thirds of the Legislatures of the several states, shall propose amendments to this Constitution . . . ." Apparently, this was thought to leave too much discretion to Congress, and the language was substituted that Congress on the application of two-thirds of the states, shall call a Convention for proposing amendments in order to make clear that Congress had a duty to act in response to the applications from the states. See II Farrand at 629-30; note 2 *supra*.

Although Hamilton had originally opposed the proposal that the states have an independent power to initiate amendments and thought that the power to initiate amendments should reside in Congress (*see* note 2 *supra*), there was no doubt in his mind that Congress was under a duty to call a convention on application of two-thirds of the states as indicated by the following excerpt from *The Federalist* No. 85, at 450 (Everyman's Library ed. 1911):

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 amount to nine], to call a convention for proposing amendments, which shall be valid, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths thereof." The words of this article are peremptory. The Congress "shall call a convention." Nothing in this particular is left to the discretion of that body.

are satisfied. Similarly, the power to issue a call for a convention implies the power to fix its time, place, and duration, and the compensation of delegates. Moreover, some questions, such as the composition of the convention, the method of selecting the delegates, and whether each state shall vote as a unit as opposed to voting by individual delegates, are fundamental questions which cannot be resolved by the delegates themselves. A broad supervisory role of Congress inheres in the situation.

This supervisory role as asserted in the Ervin bill means much more than a general housekeeping function of Congress. It involves the authority to pass upon some very basic substantive questions which assume constitutional significance. May Congress, for instance, limit the agenda of the convention by restricting amendment proposals emanating from it to certain subjects? Does Congress have the authority to determine the basis on which votes will be taken, and if it has this authority is it limited by the Constitution to the choice of a particular basis? These questions become difficult when it is recognized that it does not follow from Congress' broad supervisory authority that its determination of basic questions is free from implied constitutional limitations or that Congress is the final judge on the resolution of the constitutional issues.

Senator Ervin's bill rests on the assumption that Congress not only has the power to make the definitive rules but also the ultimate authority to make determinations within the framework of the rules it has prescribed. Its provisions reflect a general purpose to limit the judiciary in its review of the amendment process. Thus, after stating the general proposition that no convention called pursuant to its provisions may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the convention, the bill declares that questions arising under this section 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.<sup>5</sup> The same rule is made applicable to the determination of questions concerning state ratification or rejection of amendments proposed to the Constitution,<sup>6</sup> and to questions concerning the state legislative procedure and the validity of the adoption of a state resolution requesting Congress to call a convention.<sup>7</sup>

Any extended exploration of the question whether the Constitu-

---

5. S. 2037, § 10(b) (amended bill).

6. *Id.* § 15(c) (amended bill).

7. *Id.* §§ 3(b), 13(a) (amended bill).

tion gives to Congress the ultimate authority, to the exclusion of the courts, to determine constitutional issues relating to the amendment process, is beyond the scope of this Article. Certainly *Coleman v. Miller*<sup>8</sup> goes far in holding that questions going to the amendment process itself are nonjusticiable in the sense that Congress has the final authority on these matters. But whether Congress can insulate the questions as thoroughly from judicial review as is proposed in the Ervin bill is not clear, although as a practical matter it may be supposed that the courts will accord Congress a wide discretion both in interpreting the article V language and in administering the legislation designed to implement it. In any event the vital questions raised by the bill furnish a basis for discussion, both in their legal and policy aspects, regardless of whether Congress or the courts have the final voice in their resolution.

Attention will now be directed to the features of the Ervin bill which raise basic issues.

Article V is silent on how representation in the convention is to be determined. The resolution of this question opens up the central issue whether such a convention is to be a national convention of delegates elected by means of the state machinery or whether it is a convention representing the states. The Constitutional Convention of 1787 consisted of state delegations. If the same method were followed today in implementing the convention procedure, each state would be permitted to determine the number of its delegates and to prescribe the method of appointing or electing them. This method of necessity would imply a unit rule of voting and a single vote for each state, matters to be discussed later. But in the absence of compelling language in article V, Congress should be free to look upon such a convention as a convention of delegates representing not the states but the people of the United States. Proceeding on this assumption Congress could authorize a nationwide election to be conducted under state auspices whereby delegates would be elected from each state in proportion to the population and elected either statewide or on a district basis, following the same lines as those used for elections to the House of Representatives.

