ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM

STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW

Robert J. Janosik

Editor

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Encyclopedia of the AMERICAN JUDICIAL SYSTEM

Part V
CONSTITUTIONAL LAW AND ISSUES

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AMENDMENTS TO THE CONSTITUTION

Clement E. Vose

ARTICLE V of the United States Constitution provides a formal mechanism for amendment of that document. The process is legislative; the executive is given no formal role in the process. One route to amendment begins in Congress. The Constitution allows a two-thirds majority in both the Senate and the House of Representatives to propose an amendment. Once such a proposal receives the requisite two-thirds quorum in both houses, it is sent to the state legislatures for ratification. Three-fourths of all the legislatures of the states, or of the conventions called in the states especially for the purpose of considering the proposal, must then ratify the proposed amendment within a "reasonable time," as determined by Congress, before the amendment is incorporated into the Constitution.

A second mechanism for amendment is also noted in the Constitution. The legislatures of two-thirds of the states may petition the Congress to call a convention to consider a proposed amendment. Though this mechanism has never in fact been used, calls for a convention have been heard and widely considered regarding proposed balanced-budget and abortion issues.

Despite congressional suggestions for thousands of amendments, only a handful have actually been formally proposed. The rarity of formal amendment under the American Constitution has been directly connected to the blossoming of judicial review in 1803, even though amendment was expressly provided for while judicial review was not. It has been argued that the triumph of judicial review was in keeping with the goal of the framers to make the Constitution open to change. Provision for any change was an eighteenth-century novelty, but the experience of only a decade led Americans to accept judicial action as a better mode of change than amendment.

The small number of amendments adopted in the twentieth century—only eleven—attests to national satisfaction with governance by regular legislation, administration, and judicial review. In contrast to these governing routines the amendment process is treacherous because it is so little used. Because amendments are needed only when other modes fail, they tend to deal with extreme situations and are thus either very concrete or quite abstract. So much can be accomplished in American government by regularly used means that special circumstances account for amendments.

Advocacy of constitutional change by amendment is often emblematic of frustrated causes. An amendment may be a last resort, a means of dramatizing a need, and a claim on the future for the legitimacy of certain goals and values. Controversy over an amendment is ordinarily simply one part of wider political conflict but a part that is often highly symbolic. The amendments advocated by Progressives symbolized a distrust of the judiciary and of ordinary legislation in much the same way as the initiative, referendum, recall, taxpayer suits, and other popular government programs of the day did. In the same spirit, since World War II conservatives have claimed that the president and the Supreme Court were out of touch with the people and that constitutional amendments afforded a means of redress. If an amendment then fails even to be proposed, its supporters—like true believers in a small sect—will remain undaunted and be likely to persist and become ever more zealous in carrying a conviction about the constitutional legitimacy of their position. They believe—and there are occasional historical proofs to give substance to their

view—that they will someday overcome. Meanwhile, their amendment stands in their minds as a symbolic alternative to prevailing but, as they see it, illegitimate constitutional policy.

Discussions of the amendment process have been perennially couched in terms of whether it is too easy or difficult. When the Supreme Court treated ambiguities in the amendment procedure as political questions, academic regrets were offered. Interest in amendments has often been in arid legality rather than in political realities. There has been insufficient recognition that controversy over the amendment process is a function of something else, a commitment for or against a government policy on social, economic, or political matters. If a given amending procedure is deemed more or less likely to result in a certain amendment's proposal and ratification, then the attitudes about process have an anchor in policy preferences.

Amendment controversialists usually differ over social policy, government organization, power, and procedure. Opponents of the Fifteenth, Eighteenth, and Nineteenth Amendments and child-labor regulation insisted that conventions in the states were an essential ingredient of the constitutionality of the process. They pointed to legislatures as easy marks for lobbyists and argued that state legislatures were often not representative of the people. They urged in unsuccessful litigation that the process of ratification was a justiciable question, properly resolved by the Supreme Court rather than by the political branches. But the great affection of these same interests and individuals for the "popular will," conventions, and judicial review of amendments crumbled when American politics was transformed in the 1930s. Then they attacked the Court, sought amendments themselves, and found the state legislatures more dependable allies than the people who elected Roosevelt, Truman, Eisenhower, Kennedy, and Johnson.

