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THE CURRENT CHALLENGE TO FEDERALISM: THE CONFEDERATING PROPOSALS

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Professor Swindler treats the three recently proposed constitutional amendments as the culmination of state frustration at the evolution of ascendant federalism especially as embodied in modern Supreme Court decisions. Equating the proposals, in effect, to the fragmented system under the Articles of Confederation, he rejects them as contrary to the weight of constitutional history. The Constitution having established a new concept of federalism—an amalgam of the people of the United States—the author concludes that representative government is the essence of that federalism and that neither the states, their legislatures, nor their courts can have authority in the area of activity which the people of the United States have established as their exclusive domain.

INTRODUCTION: GENESIS OF THE NEW ANTI-FEDERALISM

Almost a decade has passed since *Brown v. Board of Educ.*¹ touched off a Babel of debate which has been as acrimonious as it has been prolonged. Aside from, even though inseparable from, the question of racial segregation in public schools has been the issue of state versus federal jurisdiction over certain subject-areas. When, upon hearing further arguments on its order in the first ruling in the *Brown* case, the Supreme Court unequivocally reaffirmed "the fundamental principle that racial discrimination in public education is unconstitutional," it added categorically that "all provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."² The Louisiana legislature was the first of many to react to this holding; it memorialized Congress with the declaration that such a question "is a matter of legisla-

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¹ 347 U.S. 483 (1954).

² 349 U.S. 294, 298 (1955).

tive policy for the several states, with which the federal courts are powerless to interfere."³ This has been the premise—or the ultimate issue, as the case might be—over which a long judicial struggle has been carried on in the ensuing nine years.⁴

The segregation cases, in their variants, have thus served to exacerbate a constitutional issue which is itself "separate but equal" in importance to the social question represented in the cases themselves. And the cases have developed at a significant point in time with respect to this issue; *Brown*, it should be remembered, came on the heels of the flurry of litigation and legislation involving the question of state versus federal control over tideland oil deposits,⁵ and eight years before *Baker v. Carr*.⁶ A traceable chronology of disputes over states and federalism, in terms of mid-century problems and politics, can in fact be extended back to 1937 when a series of decisions typified by *West Coast Hotel Co. v. Parrish*⁷ signaled an historic shift in constitutional jurisprudence where broad construction was equated with ascendant federalism.⁸

Ironically enough, *Parrish* established (by a five-to-four margin) a state power to establish minimum wages for women; its significance lay in the fact that it was to usher in a rapid succession of cases in which the paramountcy of the federal power, based upon the welfare and commerce clauses⁹ of the Constitution, was to be ever more positively declared. The states' power to enact social security legislation was upheld¹⁰—but it

³ Senator Ellender of Louisiana presented the concurrent resolution of the state legislature to Congress on June 15, 1954. 100 Cong. Rec. 8199 (1954). See generally the detailed statistical review accompanying the statement of Senator Daniel of Texas. 100 Cong. Rec. 6742-46 (1954). The memorial of the California legislature supporting the Supreme Court holding appears in 102 Cong. Rec. 5116 (1956). Legislative criticisms of the holding from Georgia, Virginia, South Carolina and Mississippi appear, respectively, in 102 Cong. Rec. 1512, 2020, 3519 and 4444 (1956).

⁴ The most comprehensive documentary record of this struggle appears in the collective volumes of the Race Relations Law Reporter, established at Vanderbilt University School of Law in 1956 under a grant from the Fund for the Republic.

⁵ See cases cited note 19 *infra*.

⁶ 369 U.S. 186 (1962).

⁷ 300 U.S. 379 (1937).

⁸ Representative of the torrent of commentary having some pertinence to the present debate are: Alfange, *Supreme Court and the National Will* (1937); Corwin, *Constitutional Revolution, Ltd.* (1941); Swisher, *Supreme Court in Transition*, 1 J. Politics 349 (1939).

⁹ For the most comprehensive annotation of the clauses in article I, section 8, see *Constitution of the United States of America: Analysis and Interpretation* 112-253 (Corwin ed. 1953) [hereinafter cited as Corwin].

¹⁰ *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937).

paled in comparison with the seven-to-two opinion affirming the greater federal power over this particular subject matter.¹¹ Meanwhile, the expansion of federal jurisdiction advanced steadily in other fields as Chief Justice Hughes undertook the remarkable administrative task of preserving a consistency and unity in jurisprudence—his tenure having inherited the remnants of *laissez-faire* and being destined to end in a blaze of federalism.¹² After 1937 the Court consistently found favorable constitutional grounds for national jurisdiction¹³ in the fields of labor relations,¹⁴ business¹⁵ and agriculture.¹⁶ And each step along the way was disputed by various groups with various arguments¹⁷ at first espoused by only a minority but continually waxing and waning in volume and effect.

Political straws in the wind following World War II pointed toward a mounting legislative antipathy respecting the continued expansion of federal jurisdiction. The new policy direction in labor law, exemplified in the Taft-Hartley Act,¹⁸ doubtless encouraged a move to dispute the paramount interest of the national government in an economic area of major concern to a small but powerful group of states—the area relating to tideland oil deposits. The judicial position was firmly in favor of federal jurisdiction over the underwater preserves extending from the low-tide mark to the three-mile limit; in three suits involving California, Louisiana and Texas,¹⁹ the Supreme Court uniformly found for the

¹¹ *Helvering v. Davis*, 301 U.S. 619 (1937); see *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

¹² See 2 Pusey, Charles Evans Hughes 683-748 (1951).

¹³ On this significant area of constitutional development, the most objective and concise discussion appears in Swisher, *American Constitutional Development*, ch. 37 (2d ed. 1954).

¹⁴ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

¹⁵ *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938).

¹⁶ *Mulford v. Smith*, 307 U.S. 38 (1939).

¹⁷ See authorities cited note 8 *supra*. In addition, the following works contain relevant commentary: Corwin, *Court Over Constitution* (1950); Jackson, *Struggle for Judicial Supremacy* (1941); Pritchett, *The Roosevelt Court* (1948).

¹⁸ Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C. §§ 141-87(a) (Supp. IV, 1963). Note the language of section 1:

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

¹⁹ *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

United States, with Mr. Justice Black observing that "the state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion it seeks."²⁰ Congress, however, heeded the pleas for "the returning of the tidelands to their rightful owners, the states,"²¹ and in 1953 renounced the federal government's rights in favor of state claims to the preserves.²²

On the whole, however, state efforts to resist the growing assertiveness of federal jurisdiction have been substantially frustrated. The reaction to the *Brown* decision took the form of a brief but vigorous effort to revive the constitutional doctrine of interposition²³—which was summarily

²⁰ *United States v. California*, supra note 19, at 35-36.

²¹ 99 Cong. Rec. A378 (1953) (remarks of Representative Bentsen).

²² Submerged Lands Act, 67 Stat. 29 (1953), as amended, 43 U.S.C. §§ 1301-15 (1958).

²³ Interposition, as originally conceived, was based upon the theory that the Constitution derived its powers from the people of the individual states instead of an amalgam of the people of the United States. The doctrine meant that by having originally granted powers to the federal government, the states assumed the "duty, to watch over and oppose every infraction of those principles, which constitute the only basis of Union." (Virginia Resolution) *Interposition vs. Judicial Power*, 1 Race Rel. L. Rep. 471 (1956). At its inception, the doctrine rested primarily on the fact that the states could attempt to amend the Constitution and thus overrule the expanding use of federal power; this was a constitutional basis since such state power was inherent in the amending process and was effectuated by the adoption of the eleventh and fourteenth amendments.