Senator Ervin's proposal in its original form rested on the premise that the convention is a convention of the states speaking through their representatives. It called for delegates from each state equal to the number of its Representatives in Congress, to be elected or

---

8. 307 U.S. 433 (1939).

appointed as provided by state law;<sup>9</sup> a unit rule was prescribed, and each state had one vote in the convention proceedings.<sup>10</sup> But under the amended bill, the number of delegates from a state is determined by the total of its Senators and Representatives in Congress; each delegate has a vote, and the convention's action in approving a proposal is determined by a majority of the total number of delegates to the convention.<sup>11</sup>

A serious defect in the original bill was that each state was to determine by its own law how to elect or appoint its delegates. Absent an explicit constitutional requirement to the contrary, Congress should be free to require that the delegates be elected, thereby insuring a democratic basis in the election of delegates. A natural system, it seems to me, would be the election of delegates on a district basis to correspond with the districts used in electing Representatives to the House of Representatives plus the election of two delegates at large to take care of the representation in the Senate. This is the system provided for in the amended bill.<sup>12</sup>

The more important question, however, goes to the question of voting power. Senator Ervin's original proposal that each state would vote as a unit, as determined by a majority vote of its delegates, and that each state would have one vote followed the pattern of the Constitutional Convention of 1787 which furnishes the most direct precedent. It is obviously based on a theory of representation of the states. But nothing in the language of article V compels the conclusion that a convention called under its authority must duplicate the 1787 Convention. Alternatives may be suggested. One is the pattern of the electoral college system which, while resulting in a unit vote, gives each state a total vote equal to its representation in Congress.<sup>13</sup> The other—which would mark the widest departure from the state representation theory and clearly rests on the theory of a convention of the people—would ignore the unit rule altogether, give a vote to each delegate, and permit convention action by majority vote. This is the system provided for in Senator Ervin's amended bill. I am not prepared to say that any one of these systems is either commanded or prohibited by the article V text. Here the constitutional issue may be

---

9. S. 2037, § 7(a) (original bill).

10. *Id.* § 9(a) (original bill).

11. S. 2037, §§ 9(a), 10(a) (amended bill).

12. *Id.* § 7(a) (amended bill).

13. This appears to be Senator Dirksen's idea of the voting basis as stated in an interview, *Rewrite the U.S. Constitution?*, reported in *U.S. NEWS AND WORLD REPORT*, June 5, 1967, at 63, 65.

separated from the policy issue. The language of article V in confiding to Congress the duty to call a convention leaves Congress with discretion to determine what kind of convention it should be. Its choice rests then on policy considerations. It may be contended that Senator Ervin's original proposal was most faithful to the historical antecedents and in this sense gives effect to what the Framers had in mind when they envisioned a convention to be called by Congress in response to applications by the states. But it would strike me as most unfortunate to attempt to reproduce the basic theory of the 1787 Convention. The Philadelphia Convention assumed the pattern it did because there were no other choices. Here were states getting together to form a union. But today, after 175 years of experience under the Constitution, we are a nation and not just a collection of states.<sup>14</sup> It is fair and proper to say that historical experience has confirmed John Marshall's observation in *McCulloch v. Maryland*<sup>15</sup> that our Constitution derives its authority from the people. This conclusion is reinforced by an increased commitment, again a matter of historical development, to democratic principles and procedures. The question then is whether Congress in exercising its discretion under article V will be guided by historical precedent or by contemporary understanding of the basis and nature of our political society. The amended Ervin bill by substituting a majority vote of all delegates in place of the unit rule prescribed in his original bill achieves a radical change in the basic conception of the convention and thereby removes what was probably the most vulnerable feature of his original proposal.

A further critical question is whether a convention called by Congress could be limited as to the subject matter of the amendments to be proposed by it. The Ervin bill rests on certain premises: that Congress must take account only of applications for a convention to deal with specific subject matters, that two-thirds of the states must within a four-year period join in applications respecting a given subject matter, that a convention called by Congress can then be limited to proposals dealing with these matters, and that Congress

---

14. [W]e may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Holmes, J., in *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

15. 17 U.S. (4 Wheat.) 316, 404-05 (1819).

will not be obligated to submit for ratification any proposals on unrelated matters.<sup>16</sup> Various devices are employed to secure this result.