In the period 1910–1940, the Progressive spirit expressed itself by supporting a string of constitutional amendments that were anathema to the social-conservative, states'-rights mind. The circumstances of power distribution among major governmental institutions in the United States during this era, though complex and changing, made possible the formal proposal by Congress of several constitutional amendments. State legislatures, elected on a district basis, rightly were deemed sufficient carriers of the middle-class virtues to act as ratifying bodies for the prohibition and woman-suffrage amendments. Surprisingly, because of their origins as Progressive reform mechanisms, taxpayer suits and statewide referenda became favorite weapons of opponents of these amendments. When a federal child-labor amendment was proposed to the legislatures in 1924, popular opposition was dramatized by a statewide advisory referendum in Massachusetts. In 1933, when repeal of Prohibition could muster the requisite vote in Congress, "wets" regarded the legislatures as heavily weighted against them. Because legislatures were seen as obstacles to ratification of repeal, Congress specified the state-convention method. This was in response to the urgings of the Association Against the Prohibition Amendment and the Voluntary Committee of Lawyers, who recommended at-large election of delegates to ratify the Twenty-first Amendment. This method worked.

That men opposing national constitutional regulation of suffrage, alcoholic beverages, or child labor made the wisest strategic and tactical moves possible for them occasions no surprise. But they were shortsighted in defining democracy essentially in terms of their temporary strategic posture. They attacked state-legislative ratification in the federal judiciary. They praised state ratifying conventions and referenda until times changed and President Roosevelt's popularity at the polls dictated a strategy of legislative ratification of the Twenty-second Amendment, which limited a president to two terms. In this instance, the content of the amendment and the procedure for ratification showed the sponsors' distrust of popular, at-large elections.

Constitutional amendments are a form of legislation to be studied empirically by students of elections, pressure groups, and lawmaking institutions. A knowledge of Congress, propaganda, and the climate of state legislation are all essential.

From the portrayal of amendment politics between 1910 and the 1940s, six characteristics can be distilled. First, a constitutional amendment is legislative in character, with specific alternative procedures so that proponents will choose strategies for proposal in Congress and ratification in the states that maximize support.

Second, advocates of states' rights and state sovereignty during the period from 1865 to 1937

counted on the Supreme Court and judicial review as the best means to curb claims made for national power over social, economic, and political subjects. Their basic position and theory was antagonistic to the growth of national authority, whether by acts of Congress or by constitutional amendments.

Third, Populists and Progressives, who favored the extension of government power to regulate and correct social ills, tended in these years to have the greatest leverage in Congress and the state legislatures, relative to other governmental institutions. As these institutions represented one path to constitutional amendment, this form of legislation became a viable means for seeking reform. Many ideas for progressive amendments failed in Congress. The child-labor amendment succeeded there but failed ratification in the state legislatures. The amendments for Prohibition, the income tax, the popular election of senators, and woman suffrage must be counted as essentially Progressive amendments.

Fourth, in defense of state sovereignty, a group of conservative lawyers spelled out a legal theory that placed intrinsic limits on constitutional amendments. By their theory, for example, enlargement of a state's constituency through suffrage amendments was not permissible. The total body of writing on the permissible scope of amendments shows this theory to be a transparent attack on the participation of blacks or women in elections and on government prohibition of liquor or child labor.

Fifth, convention ratification was championed by critics of amendments proposed between 1918 and 1924 and by proponents of repeal in 1933 because of its strategic value. At-large election of convention delegates was preferred over district voting. In the 1940s, conservatives shifted from this preference to favor legislative ratification. They also objected to at-large voting in presidential elections and favored an electoral college constituted by district elections. There is sufficient continuity among men and organizations with a states'-rights outlook to indicate that the preference for convention ratifications was strategic, not principled, as time and circumstance saw the preference evaporate.