But as the federal courts became the primary arbiters of the rights between the federal government and the states, the doctrine of interposition was based more upon state opposition to Supreme Court decisions affecting what a particular state thought to be within its exclusive concern. The original vitality of this aspect of the doctrine has been emasculated because of the realistic acceptance of the binding precedent of *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809), where Chief Justice Marshall declared that "if the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *Id.* at 136.

Today the doctrine of interposition has been sophisticated to the point that the claiming states now feel that they "may suspend the binding effect of federal law until such time as there has been submitted to the states, and ratified, a constitutional amendment giving the power against which the state has interposed its sovereignty." 1 Race Rel. L. Rep. 466 (1956).

For the documentary history of the modern interposition effort in eight southern states, see 1 Race Rel. L. Rep. 252 (Virginia), 435 (Georgia), 437 (Alabama), 438 (Georgia), 440 (Mississippi), 443 (South Carolina), 445 (Virginia), 462 (Virginia) (1956); 2 Race Rel. L. Rep. 228 (Tennessee), 480 (Mississippi), 481 (Tennessee), 707 (Florida), 853 (Virginia) (1957).

disposed of by the Supreme Court.²⁴ The segregation cases, and the judicial maneuvers which developed around them, were but a small part of the broad series of issues involving state versus federal jurisdiction, to which state authorities after World War II addressed themselves with increasing concern.²⁵ The doctrine of pre-emption of federal jurisdiction over activities sought to be controlled by the states touched off long comment,²⁶ especially in cases involving jurisdiction over subversive activities,²⁷ state labor relations legislation,²⁸ public employment cases where questions of political loyalty arose,²⁹ state control over admissions to the bar³⁰ and state administration of criminal law.³¹

In recognition of this expanding federal power, the Conference of Chief Justices, a coordinate agency of the Council of State Governments, in August 1958 published the now renowned report of its Committee on Federal-State Relations as Affected by Judicial Decisions.³² The committee, in a detailed review of the cases in the subject-areas where federal and state powers seemed to conflict, made a number of observations which take on added significance in the light of subsequent actions on the part of other coordinate agencies of the Council of State Governments. Noteworthy, for example, in contrast to the proposed establishment of a

²⁴ *Bush v. Orleans Parish School Bd.*, 188 F. Supp. 916, 926 (E.D. La.), *aff'd per curiam*, 364 U.S. 500 (1960).

²⁵ Cf. memorial to Congress on the tidelands oil issue in Resolutions of the Eighth General Assembly of the States, 20 State Gov't 96-97 (1947), and the protests against federal influence over interstate compacts in Resolutions Adopted by the Fifteenth General Assembly of the States, 34 State Gov't 23 (1961).

²⁶ See Note, 25 Fordham L. Rev. 522 (1956); Note, 30 So. Cal. L. Rev. 101 (1956); Note, 4 U.C.L.A.L. Rev. 118 (1956).

²⁷ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The Court there held that exclusive federal jurisdiction was established by the Smith Act, 54 Stat. 670 (1940), as amended, 18 U.S.C. §§ 2381-90 (1958), as amended, 18 U.S.C. § 2385 (Supp. IV, 1963).

²⁸ *Textile Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Amalgamated Ass'n of Bus Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951).

²⁹ *Lerner v. Casey*, 357 U.S. 468 (1958); *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

³⁰ *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

³¹ *Eskridge v. Washington State Bd.*, 357 U.S. 214 (1958); *Griffin v. Illinois*, 351 U.S. 12 (1956). For a critical discussion of the subject matter and cases referred to in notes 27-30 *supra*, see Report of the Conference of Chief Justices, note 32 *infra*.

³² Report of the Conference of Chief Justices (1958), published by the Virginia Commission of Constitutional Government (1959). The Virginia agency was established in 1958 to "develop and promulgate information concerning the dual system of government, federal and state, established under the Constitution of the United States and those of the several states." Va. Code Ann. § 9-48.2 (Supp. 1962).

"Court of the Union" which is described below, is the committee's statement that

when we turn to . . . the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos.³³

Somewhat more cryptic, and perhaps even inconsistent, is another observation of the committee that

whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments.³⁴

In summarizing its deliberations, the committee unburdened itself in these words:

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact . . . that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. . . .

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

. . . .

. . . We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot

³³ Report of the Conference of Chief Justices, *op. cit.* supra note 32, at 4.

³⁴ *Id.* at 5. (Emphasis added.)

be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. . . .

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers *when it is called upon to decide questions involving the validity of state action*, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow process of amending the Constitution which that instrument provides.³⁵

The committee report precipitated a round of comment,³⁶ as well as demonstrated the depth of anti-federalist feeling which was generating among state political and judicial divisions. It is in this context that the 1962 ruling in *Baker* (discussed in a later section of this paper) can best be appreciated. It is against this background of restiveness and resentment that the Sixteenth Biennial General Assembly of the States was convened at Chicago in December 1962. The Assembly's action had

³⁵ Id. at 33-37. (Emphasis added.)

³⁶ Brown, *Free Will on the Frontiers of Federalism*, 58 Mich. L. Rev. 999 (1960); Lockhart, *Response to the Conference of State Chief Justices*, 107 U. Pa. L. Rev. 802 (1959); Thorington, *The Federal Constitution and the Sovereign States*, 19 Ala. L. Rev. 362 (1958).

been anticipated by the September meeting in Phoenix, Arizona, of the National Legislative Conference, another constituent agency of the Council of State Governments. The Phoenix meeting approved a resolution for strengthening the states in the federal system. It concluded that the increasing trend toward concentration of power in the national government could be stemmed by present provisions in the federal constitution. In furtherance of its resolution to strengthen the states, it directed its Committee on Federal-State Relations to prepare a report for consideration by the General Assembly of the States exploring a clear cut approach to the initiation of constitutional amendments through a constitutional convention—the dormant method of amendment in article V. The committee was also requested to explore areas in which the tenth amendment could be strengthened.³⁷

At the Chicago meeting in December, the Committee on Federal-State Relations made its requested report to the General Assembly of the States, including the following observations:

Some federal judicial decisions involving powers of the federal and state governments carry a strong bias on the federal side, and consequently are bringing about a strong shift toward the extension of federal powers and the restraint of state powers. This shift tends to accelerate as each decision forms the basis and starting point for another extension of federal domination.

A greater degree of restraint on the part of the United States Supreme Court can do much, but experience shows that it is not likely to be sufficient. The basic difficulty is that the Supreme Court's decisions concerning the balance between federal and state power are final and can be changed in practice only if the states can muster sufficient interest in Congress, backed by a three-fourths majority of the states themselves to amend the Constitution. While the Founding Fathers fully expected and wished the words of the Constitution to have this degree of finality, it is impossible to believe that they envisaged such potency for the pronouncements of nine judges appointed by the President and confirmed by the Senate

To amend the Federal Constitution to correct specific decisions of the federal courts on specific points is desirable, but it will not necessarily stop the continuing drift toward more complete federal domination. The present situation has taken a long time to develop and may take a long time to remedy. Accordingly, *some more fundamental and far-reaching change in the Federal Constitution* is necessary to preserve and protect the states.³⁸

The committee then submitted to the Assembly three resolutions, memorializing Congress to call a convention for the purpose of proposing

³⁷ Problems Facing the States, 36 State Gov't 30, 32 (1963).