The constitutional language is ambiguous on these questions. It says that Congress shall call a convention to propose amendments on application of two-thirds of the states. Obviously, this language admits of varying constructions. Probably the most extreme is that as soon as applications are filed with Congress from thirty-four different legislatures for a convention to propose amendments on various specific subject matters, Congress then is under a duty to call a convention which would be free to propose any amendments it saw fit to the Constitution. The narrowest construction, it seems to me, is that which is proposed in the Ervin bill, namely, that two-thirds of the states in their applications must unite within a limited period of time on a given subject matter for constitutional amendment proposals and that any convention called will be limited to that subject matter.

In dealing with these questions I believe two basic ideas should be kept in mind. First of all, with respect to the requirement that the applications be by two-thirds of the states, it is fair to suppose that the drafters intended that there be a substantial consensus among the states. This consensus should extend to two matters, one relating to the time factor and the other to the subject factor. So far as the time factor is concerned it should be a requirement that for the applications of two-thirds of the states to be taken into account, all should be submitted within a restricted period of time so as to indicate a very substantial agreement on the part of the states at a given period of time in submitting their applications.<sup>17</sup> Second, Congress should be free to require that the applications show a substantial consensus with respect to the purpose for which the convention is to be called. If twelve states apply to Congress to call a convention to propose amendments dealing with legislative reapportionment, another twelve apply for a convention to propose amendments on the questions of prayers in public schools, and ten other states apply for a convention to propose popular election of the President, it is fair and

---

16. See S. 2307, §§ 2, 5(a), 6, 8(a) 10(b), 11(b) (amended bill).

17. This same general principle has been recognized by Congress in submitting proposals for constitutional amendment to the states for ratification. Beginning with the eighteenth amendment, Congress has followed the practice (except in the case of the nineteenth amendment) of stipulating that the amendment will be inoperative unless ratified by the legislatures of three-fourths of the states within seven years from the date of its admission. The power of Congress in proposing an amendment to fix a reasonable period within which the amendment may be ratified was upheld in *Dillon v. Gloss*, 256 U.S. 368 (1921).

proper for Congress to decide that the consensus of purpose implicit in the two-thirds requirement is lacking.

But once it is determined that two-thirds of the states, within a limited period of time as specified by Congress, have joined in an application to Congress to call a convention dealing with certain specific matters, may Congress then limit the convention to proposals concerning these matters only? Certainly the language of the constitution affords a basis for the argument that once a convention is called that convention will be free to propose any amendments which it sees fit to support and that Congress cannot limit its freedom. The language used in article V that Congress shall call a convention to propose "amendments" supports the idea of a free convention. This, however, is not an inescapable conclusion. Should Congress call a convention, in effect it would be responding to applications of two-thirds of the legislatures. If the requisite majority of legislatures is directed solely to the end of calling a convention to propose amendment on a given subject matter, it is in keeping with the underlying purpose of the alternative amendment procedure for Congress to limit the convention to such proposals. The general purpose of the alternative amendment provision is to provide something of a safety valve in case the state legislatures are deeply troubled about a matter which Congress refuses to correct by invoking its own power to propose amendments. If the applications for a call to a constitutional convention evidence only one concern—illustratively, a proposal to deal with the basis of legislative apportionment—why should Congress be required to call a convention with authority to propose any kind of an amendment? As long as the states have petitioned only for a limited convention, it should be within the competence of Congress to issue a call for such a limited convention. Indeed, the usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention.

The Ervin proposal, however, goes further. It is bottomed on the proposition that the alternative method of amending the Constitution can be initiated only by applications from state legislatures for a convention to propose one or more amendments and stating the nature of the amendment or amendments to be proposed.<sup>18</sup> This, I

---

18. S. 2307, § 2 (amended bill).

think, is a basic error in the Ervin proposal. Nothing in the language of article V indicates that states can be limited by Congress in the applications they make. Indeed, it seems to me that the most natural interpretation in the language of article V is that if two-thirds of the states request Congress to call a convention to propose amendments *generally*, Congress is under a duty to do so. A basic consideration supports this conclusion. Article V defines alternative but parallel procedures for proposing amendments to the Constitution. The one procedure requires a two-thirds vote of both houses of Congress. In this sense Congress may be said to sit as a continuing constitutional convention. It is free to propose such amendments as it sees fit. But the Constitution also explicitly sanctions the convention procedure, upon application by the states, as an alternative to the process initiated by action of Congress. It should, therefore, be within the power of the states, if they so desire, to apply to Congress for a convention possessing the same freedom to propose amendments which Congress enjoys.