Last, the comparative merits of legislatures and conventions as state ratifying bodies depend on the electoral system, the campaign, and internal practices. Many considerations, such as the enormous experience Americans have had with legislatures, as opposed to special ratifying conventions, should enter into the assessment. The single experience with convention ratification in 1933, where pledged delegations elected at large were the rule, was much like a straight referendum. By so classifying the convention, the basic issue becomes one of comparing the referendum to the legislature as an instrument of the popular will. The literature on this subject is large and complex, but it strongly questions a conclusion that the referendum or the convention represents the millennium for democracy.

The written Constitution of the United States needs constantly to be revised, and its revisions, whether by amendment, statute, ruling, or order, also need clarification. The number of changes advocated is exceedingly high, compared to the number acceded to. This has been a general condition of American constitutional law throughout its history. While the ten amendments embodying the Bill of Rights were adopted early in the 1790s, only five amendments were added in the nineteenth century and eleven more in the twentieth century (as of 1986). Since the 1950s the best-known measures, mostly nonamendments, have been provoked by the decisions of the Supreme Court and by presidential action. This is because of American reverence for the Constitution and the amendment procedure itself.

Reverence for the American Constitution is akin to the reliance of religious fundamentalism on biblical texts, for it assumes that a written instrument has easily discernible meanings. It rests also on the inescapable fact that certain textual language is so specific that close to 100 percent of the public is in agreement. For those parts especially concerning dates, very specific changes and rules of eligibility may be advocated. Otherwise, amendments are urged on occasions when the Court or the president has been thought to have misinterpreted the original, true meaning of the text. A clarifying amendment may be needed.

An attachment to formal amendments as having a pedigree, a virtue, and a legitimacy superior to the decisions of judges or presidents is normal. When a group gains satisfaction from the judges and president in power, it ordinarily sheds its preoccupation with formal amendment. The heirs of the Progressives were not much interested in amendments after about 1941, by

which time the Supreme Court had upheld the constitutionality of federal power to regulate child labor and other New Deal measures.

After one studies amendment politics for the period 1910 to 1970, it comes as a surprise to conclude that a historical treatment of constitutional amendments—advocated, proposed, or ratified—explains less about amendments themselves than about governmental structure and procedure. The subject matter, the motivations, and the alliance of interests vary over the years, but the procedures, the arguments, the strategies, and the tactics have a certain consistency attached to the constitutional order itself. A large time frame is critical to understanding this conclusion because it shows how the same substantive sides reverse their procedural positions. Observations limited to one era will confuse this picture by making particular criticisms of institutions appear timeless when they are not.

Advocacy of an amendment to the Constitution usually stems from one or a combination of these five considerations: (1) As a higher law, the existing constitutional text cannot be changed by ordinary legislation, and so, both in a symbolic sense and in a technical sense, an amendment appears to be required. (2) As a federal constitutional system in which some state practices cannot be reached by ordinary acts of the national government, an amendment may be required to apply practices of some states to recalcitrant states. (3) The reverse may come into play when frustrated provincial interests seek amendments to regulate or limit national power. (4) Amendments are aimed at specific national institutions, occasionally Congress but more commonly the Supreme Court and the presidency; one purpose of such amendments is to alter the method of selection of, the authority of, or procedures followed by the president and the Supreme Court. (5) Amendments may also be limited to overcoming particular acts or rulings of a governmental body, especially those of the Supreme Court and the president.

PRESIDENTIAL TENURE AND THE BRICKER AMENDMENT

Franklin D. Roosevelt's bid in 1940 for a third term first evoked a rather comic effort to return to the "true principles of the Constitution" even though the text set no limit of presidential tenure. Opponents in Congress hastily called hearings to record their offense at Roosevelt's audacity. Those testifying had remarkable genealogical credentials but little else. Among them was a small collection of descendants of American presidents. After Roosevelt was elected to both a third term and a fourth, this opposition turned out to be something more than lampoon. The Republican-dominated Eightieth Congress in 1947 voted to propose an amendment limiting a president to two terms, and the requisite number of states completed ratification in 1951. This Twenty-second Amendment did not apply to Harry Truman, who was then president, but it was otherwise strict by providing that "no person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once."