³⁸ Amending the Constitution to Strengthen the States in the Federal System, 36 State Gov't 10 (1963). (Emphasis added.)

one or all of the constitutional amendments embodied in the report. The committee recommended that the resolutions "should be in whatever technical form the state employs for a single resolution of both houses of the legislature which does not require the Governor to approve or veto."³⁹ The first proposed amendment concerns the amending of the amending process itself:

Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which 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. Whenever applications from the *Legislatures* of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House of Representatives shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, *without further action by Congress*. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

Section 2. This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the *Legislatures* of three-fourths of the several states within seven years from the date of its submission.⁴⁰

The resolution also provided that in each case the application for a convention under article V is to have no force or effect if, by January 1, 1965, Congress itself has proposed an identical amendment.⁴¹

Forty-five state delegations to the General Assembly voted on the constitutional proposal quoted above, with thirty-seven in favor, four

³⁹ Id. at 11 n.*, 12 n.*, 13 n.*; cf. the following resolution in regard to legislative apportionment generally:

WHEREAS the General Assembly of the States has favorably acted upon a proposal for state initiation of an amendment to the United States Constitution which would eliminate federal judicial authority over apportionment of representation in state legislatures; and

WHEREAS it is essential that the states themselves act responsibly and effectively in redistricting and reapportioning their legislative bodies in accordance with the provisions of their own constitutions;

NOW THEREFORE BE IT RESOLVED that all States proceed as quickly as possible to reapportion their legislatures in accordance with the provisions of their state constitutions and in a manner which will insure an equitable basis for representation of the people of their states.

Action on Resolutions of the Sixteenth General Assembly of the States, 36 State Gov't 24 (1963).

⁴⁰ Amending the Constitution, *supra* note 38, at 11-12. (Emphasis added.)

⁴¹ Id. at 11-12.

opposed and four abstaining.⁴² Forty-six delegations answered the roll call on the second and third proposals.⁴³

The second proposed amendment is aimed at reversing the rule in *Baker v. Carr*, and was approved by the General Assembly by a vote of twenty-six to ten, with ten abstentions.⁴⁴ The proposed amendment reads as follows:

Section 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.

Section 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the *Legislatures* of three-fourths of the several States within seven years from the date of its submission.⁴⁵

The final proposal, approved by an Assembly vote of twenty-one to twenty with five abstentions,⁴⁶ is an elaborate provision for the establishment of a *fifty-member court* to review certain Supreme Court opinions in cases involving state-federal relations. This *extensio ad absurdum* is set out as follows:

Section 1. Upon demand of the legislatures of five states, no two of which shall share any common boundary, made within two years after the rendition of any judgment of the Supreme Court relating to the rights reserved to the states or to the people by this Constitution, such judgment shall be reviewed by a Court composed of the chief justices of the highest courts of the several states to be known as the Court of the Union. The sole issue before the Court of the Union shall be whether the power or jurisdiction sought to be exercised on the part of the United States is a power granted to it under this Constitution.

Section 2. Three-fourths of the justices of the Court of the Union shall constitute a quorum, but it shall require concurrence of a majority of the entire Court to reverse a decision of the Supreme Court. In event of incapacity of the chief justice of the highest court of any state to sit upon the Court of the Union, his place shall be filled by another justice of such state court, selected by affirmative vote of a majority of its membership.

Section 3. On the first Monday of the third calendar month following the ratification of this amendment, the chief justices of the highest courts of the several states shall convene at the national capital, at which time the Court of the Union shall be organized and shall adopt rules governing its procedure.

Section 4. Decisions of the Court of the Union upon matters within its

⁴² Id. at 12.

⁴³ Id. at 12-13.

⁴⁴ Id. at 13.

⁴⁵ Ibid. (Emphasis added.)

⁴⁶ Id. at 15.

jurisdiction shall be final and shall not thereafter be overruled by any court and may be changed only by an amendment of this Constitution.

Section 5. The Congress shall make provision for the housing of the Court of the Union and the expenses of its operation.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.⁴⁷

The three resolutions embodying the proposed amendments were quietly introduced in a large number of state legislative sessions in the early months of 1963. The record of action upon them is difficult to confirm, but a tabulation published in the summer of this year showed the following course of action:⁴⁸

amendment	one house approving	both houses approving	total states considering
article V	4	18	22
apportionment	8	15	23*†
Court of Union	4	5	9

* Nebraska's unicameral legislature, ignoring the Assembly recommendation to keep the resolution from action by the Governor, adopted the resolution but saw it vetoed by Governor Frank Morrison.

† Utah's resolution reportedly departs from the uniform language of the recommended resolution.

In February 1963, Senator J. Strom Thurmond of South Carolina introduced the article V and Court of the Union proposals as Senate Joint Resolutions 42 and 43.⁴⁹ Representative Sydney A. Herlong of Florida in March 1963 introduced the apportionment resolution as House Joint Resolution 300.⁵⁰ In May, the Board of Governors of the American Bar Association at its annual meeting in Washington, acting on a recommendation of its Committee on Jurisprudence and Law Reform, went on record as opposing the first and third proposals.⁵¹ The apportionment proposal was the subject of a special report of the committee to the House of Delegates at its August meeting in Chicago. The committee headed by Representative Louis C. Wyman (R., N.H.) endorsed the apportionment amendment by a vote of 6 to 1. But the Bar Association's Board of Governors voted 10 to 7 to urge opposition to the

⁴⁷ Id. at 14.

⁴⁸ 49 A.B.A.J. 635 (1963).

⁴⁹ 88th Cong., 1st Sess. (1963).

⁵⁰ 88th Cong., 1st Sess. (1963).

⁵¹ 49 A.B.A.J. 635 (1963).

committee report. Later, the House of Delegates voted 136 to 74 to oppose the apportionment proposal.⁵²

Thus stands the anti-federalist movement of the mid-century, at the end of twenty-five years of judicial and legislative activity extending from 1937 to 1962. The importance of the issue now presented in the three constitutional proposals is attested by the commentary which has begun to appear both in legal and general publications.⁵³ It is not so much the intrinsic merit (or lack of merit) in the propositions themselves, as the challenge which they present to the practical reality of federalism itself, which requires this exhaustive assessment. For it is clear—upon the analysis of each proposal in the present paper and the others now being published—that the effect of one or all of the proposals, if they should be adopted, would be to extinguish the very essence of federalism which distinguishes the Constitution from the Articles of Confederation.

The current anti-federalism, as the historical references in the present study will seek to show, is anachronistic in that it looks to a pre-1787 form of national union; hence, it is alien to the historic advocacy of state sovereignty within the federal system to which this nation was committed in 1787. It is fundamentally dangerous because it threatens to upset the political balance of nature. And it is ironically brought into its present focus on the centennial of the dread conflict which settled, beyond any reasonable doubt, that the federal structure was indissoluble. The propriety, or the jurisprudential soundness, of any judicial opinions which have helped to precipitate the present proposals, is not here in question. The central problem is the jeopardy in which the essence of federalism would be placed if these proposals were seriously entertained. That there is a concerted effort now to bring about their serious entertainment warrants the critical examination of each of the proposals in the light of our constitutional heritage.

I

ARTICLE V—THE AMENDING PROCESS

Article V, as it presently stands, 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

⁵² N.Y. Times, Aug. 13, 1963, p. 19, col. 1.

⁵³ Black, Proposed Constitutional Amendments: They Would Return Us to a Confederacy, 49 A.B.A.J. 637 (1963); Black, Proposed Amendments of Article V, A Threatened Disaster, 72 Yale L.J. 957 (1963); Shanahan, Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations, 49 A.B.A.J. 631 (1963).

Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The amending process, it can be seen, is termed in alternatives. There are two alternative ways by which application may be made for a proposed amendment: (1) by originating directly from the Congress or (2) by applications from state legislatures, whereafter the Congress calls for a convention for the purpose of proposing amendments. Ratification also comes about by alternative methods: either by conventions or legislatures of three-fourths of the states; Congress, however, makes the crucial determination as to which alternative is to be used.

The proposed article V would abolish the convention proviso as a method of amending the Constitution by removing both the convention as a proposing body and the power of Congress to choose the convention method of ratification if it so desires. Furthermore, Congress' right to initiate amendments could be circumvented and its power as a proposing body thus diluted whenever two-thirds of the state legislatures had identical language in their applications to Congress.

PRINCIPLES UNDERLYING THE CONVENTION PROVISIO

In the famed series of resolutions with which the Virginia plan of a stronger union was introduced to the Constitutional Convention of 1787, Edmund Randolph submitted one which proposed "*that provision ought to be made for [hereafter] amending the system now to be established, without requiring the assent of the Natl. Legislature.*"⁵⁴ His fellow Virginian, George Mason, supported this resolution. It would be improper, Mason contended, to require the consent of Congress to amendments proposed by the states "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 amendmt."⁵⁵ James Madison noted that Charles Pinckney "doubted the propriety or necessity

⁵⁴ 1 Farrand, *The Records of the Federal Convention of 1787*, at 121 (2d ed. 1934) [hereinafter cited as Farrand].

⁵⁵ *Id.* at 203.

for it";⁵⁶ but Elbridge Gerry added his support by saying that: "[T]he novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the Govt."⁵⁷ The resolution was postponed by a vote of seven states to three.⁵⁸

Randolph's proposal for amending the Constitution without the consent of Congress was postponed on several occasions as the convention proceeded to its work.⁵⁹ When, on June 12 and 13 the committee of the whole recapitulated the resolutions after a week of revision, the proviso had been stricken; it did not reappear.⁶⁰ The committee, on the other hand and in due course, inserted a clause requiring "the Approbation of Congress" for the proposing of new amendments.⁶¹ It was not until August 30 that the alternative proposal for initiating amendments by state action was advanced and adopted without debate.⁶² It was not until September 15—the day of the final debate on the new organic instrument—that Gouverneur Morris and Elbridge Gerry moved that Congress should call a constitutional convention upon application of two-thirds (*nine*, as Madison noted⁶³) of the states.⁶⁴ The Morris-Gerry motion was thus incorporated into present article V. With the twenty-one year moratorium on the question of legislation outlawing the slave trade, and the assurance to the small states that their equal vote in the Senate would be preserved,⁶⁵ article V as it now reads was approved.

From the records of the Convention of 1787 it is clear that the Founding Fathers were concerned, in article V, with two central problems: One was the desire to reform the rigid procedure for "alteration" which had been provided in the Articles of Confederation; the other was a doubt as to whether the federal system which they were constructing would actually work in practice. The need for overhauling state constitutions hastily devised during the Revolution was familiar to many of the delegates to Philadelphia; by 1787 at least half of the original states had taken, or were about to take, action to replace their first constitutions.

⁵⁶ Id. at 121.

⁵⁷ Id. at 122.

⁵⁸ Ibid.

⁵⁹ Id. at 194, 203.

⁶⁰ Id. at 223, 227, 231, 237.

⁶¹ 2 Farrand 133.

⁶² Id. at 467-68.

⁶³ Id. at 148.

⁶⁴ Id. at 629-30 (general discussion)

⁶⁵ Id. at 631.

New Hampshire had made three attempts to draft an acceptable document before its constitution was finally adopted in 1784; Massachusetts had had a comparable experience in the lengthy debates of its constitutional convention. Before the end of the eighteenth century, Delaware and Pennsylvania had each adopted two constitutions, while Georgia, South Carolina and Vermont had adopted three apiece.⁶⁶

For that matter, the fact that a second national charter was now being drafted only six years after the final ratification of the first one, made many besides Elbridge Gerry feel that "the novelty and difficulty of the experiment" would necessitate frequent revision.⁶⁷ Edmund Randolph, fearing the "indefinite and dangerous power given by the Constitution to Congress," moved "that amendments to the plan might be offered by the State Conventions, which should be submitted to and finally decided on by another General Convention."⁶⁸ Charles Pinckney, while having grave reservations, observed that "conventions are serious things, and ought not to be repeated."⁶⁹ The Randolph motion was defeated by unanimous vote.⁷⁰

Article 13 of the Articles of Confederation had provided that "alterations" in the Articles were to be approved by the Continental Congress and then unanimously confirmed by the states. Alexander Hamilton reminded the convention that it "had been wished by many and was much to have been desired that an easier mode of introducing amendments had been provided."⁷¹ But Hamilton rejected the idea that the states should have either joint or exclusive rights to propose amendments: "The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments."⁷²

The convention proviso in article V, as the internal evidence of the convention and ratification debates strongly suggests, was never considered as anything but a transitional safeguard. Randolph, in his notes

⁶⁶ Nevins, *The American States During and After the Revolution*, chs. 4 & 5 (1927); 1 Thorpe, *The Federal & State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies, 1492-1908*, at 562, 568 (1909) [hereinafter cited as Thorpe]; 2 Thorpe 777, 785, 791; 5 Thorpe 3081, 3092; 6 Thorpe 3241, 3248, 3258, 3737, 3747, 3762.

⁶⁷ 1 Farrand 121-22.

⁶⁸ 2 Farrand 631.

⁶⁹ *Id.* at 632.

⁷⁰ *Id.* at 633.

⁷¹ *Id.* at 558.

⁷² *Ibid.*

refers to "two-thirds" of the states as "nine"—*i.e.*, in terms of the thirteen members of the "perpetual union" proclaimed by the Articles, now being made "more perfect" under the new instrument.⁷³ Hamilton, writing after the fact of ratification but in refutation of New York's abortive effort to seek a new convention, observed: "The intrinsic difficulty of governing THIRTEEN STATES . . . will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents."⁷⁴ Somewhat ruefully, Hamilton conceded, "we may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority."⁷⁵ But to demand a new convention, Hamilton insisted, would be to deny to the new Constitution the practical tests of time and experience which alone would determine if it was workable.⁷⁶ The thrust of all the writing concerning the convention proviso would seem to be that once the constitutional system was demonstrably operative, the proviso itself would become inoperative since its only function was to provide a means of correcting the system if it failed to become self-sustaining.⁷⁷

At the very least, the historical evidence demonstrates the totally different intent of the current proposal to amend article V by resort to the general convention device. In the first place, the proposal of the General Assembly of the States seeks to utilize that quite possibly inoperative device to alter the article in such degree as to reduce the national government to a confederation subject to state legislative control—and in the very process to eliminate the convention device once its purposes had been served.⁷⁸ The proposed amendment would, in fact, strike both convention

⁷³ *Id.* at 148.

⁷⁴ The Federalist No. 85, at 593 (Cooke ed. 1961) (Hamilton).

⁷⁵ *Ibid.*

⁷⁶ *Id.* at 594-95.

⁷⁷ Cf. Elbridge Gerry in the House of Representatives in 1789:

The Constitution of the United States was proposed by a Convention met at Philadelphia; but . . . that Convention was not convened in consequence of any express will of the people, but an implied one, through their members in the state legislatures. The Constitution derived no authority from the first Convention; it was concurred in by conventions of the people, and that concurrence armed it with power, and invested it with dignity.