Admittedly the resolution of the questions here discussed is fraught with difficulties and conjecture. The task alone of trying to define for purpose of limitation the subject matter of proposals to be considered by a convention is a formidable one. Opinions may well differ on the question whether Congress may limit the subject of amendments considered and proposed by a convention once it has been called. Is Congress under a duty to submit to the states for ratification amendments or revisions proposed by a convention which turns loose and disregards limitations imposed on it by Congress? Certainly Congress would be under strong pressure in that event to submit the convention's proposals to the states for ratification. What is least likely is that the Supreme Court would intervene and declare invalid amendments originating in a people's convention, submitted by the Congress, and ratified by the states. It is equally improbable that the Court would undertake to force Congress to submit proposals which Congress determined to be beyond the scope of the convention's authority. In short, whatever may be the theoretical limitations on the power of Congress to exclude judicial review of these questions, the practical result may well be that the Court would elect to treat these as political questions and in effect give Congress the upper hand in resolution of the constitutional issues.

The possibility that a convention might be called to consider and propose amendments to the Constitution has aroused fear and consternation. Various considerations are advanced in opposition to the

alternative method of amendment: that it furnishes a means of minority control of the amendment process; of bypassing Congress and allowing parochial and state-centered interests to prevail; of upsetting Supreme Court decisions; and of opening an avenue for radical distortion of the system which has served us so well. Further, it is claimed there are no urgent needs or critical problems which justify the calling of a federal constitutional convention.

On the issue of minority control Mr. Theodore Sorenson states that "thirty-four states representing 30% of the population could call the convention, twenty-six states representing one-sixth of the population could propose new amendments, and thirty-eight states representing less than 40% of the population could ratify them."<sup>19</sup> In comment on this statement it may be observed that Mr. Sorenson starts with the states having the smallest populations in building up the number requisite for the various steps required for the alternative amendment process and assumes a congruence of interest among them. This, in itself, is a speculative assumption. It is not irrelevant to observe that through use of this same method the Senators from each of the least populous seventeen states can presently obstruct a constitutional amendment which may be desired by a preponderant majority of both houses of Congress.

The most dramatic aspect of Mr. Sorenson's statement, granting the validity of his assumption, is that twenty-six states representing one-sixth of the population could propose new amendments. Here he proceeds on the assumption, as he recognizes, that the convention called by Congress would be a convention of the states, acting through their representatives, and that each state would cast one vote on a unit rule basis. This was the rule embodied in Senator Ervin's original bill. But if Congress makes the convention a true delegate convention by giving a vote to each delegate and making the convention's actions turn on a majority vote of all the delegates, as is provided in the amended Ervin bill, the central argument advanced by Mr. Sorenson respecting minority domination loses its force.

A further criticism is that the alternative amendment process permits a by-passing of Congress and allows parochial and state-centered interests to prevail. But this alternative procedure is another one of the compromises or accommodations that permeate our federal system. Congress has the power to initiate amendments and the states have the power one further step removed. Certainly the national

---

19. *The Quiet Campaign To Rewrite the Constitution*, SAT. REV., July 15, 1967, at 17, 19.

legislature, with its national perspective and knowledgeability, should have an important voice in the amendment process. This is assured by the method which has been employed exclusively to this time. But the states too have interests in the federal system which Congress may not always recognize. The alternative amendment procedure furnishes a vehicle for consideration of those interests. The very fact that Congress is concerned primarily with national interests constitutes a reason for an amendment procedure which starts from a different perspective. The whole purpose of the alternative amendment procedure is to give the states an opportunity to voice their concerns if the national government is thought to abuse its powers. As long as we continue to have a federal system, this is a legitimate consideration.

It is also urged that a convention called by Congress upon application by the states could be so state-minded and parochial in its vision as to submit proposals injurious to national concerns. There would be a substantial risk of this if the convention were a convention of the states and each state had an equal vote. This possibility makes it all the more important that the convention be a genuine delegate convention, representing the electorate and a variety of political, economic, and social interests. Such a convention might still be more sympathetic to state interests than the Congress, with its concern for national interest; indeed, as noted above, this was the reason underlying the alternative amendment procedure. But I have difficulty believing that a convention so constituted would emerge as a distinctive states' rights convention. Indeed, its deliberations and conclusions might even surprise the state legislatures which united in the application for a convention.