Although Dwight D. Eisenhower, the first president to be elected after the ratification of the Twenty-second Amendment, later repudiated this measure, there appears little chance for its repeal.

Champions of presidential power as asserted by Roosevelt, Truman, and, in the domestic field, Kennedy and Johnson have been largely disenchanted with this resource. Where they once saw eternal verities, they have come to see human failings and have turned against the presidency as an institution in much the same way that conservative critics did in the 1930s and 1940s.

A second amendment effort should also be noted in this context. As a constitutional barrier to the president and the national government, no proposal generated as much political heat in the 1950s as an amendment formulated by Senator John Bricker of Ohio. The Bricker amendment became a rallying point for the modern states'-rights forces because it seemed calculated to give to the rural areas in the sparsely populated states some veto over the national government's treaty-making power, by declaring that no treaty shall affect the internal law of an individual state without the approval of the state.

The movement for the Bricker amendment was driven by a constitutional myth that formal

limitations are more important than capabilities of power. One section of the proposal provided that any treaty contrary to constitutional restrictions would be void. Critics argued that this was already the case, but defenders pointed to the incontrovertible fact that no treaty had ever been declared unconstitutional. Despite the fact that no treaty can become the law of the land without presidential endorsement and a two-thirds vote of the United States Senate, proponents of the Bricker scheme insisted that an amendment was needed to require review by the Supreme Court in case the Constitution were violated.

Although constitutional limitations would have been reinforced, the most significant goal was to cut into the power and independence of the president in foreign policy. The amendment was aimed at any president aggressive enough to favor agreements of consequence with other nations.

Bricker's departure from the Senate in 1958 ended the active campaign for this amendment. Eisenhower's style and his luck in international diplomacy helped quell the movement. But a decade later the Vietnam War ended Johnson's chance for a second elected term as president and was feeding Senate Democrats with a fear of power in the White House. This did not take the form of advocacy of a constitutional amendment. Instead, efforts were made to cut asunder the Tonkin Gulf Resolution of 1964—which was the basis of President Johnson's military buildup and engagement in Vietnam—through the War Powers Act of 1973.

AMENDMENTS AND DECISIONS OF THE SUPREME COURT

There is such wide opportunity for those unhappy with the Supreme Court to express their dissatisfaction that constitutional amendments must be understood to be only one opportunity to do so. Article III of the Constitution merely says that there shall be "one supreme Court," leaving Congress with broad powers over the number of justices, their compensation, and the Court's budget. Congress also has considerable control over the Court's jurisdiction and over the establishment of other federal courts. Since first exercising this authority by enacting the Judiciary Act of 1789, Congress has developed a complete statutory code, Title XVI of the *United States Code,* regulating numerous aspects of the business of the Supreme Court. Even in times of great constitutional crisis, as in 1937, the proposals of President Roosevelt to curb the Court took the form of a legislative bill rather than a constitutional amendment. Indeed, particular judicial decisions objected to by Congress may often be altered or countermanded by statutes.

Statutes are only one means Congress has to correct, to modulate, or to harass the Court. Another means was shown by the Senate's refusal in 1968 to act favorably on President Johnson's elevation of Abe Fortas to be chief justice of the United States, followed by its outright rejection in 1969 and 1970 of President Richard Nixon's nominations of Clement Haynesworth and G. Harrold Carswell to be associate justices of the Supreme Court. A possibly more explosive and damaging move lay in Congressman Gerald Ford's efforts to have the House of Representatives vote to impeach Associate Justice William O. Douglas. There are also the routine matters of authorizing new federal judgeships, action on nominees to fill those and other vacant seats, annual consideration of appropriations for the judiciary, and committee investigations of subjects bearing on the courts.