⁷⁸ Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 404 (2d ed. 1836). See generally Orfield, Amending the Federal Constitution, ch. 6 (1942).

⁷⁸ Action on Resolutions of the Sixteenth Biennial General Assembly of the States, 36 State Gov't 24 (1963).

procedures presently incorporated in the article—the first being the general convention proviso inserted at the last minute by the Morris-Gerry motion⁷⁹ and the second being the alternative method which Congress may stipulate for state ratification of proposed amendments.⁸⁰ It is pertinent here to recall the observation made by Madison at the 1787 Convention, in reference to the proposal in article VII to require ratification of the Constitution by conventions rather than by legislatures.⁸¹ Madison pointed out that

the powers given to the Genl. Govt. being taken from the State Govts. the Legislatures would be more disinclined than conventions composed in part at least of other men; and if disinclined, they could devise modes, apparently promoting, but really thwarting the ratification.⁸²

Subsequently, writing in support of adoption of the Constitution, Madison speculated:

If . . . the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may consider it to be most due⁸³

The preamble confirms what is manifest in every part of the record of the convention and the adoption—that the Constitution emanated from the people and was not the act of sovereign and independent states.⁸⁴ If the people of the United States—the amalgam of the people of the thirteen original states and of the subsequently created states—ordained and established this Constitution, the states and their legislatures cannot be

⁷⁹ 2 Farrand 629-30.

⁸⁰ *Dillon v. Gloss*, 256 U.S. 368, 374 (1921).

⁸¹ It is worth noting in passing that another resolution submitted by Edmund Randolph proposed ratification of the "amendment" of the Articles of Confederation (the presumed business of the 1787 convention) by conventions of the people of the several states. James (later Mr. Justice) Wilson commented concerning this resolution that "the people by a convention are the only power that can ratify the proposed system of the new government." 1 Farrand 126-27. The concept of "the people of the United States" was already taking shape.

⁸² 2 Farrand 476.

⁸³ *The Federalist* No. 46, at 317 (Cooke ed. 1961) (Madison).

⁸⁴ "The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324 (1816) (Story, J.); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, C. J.).

proper parties at interest in any amending proposal having the effect, as threatened by proposed article V, of abridging a right of the very people who created the Constitution.

On yet another count the present proposal concerning article V is indictable as capricious and subversive of the entire constitutional system. It is that in the majority of states the state constitution is subject to revision or at least approval of revision by the people, either by election or convention.⁸⁵ Even the conservative, Thomas M. Cooley, considering the ultimate source of constitutional power, found it in the people and not in their legislatures except as the people had so delegated it.⁸⁶ But all revisions of the Constitution, Cooley maintained, must ultimately be submitted to the people as a whole.⁸⁷ It is clear that the resolution of the case for the legitimacy and authority of a republican form of government rests ultimately upon the people who constitute that government. In the one case, these are the people of a state in the American form of federalism; and in the other, they are the people of the United States. It is begging the question to aver that the federal government is one of delegated and limited powers; assuming this to be true, the powers are delegated and limited by the people of the United States who ordained and established the Constitution. An amending proposal going to the legitimacy of the federal authority is the exclusive concern of the people upon whom such legitimacy and authority rests; for the states or their legislatures to call it in question is only to derogate their own legitimacy and authority.

THE AMENDING PROCESS IN PRACTICE: FEDERAL OR STATE RESPONSIBILITY?

Time and experience—the basic Hamiltonian requisites for testing the workability of the new Constitution—have demonstrated two basic features of article V in practice. One is that amendments have been kept to a minimum; in the course of 175 years, only twenty-nine have been submitted by Congress to the states, and of these only twenty-three have been adopted. The other is that, with three early exceptions (the ninth, tenth and eleventh, all adopted in the first decade of the Constitution),

⁸⁵ Cf. constitutions of the following states: Alaska Const. art. XIII, § 1; Ariz. Const. art. 21, § 1; Cal. Const. art. 18, § 1; Ga. Const. art. XIII, § 1; Idaho Const. art. 20, § 1; Ind. Const. art. 16, § 1; Iowa Const. art. 10, § 1; Mass. Const. art. XLVIII, § 173; N.J. Const. art. 9, § 1; N.Y. Const. art. 19, § 1; Pa. Const. art. 18, § 1; Tenn. Const. art. 11, § 3; Va. Const. art. XV, § 196.

⁸⁶ Cooley, *Constitutional Limitations* 81-90 (8th ed. Carrington 1927).

⁸⁷ *Id.* at 88.

the amendments have tended to strengthen the federal position and correspondingly to limit the states' participation in or exemption from national concerns.

Constitutional Amendatory History

Since the first amendments were proposed by the first Congress, more than three thousand proposals for amendment have been introduced in subsequent Congresses, many of them via state legislative memorials.⁸⁸ The first attempt to fix the amending process itself in a more rigid, state-dominating form, was made in 1794 by Rhode Island, last of the original states to ratify the Constitution. It proposed that no subsequent amendments be effective "without the consent of 11 of the States heretofore united under the Confederation."⁸⁹ Scores of other proposals for altering article V—all of them understandably seeking the interest of the proposing agency—have been advanced since then. Most of them have sought to relax the amending requirements—by reducing the majority needed to propose or to ratify, by providing for a popular vote in ratification, or by making possible the introduction of amendments by initiative.⁹⁰ In 1911, Senator Bristow of Kansas anticipated the sense of the 1963 proposal by introducing a plan which would have provided that

whenever the Legislature of any State wishes the Constitution altered, it shall pass a resolution embodying the proposed change or amendment and send a copy to the Secretary of State, who shall without delay transmit a copy thereof to the governor of every State with a request that it shall be brought to the State legislature either at the next regular session or at a special session, as the governor may think advisable.⁹¹

The Bristow proposal reflected the zeal of the progressive political movement, which had captured many of the states and had persuaded them that the federal government was moving too slowly into the socio-economic paths of the twentieth century.⁹² The opposite state persuasion is reflected in the 1963 proposal; but both suffer from the same error of constitutional theory—the assumption that the states or their legislatures

⁸⁸ See Ames, *Proposed Amendments to the Constitution of the United States During the First Century of Its History*, 2 *American Historical Ass'n Report* for 1896 (1897); Musmanno, *Proposed Amendments to the Constitution*, H.R. Doc. No. 551, 70th Cong., 2d Sess. (1929).

⁸⁹ Musmanno, *supra* note 88, at 190; Ames, *op. cit.* *supra* note 88, at 292.

⁹⁰ Musmanno, *supra* note 88, ch. V.

⁹¹ *Id.* at 191-92.

⁹² An excellent portrait of the Senate in the clash of reform and tradition appears in Bowers, *Beveridge and the Progressive Era* 313-66 (1932).

have a right to determine the amending process and the subject-matter of amendments to the federal constitution.⁹³

As for the subject-matter of the amendments which have in fact been submitted and adopted, they may be seen to fall into three broad categories—subject both to judicial interpretation and the changing political frames of reference across the years. Of the twenty-one operative amendments (the twenty-first having repealed the eighteenth), thirteen may be described as primarily intended to secure personal rights for the people of the United States—the source of the federal power itself. Four amendments relate to the functions of the federal government. The remaining four relate to the rights—or liabilities—of the states in the federal system.