The further objection is raised that in any event the time is not ripe for a constitutional convention. We face no acute constitutional problems of the kind that faced the representatives who gathered in Philadelphia in 1787. Our constitutional system has served us well to date; let us, therefore, leave well enough alone. A convention consisting of delegates with various stripes of opinion could be a Pandora's box and result in extreme proposals whether to the right or to the left. I am not much impressed by this parade of horribilities. We have had experience with a number of state constitutional conventions, and nothing in this experience, including even the recent ill-fated New York Convention, suggests that a federal constitutional convention would be infected with the radicalism of either left or right. Indeed, the success on the whole of recent conventions in

drafting improved state constitutions affords a basis for considerable optimism. Moreover, any radical proposals stemming from a federal people's convention would have to run the gauntlet of ratification by three-fourths of the states, whether by the legislature or state convention, as Congress chooses to direct.

Whether there is a need for general constitutional revision is a matter of subjective judgment. We may well agree, however, that there is no crying or critical need for a general constitutional convention and that we can continue to get along reasonably well by using the ad hoc amending process, whether initiated by Congress or the states. In any event the question whether the time is ripe for a general constitutional convention is really beside the point, unless any convention which is called is necessarily a free convention. In this connection, it should be recognized and emphasized that the applications to Congress by the state legislature have not been directed to the end of calling a convention with an unlimited power to propose amendments. On the contrary, the legislatures have been interested in the calling of a convention to propose amendments on specific subject matters, such as the basis for state legislative apportionment. This is a legitimate state concern, and whether the concern is sufficient to warrant the application for a convention to make proposals directed to this issue is for the state legislatures to decide. There is no evidence of any substantial interest in the calling of a general constitutional convention. State legislatures may well feel that the states have as much to lose as they have to gain by the calling of a convention free to propose any amendment or amendments it sees fit. If it may be assumed that Congress in making its response to applications submitted by the states can limit the convention to proposals dealing with the specific matter or matters identified in the applications, determined according to rules prescribed by Congress, the question whether the time is ripe for a general constitutional convention is likely to remain academic.

Any consideration of the alternative amendment procedure and of the Ervin bill as a concrete proposal for implementing this procedure invites some thought as to the whole process of constitutional change. The Constitution recognizes two procedures for formal amendment of the Constitution. Both of these procedures are hedged in by limitations designed to prevent easy change by a transitory majority. This is as it should be. The Constitution was designed as a relatively permanent document. The accumulated wisdom of

past generations should not be lightly discarded or modified. But it is easy to overemphasize the permanence of the written Constitution. The truth is that we have had remarkable constitutional development in our country with an accommodation of the system to vast changes in our national life. The process of constitutional change in adaptation to new needs and conditions, however, has come about only in part through the formal amendment process. This fact is obscured in the popular understanding of the Constitution by a mythology which attaches a peculiar sanctity to the text of the Constitution and presumes that this text, aided by well-defined techniques of legal interpretation, yields compelling answers in determining the relevance of the text to today's problems.

The role of the Supreme Court is a part of this mythology. According to the myth the Court does no more than apply the Constitution to the cases before it. If the Supreme Court holds that the equal protection clause of the fourteenth amendment requires apportionment of both houses of the legislature on the basis of the "one man-one vote" rule, this must be a necessary deduction from the text of the Constitution. Central to this mythology is a refusal or failure to recognize that by its decisions the Supreme Court determines what the Constitution means and that in the interpretation of the broad and indeterminate provisions of the Constitution the Court is free to disregard history and precedent and interpret on the basis of its own policy predilections and its sense of the basic values of contemporary society. Judicial interpretation is the vehicle for the assertion of judicial will.

This informal process of amendment by judicial interpretation has perhaps been more significant over the long run than the formal processes of amendment. The whole process whereby the first amendment is now for all practical purposes made to read, "Neither Congress nor the states shall pass any laws respecting an establishment of religion . . ." is only one conspicuous illustration of a basic alteration in the federal system by judicial interpretation. In recent overruling decisions the Supreme Court has recognized the creative elements in the constitutional interpretation process by holding that certain decisions fashioning new constitutional law should be applied prospectively only.<sup>20</sup> The Court has said that its interpretation of the Constitution is the supreme law of the land.<sup>21</sup> When

---

20. *See, e.g.*, *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

21. *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958).

the Court changes its interpretation, it changes the law of the land. When formal processes are used to make these changes, we speak of an amendment to the Constitution. The informal amending process is called judicial interpretation.