Constitutional amendments may nevertheless be needed to deal with limited situations. It is remarkable how many amendments have followed an unyielding Supreme Court ruling. Oftentimes the Court ruling has been only a minor obstacle faced by a cause. This seems true of the *Dred Scott* v. *Sandford* decision in 1857, which is sometimes pictured as a cause of the Civil War, which in turn was corrected by the Northern victory in the field and then the Thirteenth, Fourteenth, and Fifteenth Amendments. A decision with an incidental effect was *Minor* v. *Happersett* (1875), wherein the Court ruled that the Fourteenth and Fifteenth Amendments did not afford women the right to vote. This made certain the need of a woman-suffrage amendment, ratified as the Nineteenth Amendment in 1920.

The equal rights amendment (ERA) went to the states for ratification on 22 March 1972 when the required two-thirds vote was achieved in the Senate, having been passed by the House of Representatives in October 1971. As finally approved for action by the states the key section of

the ERA read, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Congress would have the power to legislate under the amendment but not until two years after ratification.

Senator Sam Ervin of North Carolina insisted to the end of debate that women were adequately protected against sex discrimination by the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. But women despaired of this and insisted that a primary reason why the ERA was needed was the Court's record. The issue was often cast as an amendment to overcome Supreme Court unwillingness to apply the Constitution to women's rights. By the end of 1973, twenty-two states had ratified the ERA, but this initial rush of support engendered strong opposition outside Congress. In the South particularly, state ratification movements bogged down in heated debate on the wisdom and utility of the amendment.

By 1979 the state ratification movement was languishing. In all, thirty-five states had voted to ratify, but four of those states then rescinded their approval. Since Congress had originally allowed the usual seven years for the state ratification process, it became necessary to extend that period to 30 June 1982, to allow the requisite thirty-eight states to ratify. But by the expiration of the extended period, the amendment still lacked the necessary state support, and so the ERA failed to achieve constitutional status.

The Sixteenth Amendment, which was ratified in 1913 and permitted the United States government to levy an income tax, is the only clear instance in the twentieth century of ratification of an amendment that was virtually required by a Supreme Court ruling. In one of its most famous cases, *Pollock* v. *Farmers' Loan and Trust Co.* (1895), the Court, voting 5–4, held that an income tax enacted in 1894 was beyond the power of Congress. In 1913 the income tax was adopted in the Sixteenth Amendment and upheld as valid by the Supreme Court in *Dodge* v. *Brady* (1916).

Much is made of the unratified child-labor amendment, as it should be, for its proposal in 1924 by Congress followed the Supreme Court's invalidation of two successive child-labor statutes. But when Congress finally enacted a third law regulating child labor, the Court, in *United States* v. *Darby* (1941), changed its position and overruled the *Hammer* v. *Dagenhart* decision of 1918. This quite correctly suggests that given time, the Court might have cooperated with Congress in permitting an income tax and even in watering down the prohibition amendment. These are all instances in which congressional leadership and willpower may do things eventually accepted by the Court, even if reluctantly.

The number of would-be amendments aimed at the Supreme Court is too large to attempt a review, but a few failures achieved sufficient prominence to require mention. Although each is a complicated story in itself, they may be condensed to indicate their essence as protests against judicial rulings. Those to be reviewed here are the Becker amendment to overcome decisions forbidding prayers in public school and the Dirksen amendments in response to reapportionment and religious cases. Each has so far failed but has gained considerable attention. It should be added that the failure of these amendments gives a certain negative endorsement by Congress and the states of the judicial decisions that provoked them. This is true also for the civil rights rulings of the Supreme Court so commonly attacked by southerners in Congress, for here again the majority not only acquiesced but, in voting overwhelmingly for the Civil Rights Act of 1964 and the Voting Rights Act of 1965, really supported rulings of the Warren Court on race relations.