1. Amendments I-VIII (the Bill of Rights) concern certain civil, criminal and political rights of the individual: freedom of expression, the now dead-letter definitions of civilian-military relations, freedom from unlawful search and seizure, self-jeopardy (the “fifth”), speedy jury trials and reasonable bail.⁹⁴ The thirteenth abolished slavery, the fifteenth enforced manhood suffrage and the nineteenth woman suffrage. The twenty-third extended suffrage to residents of the District of Columbia. The seventeenth—which was a substantial curtailment of state legislative influence in national legislative affairs—also extended the people’s voting rights to the election of United States Senators.

2. Four amendments amplify or clarify functions of the national government—the twelfth and twentieth, relating to presidential electoral procedures; the sixteenth, overcoming the income tax rule in *Pollock v. Farmers’ Loan & Trust Co.*,⁹⁵ and the twenty-second, limiting incumbency in the presidency to two terms.

3. The remaining four amendments are the only ones primarily affecting the states in the federal system. The ninth is hardly more than a policy statement, and pertains as much to the people of the United States as to the people of the individual states; it has aptly been termed the “forgotten” amendment⁹⁶—and indeed there has been almost a total

⁹³ Cf. Corwin’s comment: “The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words, the original, inalienable power of the people of the United States to determine their own political institutions.” Corwin, *The Constitution and What it Means Today* 177 (12th ed. 1958).

⁹⁴ See *id.* at 188-239.

⁹⁵ 157 U.S. 429, modified on rehearing, 158 U.S. 160 (1895).

⁹⁶ Patterson, *The Forgotten Ninth Amendment* (1955). See also *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94 (1947) (dictum).

dearth of judicial commentary upon it. It might be termed a constitutional maxim in derogation of the common-law rule of *expressio unius*. The tenth has had little more significance; indeed, the Supreme Court in 1931 went out of its way to declare that it "added nothing to the instrument as originally ratified."⁹⁷ But the tenth amendment has provided the point of departure, at least, for three lines of judicial argument: through Marshall's tenure, in the direction of narrow construction of reserved powers;⁹⁸ for the following century, in the opposite direction;⁹⁹ since 1937, in a new course emphasizing that certain assertions of federal powers were not incursions into the tenth amendment area.¹⁰⁰ The eleventh was a swift and vigorous (at the time) assertion of state prerogative in overturning *Chisholm v. Georgia*.¹⁰¹ But outweighing all of these in practical and jurisprudential effect has been the fourteenth. Although its language purports to extend to the people of the states the privileges guaranteed to them by the federal government under the fifth amendment, voluminous judicial interpretation has made it the instrument by which state freedom of action or freedom from liability vis-à-vis many national and interstate subject-areas has been progressively circumscribed in narrower dimensions.¹⁰²

The Strengthening of the Federal Position

The first twelve amendments were adopted within the first generation of the new Constitution. In the hundred years that followed only three more were enacted. Then came four (on the income tax, popular election of Senators, prohibition and woman suffrage) which reflected the high tide of the progressive movement. The remainder have been responses to particular needs of the political economy of the mid-twentieth century. What is more significant, historically, is the fact that since adoption of the eleventh amendment in 1795, the added constitutional provisions have applied to the states only in a restrictive sense—witness the thirteenth, fourteenth, fifteenth and seventeenth. Even more in point will be the pending twenty-fourth amendment which would abolish the poll tax in federal elections.

In 1920 the Supreme Court undertook to define the scope and purpose

⁹⁷ *United States v. Sprague*, 282 U.S. 716, 733 (1931).

⁹⁸ See Corwin 915-16.

⁹⁹ See *id.* at 916-18.

¹⁰⁰ See *id.* at 918.

¹⁰¹ 2 U.S. (2 Dall.) 419 (1793).

¹⁰² See generally Corwin 957-1177.

of article V by considering two series of cases, raised in reference to the prohibition and woman suffrage amendments. One question presented to the Court disputed the constitutional power of Congress to propose amendments on matters which were claimed to be exclusively state concerns. The question, in the *National Prohibition Cases*,¹⁰³ was settled definitively in favor of the congressional power. The second contention, in *Dillon v. Gloss*,¹⁰⁴ was that Congress had acted arbitrarily in proposing ratification by conventions rather than by action of the state legislatures. Speaking for a unanimous Court, Mr. Justice Vandevanter said:

An examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. . . . Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.¹⁰⁵

The state, in acting upon a proposed amendment to the federal constitution, has been held by the Supreme Court to be performing a federal function derived from the Constitution itself; and this "transcends any limitations sought to be imposed by the people of a state."¹⁰⁶ Nor is there such a distinction, in the tenth amendment, between powers reserved to the states and those reserved to the people, as to give the states a right of qualifying their federal function in acting upon a proposed amendment purportedly affecting their powers.¹⁰⁷ No conditions to discharging the federal function may be imposed by a state in such cases.

Constitutional federalism in the United States is a product of the national experience during the past 175 years; that the state-federal relationship has changed as it has matured is simply a fact of history. In 1787 there were two forces which functioned in relationship to the

¹⁰³ 253 U.S. 350 (1920).

¹⁰⁴ 256 U.S. 368 (1921).

¹⁰⁵ *Id.* at 373-74.

¹⁰⁶ *Lesser v. Garnett*, 258 U.S. 130, 137 (1922); cf. *United States v. Sprague*, 282 U.S. 716 (1931). Where a state legislature acts upon an amendment submitted to it by Congress, it is exercising power conferred by the federal constitution and not by any provision in its own state constitution. *State ex rel. Tate v. Sevier*, 333 Mo. 662, 667, 62 S.W.2d 895, 897 (1933).

¹⁰⁷ See *Hawke v. Smith*, 253 U.S. 221, 229 (1920).

creature of one of the forces. These were the people of the states and the states themselves, on the one hand, and the Continental Congress—the product of an interstate compact which, in Randolph's words, "cried aloud for its own reform"¹⁰⁸—on the other. In 1789, and probably in 1788 when the Constitution was ratified, the American polity was comprised of four forces—the people of the several states and the states themselves, substantially as before; and in addition, the people of the United States and the federal structure they had established. The process effectuated in 1787-1788 was irreversible, as the Civil War was to establish. The competence of the states in national questions under the Confederation was one thing; it was quite another under the Constitution.

In the light of these facts, it can reasonably be insisted that only a federal agency (Congress, as provided by the Constitution) is competent to evaluate and take action upon initiating proposals to be submitted to the states, relating to the federal constitution. The only competence in the states is that which is vested in them by the same Constitution, if the general convention proviso of article V is in truth no longer of any effect. Even if it were assumed to have continued in effect, the qualifications of a state to participate in a constitutional question would depend upon the standards enunciated by a federal judiciary—witness the criteria proposed by the opinion in *Baker v. Carr*.¹⁰⁹

The ultimate question whether the general convention proviso in article V is still viable today is obviously one to be determined by the Supreme Court. There is then the question whether an alteration of article V, by the general convention device or other means, is inconsistent with the essence of federalism evolved in the course of 175 years. The answer to this question is the responsibility of Congress itself, fixed by the oaths of its members to uphold the Constitution. It is also the clear responsibility of Congress, if the general convention method were held valid and if the propriety of such a proposal as the current one were conceded, to prescribe the convention in terms of genuinely representative delegations under the *Baker* rule. And, finally, it is within the reasonable discretion of Congress, in the event of such a convention, to stipulate unanimous approval of the results, in accordance with the action of ratification of the original Articles of Confederation and with the final vote of the qualified state delegations to the Convention of 1787.