I am not suggesting that this kind of judicial power is bad or that decisions of the Court, viewed as policy judgments by a tribunal which employs the forms of law in dealing with important political and social problems, are bad. I am suggesting only that we recognize realistically the creative role the Court has assumed in maintaining the validity of the Constitution as a living document responsive to what the Court regards as the dominant values of our contemporary society and that we acknowledge that the Court is free to and does use the Constitution as an instrument for achieving what it regards as desirable changes in the political and social order.<sup>22</sup>

Such a realistic appraisal of the Court's role should help to keep in proper perspective the questions relating to the amendment process and particularly the questions which arise when proposals are made for amendments designed to overcome or avoid the effects of Supreme Court decisions which result in constitutional changes. It is one thing to oppose any such proposals on the merits. But the issue should not be confused with cries that we are tampering with the Constitution or summarily dismissed with the observation that the decision may be wrong or the Court may have abused its power but we should not amend the Constitution to correct the error. The issue cuts more deeply than this. The question is where lies the ultimate authority to fashion new constitutional policy? Some, distrustful of the people and quite happy with rules by the elite, may be quite content to have basic constitutional policy determined by what Professor Burgess described as "the aristocracy of the robe"<sup>23</sup> or by what the late Judge Learned Hand referred to as "a bevy of Platonic Guardians."<sup>24</sup> Our Constitution is premised on the assumption, however, that the powers of government derive from consent of the governed and that the people have the ultimate authority over the decisions that touch their important concerns. The Court's

---

22. For protests against what they regard as the Court's use of its power of judicial review as a substitute for the formal amendment process, see the dissenting opinions of Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964), and in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 686 (1966), and of Justice Black in the *Harper* case, *id.* at 677-78 and in *Griswold v. Connecticut*, 381 U.S. 479, 522-27 (1965).

23. 2 J. BURGESS, *POLITICAL SCIENCE AND CONSTITUTIONAL LAW* 365 (1891).

24. L. HAND, *THE BILL OF RIGHTS* 73 (1958).

policy formulations and value predilections are, therefore, properly subject to scrutiny before the bar of public opinion. Its use of the Constitution as an instrument of social change is subject to review and criticism by the ultimate authority in constitutional matters. The Court's decisions may strike a responsive note. If they do not, various corrective processes may be available. The amendment process is one of these. The amendment procedures are hedged in with enough restrictions to prevent a hasty and intemperate overruling of judicial decisions. Indeed, in the face of the enormous advantages enjoyed by the Supreme Court in the exercise of its powers, the power reserved to the people to express their will and judgment by means of the carefully limited amendment process, whether initiated by the representatives in Congress or in the state legislatures, seems modest enough.

#### CONCLUSION

It is highly important that Congress define procedures and rules to govern the alternative mode of constitutional amendment. Congress owes it to the states to put them on notice respecting what will be required and to formulate general legislation on the subject rather than rely on ad hoc improvisations representing a hasty response to a concrete situation. Its duty is both to fashion an appropriate body of rules to govern the matter and to respond in accordance with these rules when applications are filed with it by two-thirds of the states.

To repeat what I said at the outset, Senator Ervin is to be commended for taking the initiative in this matter by introducing his bill and thereby stimulating debate on the kind of enabling legislation needed and the basic features it should incorporate. Admittedly this is a wide open field since there are no authoritative interpretations or legislative precedents to give guidance. Any conclusions expressed either on the constitutional aspects of the Ervin bill or on its merits are matters of individual opinion buttressed at most by an understanding, whether correct or incorrect, of the general purpose intended by the alternative amendment clause of article V.

The Ervin bill incorporates a number of good provisions. Some of its very vital and fundamental features, however, are highly debatable. It is by no means clear that Congress can limit the authority of a convention to make proposals, once a convention is called.

But probably the most crucial issue is whether a convention called pursuant to article V will be regarded as a convention of the states' representatives, as provided in Senator Ervin's original bill, or a convention of the people's delegates, as recognized in his amended bill. Many other issues turn on the resolution of this central question. The opportunity for judicial resolutions of the constitutional issues will be highly limited and, indeed, the Court may elect to abstain from deciding what it regards as political questions. In effect, then, Congress by its implementing legislation and the determinations pursuant to it will be resolving both the constitutional and policy questions. This is added reason why the whole range of questions opened up by Senator Ervin's proposal deserves wide debate and discussion.