Becker School-Prayer Amendment. The impression that American politicians prefer God as a running mate was mightily reinforced during 1963–1964, when some two hundred separate House joint resolutions were proposed to provide for the constitutionality of prayers and Bible reading in the public schools. This avalanche of amendments was triggered by three Supreme Court decisions. A denominationally neutral prayer adopted by the New York State Board of Regents for a program of daily classroom prayers in public schools was ruled invalid by the Supreme Court in the case of *Engle* v. *Vitale* (1962). The Court ruled 6–1 that this was inconsistent with the First Amendment, which prohibits laws respecting an establishment of religion. The following year, the Court upset Bible reading and the unison recitation of the Lord's Prayer by students prescribed by a Pennsylvania

statute and by a rule of the school board in Baltimore.

These cases, *Abington School District* v. *Schempp* and *Murray* v. *Curlett,* were decided together in a flurry of opinions in which the Supreme Court held, 8–1, that the establishment clause of the First Amendment, as applied to the states through the Fourteenth Amendment, had been unconstitutionally breached. There was an immediate outcry against the New York decision, intensified a year later by the Pennsylvania and Maryland cases. The criticism of the Court reached such an intensity that the phlegmatic chairman of the House Judiciary Committee, Emanuel R. Celler, finally called hearings to consider the hundreds of amendments put forward by members of Congress.

Representative Frank J. Becker, a Republican from Nassau County, New York, formulated the amendments that became the focus of the hearings. A Roman Catholic and a veteran of World War I, Becker was prominent in the Knights of Columbus and the American Legion, and it was thought that his motions were representative of the wishes and perhaps even directions of leading critics of the prayer decisions, such as Cardinal Spellman of New York. Becker was the first member of the House to submit an amendment in the Eighty-eighth Congress, which opened in January 1963. This was just a sentence that read, "Prayers may be offered in the course of any program in any public school or other public place in the United States."

This was sufficient in response to *Engle,* but when the Supreme Court reinforced that ruling in its decision in the *Schempp* and *Curlett* cases, Becker submitted a more elaborate resolution. This revised Becker amendment was drafted by an ad hoc committee of congressmen to satisfy all critics of the Court's rulings with a single resolution they could all support. The wording thus became more elaborate in a resolution submitted on 10 September 1963 which included this provision: "Nothing in this Constitution shall be deemed to prohibit making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school institution, or place, or upon any coinage, currency, or obligation of the United States."

The perfected Becker amendment of September 1963 had the stated support of 58 other House members, but Chairman Celler opposed it and would not call hearings. In a familiar routine, efforts were made to bypass Celler by a petition to discharge the Judiciary Committee from considering it. But 218 signatures were needed. Had the measure come to the House floor, it probably would have won many votes. Yet Celler gauged there was solid, if not vocal, support for his position, and he held his ground. By April 1964 the discharge petition had gained 157 signatures, and Celler felt it wise to hold hearings in the hope of stopping the amendment. The hearings in April, May, and June 1964 are printed in three volumes, containing nearly 2,774 pages of testimony, exhibits, and documents. But after the hearings ended on 3 June 1964, the House Judiciary Committee took no further action and Congressman Becker's discharge petition drive also failed.

Ardor for the Becker school-prayer amendment had peaked early, and gradually it became evident through the 1964 hearings that it was insufficient. Mail to the Judiciary Committee changed from pro to anti, and Catholic interests especially retreated from support of Becker. The ideal of church-state separation was clearly strongly supported, and while the Supreme Court's application of this ideal to exclude prayers from school was widely criticized, the decisions also were persuasive. Eventually opponents to these decisions were made to look like opponents of the First Amendment. Attacking the justices for their godlessness was one thing, but amending the Constitution's First Amendment came to seem like medicine too strong for the malady.