¹⁰⁸ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 423 (1793).

¹⁰⁹ 369 U.S. 186 (1962).

II

FEDERALISM AS REPRESENTATIVE GOVERNMENT

"Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question," Mr. Justice Brennan observed in *Baker v. Carr*.¹¹⁰ It is not necessary here to subject this renowned case to an exhaustive critique—this has already been done;¹¹¹ but its basic propositions lead directly to the question of the degree to which representative government is part of the essence of federalism which, in the concept of the preceding section of this paper, is an exclusive concern of the people of the United States and their national government. It is on this ground that the second of the proposed amendments of the General Assembly of the States must be condemned—and this condemnation must rest upon the *corpus* of constitutional history as much as upon the variable premises in *Baker*.

The language of the proposed amendment has a plausible ring—it seeks to vest in the state legislatures the control of apportionment of membership in these legislatures.¹¹² And the language of the majority opinion in *Baker* tends to encourage the advocates of this proposition, by emphasizing that the justiciability of malapportionment issues turns upon the combination of irrationality of the local law and unavailability of local remedy.¹¹³ But the flaw in the one instance is not unlike the inherent difficulty in proposed article V, namely, that the control sought by the proposed apportionment amendment would be vested in the *legislatures* and hence beyond the reach of the people. And the flaw in the second instance is that the majority opinion in *Baker* has accepted, all too uncritically, the strained and special rule laid down by Chief Justice Taney, and followed equally uncritically by later courts, as to what constitutes "political" questions beyond the judicial purview.¹¹⁴

THE GUARANTEE CLAUSE: ESSENCE AND ORIGIN

The Court, this writer submits, must ultimately—in consequence of the welter of rulings which have developed as a result of *Baker*¹¹⁵—

¹¹⁰ *Id.* at 209.

¹¹¹ Among the more successful efforts to place this holding in its proper context are: *The Problem of Malapportionment: A Symposium on Baker v. Carr*, 72 *Yale L.J.* 7 (1962); and the two issues devoted to the electoral process in 27 *Law & Contemp. Prob.* 157-327 (1962).

¹¹² See *Amending the Constitution to Strengthen the States in the Federal System*, 36 *State Gov't* 13 (1963).

¹¹³ 369 U.S. 186, 198-204 (1962).

¹¹⁴ *Cf. id.* at 242 n.2 (Douglas, J., concurring).

¹¹⁵ E.g., *Sincock v. Duffy*, 215 F. Supp. 169 (D. Del. 1963); *Valenti v. Dempsey*, 211 F. Supp. 911 (D. Conn. 1962); *Thigpen v. Meyers*, 211 F. Supp. 826 (W.D. Wash. 1962).

reconsider the essence of the guarantee clause which it so quickly dismissed in that case. That clause was first introduced at the Convention of 1787 by Edmund Randolph in the same series of resolutions on the Virginia plan, to which reference has already been made.¹¹⁶ The resolution "that a Republican government & the territory of each State . . . ought to be guaranteed by the United States to each State" was accepted by the convention virtually as axiomatic; the only concern expressed by the delegates was that it might tend to perpetuate existing state constitutional processes which had outlived their value or called for reform.¹¹⁷ James Wilson proposed a revision of the resolution which appears substantially as the present clause, and this virtually closed debate on the matter.¹¹⁸ The clause, now section 4 of article IV of the Constitution, thus provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

The wording of the clause is significant in several respects. First, as to the general intent of the provision, the convention's committee on detail advised that it was "(1) to prevent establishment of any government, not republican (2) [3] to protect each state against internal commotion and (3) [2] against external invasion."¹¹⁹ The Founding Fathers were, from the record of the convention debates, particularly concerned with the latter two subjects;¹²⁰ but enough had been said about the first subject to make it clear that they viewed anti-republicanism as equally basic an evil to be combatted.¹²¹ Domestic violence was a subject fresh in the

¹¹⁶ 1 Farrand 20-23.

¹¹⁷ 2 Farrand 47-49. One of the few, and certainly the most comprehensive, studies of this clause is Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513 (1962). The present writer, while working independently in the same source material, wishes to acknowledge the corroborating research on this subject to be found in the Bonfield article. Professor Bonfield has extended his observations in *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 Calif. L. Rev. 245 (1962).

¹¹⁸ 2 Farrand 48-49.

¹¹⁹ *Id.* at 148.

¹²⁰ See 4 Farrand 122 (2d ed. 1937) for citations regarding these debates.

¹²¹ Cf. the objection to Randolph's resolution voiced by William Houston of Georgia: he was "afraid of perpetuating the existing Constitutions of the States. That of Georgia was a very bad one, and he hoped would be revised & amended." 2 Farrand 48. See note 128 *infra*.

delegates' memories. Shays' rebellion in Massachusetts had taken place the previous winter.¹²² Disputes between Connecticut settlers and the Pennsylvania government over the settlers' claims in Pennsylvania's Wyoming valley had flared sporadically between 1782 and 1787.¹²³ Externally, Spanish threats in Florida loomed large in Georgia's eyes,¹²⁴ and the British power on the Great Lakes continued to worry the northern states.¹²⁵ It is readily understandable, therefore, that dangers of internal and external force should be a subject which the convention wished to make a national one. But by this very fact, the initial provision in the clause for the protection of "a Republican Form of Government" assumes an equal importance as a responsibility of the national authority.

Second, then, is the significance of the reference to this national authority—"the United States shall guarantee" this republican form of government. The guarantee is not the exclusive concern of Congress, whose powers are set out in article I; nor of the executive, whose powers are set out in article II; nor of the judiciary, whose powers are set out in article III. Article IV, in which this guarantee appears, concerns the relations of the states to each other and to the national government in the federal system. Section 1 contains the "full faith and credit" clause and empowers Congress to implement it; section 2 prescribes the privileges and immunities of citizens of the several states and has derived its force throughout the national history from Supreme Court interpretation;¹²⁶ section 3 concerns the admission of new states and vests the authority to admit them in the Congress, as well as vesting in Congress a general authority over territories. But section 4 is a general power vested in the national government—which of necessity and logic means in any and all branches of that government established by the Constitution.

GUARANTEE CLAUSE AS INTERPRETED—AN EXCLUSIVELY
"POLITICAL" CONCERN?

If the intention of the guarantee is that a republican form of government is to be a constitutional concern of the federal government, it is clearly *not* a "political" question but a legal one. It may not be exclusively judicial but under the language of the clause, it may also

¹²² Warren, *The Making of the Constitution* 30-32 (1928).

¹²³ 6 Avery, *A History of the United States and its People* 387-89 (1909).

¹²⁴ 1 Morison & Commager, *The Growth of the American Republic* 270 (1942).

¹²⁵ See Bemis, *A Diplomatic History of the United States* 70, 73 (4th ed. 1955).

¹²⁶ Corwin 686-92.

be legislative and/or executive. That it should have come to be held to be "political" is an unfortunate result of Chief Justice Taney's opinion in the old case of *Luther v. Borden*¹²⁷—and a misreading of that opinion as well. The case arose in Rhode Island and developed from Dorr's rebellion in 1841-1842; *i.e.*, from the type of "domestic violence" to which reference is made in the third proviso of section 4 of article IV.¹²⁸ The state's fundamental charter, as a matter of fact, was its colonial charter of 1663 which it did not replace with a new constitution until 1843.¹²⁹ In 1841 a group of state residents, disfranchised under the ancient charter, took the initiative in organizing a constitutional convention, which in turn adopted a new constitution and elected Thomas W. Dorr as the governor. An abortive attempt was made to carry the constitution into effect by force, but the rebellion was quickly frustrated.