Dirksen Apportionment Convention Amendment. Senator Everett McKinley Dirksen's death on 7 September 1969 ended an intriguing crusade over several years to overturn the Supreme Court's "one man, one vote" ruling on apportionment of state legislatures. He had sought to accomplish this amendment to be proposed by a special constitutional convention, an untried method of proposal provided by Article V of the Constitution. Dirksen was reacting to the reapportionment rulings of *Baker* v. *Carr* (1962) and *Reynolds* v. *Sims* (1964). The Court had alarmed Dirksen by taking jurisdiction of cases where malapportionment was claimed and then, in *Reynolds,* declaring that the equal protection clause requires that the seats of both houses of

a bicameral state legislature be apportioned on a population basis. As the strongest objections to these rulings were from state legislators, especially those with rural constituencies, Dirksen and others determined that their initiative could register most effectively through voting to call a special constitutional convention to deal with this outrage. A majority of legislative bodies in thirty-four states (two-thirds of the fifty states in the Union after 1959) would be needed to support the petition.

In seeking to employ the untried procedure of having the state legislators apply to Congress to call a federal convention to consider an apportionment amendment, Senator Dirksen chose the most favorable procedural path to his goal. He had already failed to persuade congressional colleagues to order a delay in court-ordered reapportionment. Dirksen quietly took an unused route, one that was most suited to capturing the political strength of hostility to the Supreme Court apportionment rulings. State chapters of the American Farm Bureau Federation worked closely with Dirksen through the entire campaign. In 1964 the general assembly of the Council of State Governments passed a resolution favoring an application to Congress for a constitutional amendment on apportionment. Almost before it was announced, sixteen state legislatures had voted for the Dirksen petition to Congress. This swift start led to an awareness of danger, which provoked supporters of reapportionment to worry about the procedures for a convention as well as the substance of any amendment that might be proposed.

The Constitution provides that upon application of two-thirds of the states, Congress "shall call a convention." Dirksen's opponents began to talk darkly about the possible nightmare of a "runaway" convention, one that might propose any number of amendments or even an entirely new constitution. As the number of state legislatures to pass a "Dirksen resolution" increased to twenty and then twenty-five, the most constructive response to the threat of an unbridled constitutional convention was the introduction by Senator Sam Ervin of a bill to provide procedures for such an eventuality.

Ervin's "federal constitutional act" would have required, particularly in the amendment or amendments to be proposed, uniformity in each application to Congress, placed a six-year life on such applications, and permitted a state to rescind its application. When two-thirds of the states had made proper application, certified by the clerk of the House and the secretary of the Senate, each house would be duty bound to agree to a concurrent resolution calling for the convening of a federal constitutional convention on the designated subject. Such a resolution would designate the place and time of meeting of the convention, set forth the nature of the amendment or amendments for consideration, specify the means of ratification, and provide that the convention be convened within one year. Any such convention would "be composed of as many delegates from each State as it is entitled to Representatives in Congress." The states themselves would govern the method for selecting delegates, and the vice-president of the United States would convene the constitutional convention. The state delegations would each have but a single vote, but in case "the delegates from any State present are evenly divided on any question before the convention, the vote of that State shall not be cast on the question." Ervin's bill also ruled out proposing an amendment "of a general nature different from that stated in the concurrent resolution calling the convention." This measure was not acted upon, even though the number of Dirksen resolutions rose to thirty.

By June 1969 thirty-three states had passed resolutions to apply to Congress for a special constitutional convention to propose the Dirksen apportionment amendment. There was fear that the Senate might be obliged to drop other business to engage in "a chaotic fight over basic Constitutional law."

Meanwhile, an increasing number of states—more than forty—were complying with *Reynolds,* and second thoughts about an amendment were spreading to the state legislatures. The North Carolina legislature rescinded its earlier resolution, and the number of states was suddenly down to thirty-two. The campaign continued in the summer of 1969, but legislatures were going out of session without acting, and then, Senator Dirksen died in September. Finally, on 4 November 1969, the Wisconsin assembly refused by a vote of 62–36 to support the Dirksen resolution, and the idea of such an amendment was virtually abandoned.