In the case which came before the Taney court, one Martin Luther, a supporter of Dorr and a participant in the rebellion, sought to maintain an action in trespass against Luther Borden and others who, relying upon the authority of the incumbent "charter government," had broken into Luther's house to arrest him. The plaintiff insisted that the people of the state of Rhode Island had by sovereign action replaced the old charter, and hence that Borden and his associates were without lawful authority to come upon his property.¹³⁰ The question therefore presented to the Court was, as the Chief Justice stated it, whether any legality obtained for acts done under the constitution adopted by the popular convention in 1842 or whether the constitution of 1843, sanctioned by the "charter government," was the proper terminal date for the latter government.¹³¹ This, clearly, was not the same as a question whether the United States was being required to guarantee to Rhode Island a republican form of government; the plaintiffs either neglected, or were unable, to raise a constitutional question in such a form as would have focused the Court's attention upon the guarantee question. Thus, Taney was confined (or confined himself) to the

¹²⁷ 48 U.S. (7 How.) 1 (1849); cf. Bonfield, *The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 533 (1962).

¹²⁸ It is worth remembering that Gouverneur Morris objected to the original proposal of the guarantee in the Convention of 1787 by stating that he did not wish to guarantee Rhode Island's constitution. 2 Farrand 47. And Rhode Island, it will be recalled, did not participate in the Convention.

¹²⁹ 48 U.S. (7 How.) at 35.

¹³⁰ *Id.* at 35-37.

¹³¹ See *id.* at 46.

question of legitimacy under the circumstances of the constitutional upheaval of this whole period in Rhode Island. And he found the Court estopped from assuming the function vested in the United States under section 4 of article IV because another federal agency—the executive—had already elected to settle the question acting under authority conferred upon that agency by Congress.¹³² Taney's opinion, however, requires some attention, since it was the progenitor of a succession of opinions tending to establish the concept of the "political" question:

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State . . . that, according to the law and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. . . .

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a state government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest. . . .

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily

¹³² *Id.* at 43. The statute is quoted in the opinion in its original form. In its modern form it appears in 10 U.S.C. § 331 (1958), and provides, in event of domestic disturbance in a particular state, for calling into federal service such of the militia of other states, in the number requested by that state, and using such of the armed forces, as he (the President) considers necessary to suppress the insurrection.

decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . .

So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection.

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. . . .

. . . . The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force.¹³³

Relying upon Taney's opinion, including his dictum, the majority opinion in *Baker* concluded that *Luther* had established "that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."¹³⁴ This conclusion was not necessarily a valid one since the question in *Baker* was not whether the governmental process involving malapportionment was lawful (in the sense of being legitimate and not insurrectionary) but whether it was republican. Thus, *Luther* could only be concerned with the proviso in article IV, section 4, relating to domestic violence. Confined to this narrow issue, the Taney holding

¹³³ 48 U.S. (7 How.) at 39, 40, 42-44.

¹³⁴ 369 U.S. at 223; cf. *id.* at 292-97 (Frankfurter, J., dissenting and analyzing *Luther*).

is a proper precedent. The point in reviewing at such length the role of *Luther* with respect to the guarantee proviso is to underline the proposition that that case is not applicable to the guarantee of a republican form of government. The proposition that judicially manageable standards are not available with regard to the republican form of government proviso, then, may only mean that courts have been reluctant to enter this area, but it does not mean that it may not be a legal question.

Taney's statement that the language of article IV, section 4, "has treated the subject as political in its nature," and that "Congress must necessarily decide what government is established in the State before it can determine whether it is republican,"¹³⁵ is gratuitous as well as dictum. Article IV vests certain specific responsibilities in Congress in sections 1 and 3; the mention of Congress in these clauses merely underlines the significance of the lack of such mention in section 4. It is obvious that Congress is concerned with the application of the guarantee clause, and as a practical matter, legislative action may be the most practical means of implementing the clause. But such action is properly limited to particular subjects within the area of responsibility envisioned by the clause; the act of 1795, to which the Taney opinion refers, is addressed only to the specific issue of domestic violence. Therefore, until Congress acts, in like manner, with regard to the republican form of government proviso, that subject matter may still be thought of as being a legal issue open even to the federal judiciary.¹³⁶ Surely, as was pointed out earlier, the language of the guarantee clause does not support the conclusion that all determinations thereunder are within the exclusive province of Congress—especially not the determination of what violates the republican form of government proviso. In any event, the guarantee clause is an example of *federal* power, be it judicial, congressional or executive, over the states in the areas specified in article IV.

The Court in *Baker*, having persuaded itself that the guarantee clause was exclusively "political," failed to spell out the *complete* federal authority under that clause and based its opinion on the provisions of

¹³⁵ 48 U.S. (7 How.) at 42.

¹³⁶ The present writer contends, as is evident from his treatment of the *Luther* case and the subsequent reliance upon it, that the term "political" is properly applicable only to those functions of the legislature which consist essentially of a choice of alternative courses in terms of policy (or party) preferences, and that this legislative function is distinguishable from the legal; i.e., lawmaking or statute-enacting function in discharge of constitutional obligations.

the fourteenth amendment which it deemed applicable.¹³⁷ As is suggested below, this amendment may actually be considered as complementing the responsibilities settled upon the states and the federal government by article IV, section 4. This depends upon a proper re-examination of *Luther* in terms of the foregoing review. But that the draftsmen of the proposed amendment now advocated by the General Assembly of the States have not overlooked the latent federal power in the guarantee clause is clear in its wording: "No provision of this Constitution [*i.e.*, article IV, section 4] or any amendment thereto [*i.e.*, the fourteenth] shall restrict or limit any state"¹³⁸ in the matter of legislative apportionment. The complementary section of the proposal would remove from the judiciary the authority to entertain any suit at law or equity on questions of apportionment.¹³⁹

REPRESENTATIVE GOVERNMENT IN JEOPARDY

The current proposal, then, challenges the federal concept of our governmental structure at three points. In the first place, it recognizes, if the Court as yet does not, the true breadth of the federal authority vested in article IV, section 4. Secondly, it concedes, by specific reference, that this authority may extend to the judicial as well as to the legislative and executive branches of the federal government. But thirdly in sum, it is intended to excise from American federalism the concept of representative government. If representative government is the essence of federalism—as this discussion has assumed and as is examined below—then the proposed amendment must be indicted as subversive of the entire constitutional structure.

That representative government is the essence of federalism is readily discerned in the specific provisions of the Constitution itself. Indeed, our history demonstrates that representation in terms of a broadened suffrage has become more fundamental a requirement of federalism with the passing of time. Thus, manhood suffrage became universal in 1870;¹⁴⁰ it was extended to women in 1920;¹⁴¹ and, it was extended in 1961 to the residents of the District of Columbia with reference to presidential elections.¹⁴² The present policy of the United States, to

¹³⁷ 369 U.S. at 237.

¹³⁸ See Amending the Constitution, *supra* note 112, at 14.

¹³⁹ *Ibid.*

¹⁴⁰ U.S. Const. amend. XV, § 1.

¹⁴¹ U.S. Const. amend. XIX.

¹⁴² U.S. Const. amend. XXIII.

minimize or eliminate any restraints upon the exercise of suffrage, is reflected in the imminent ratification of the twenty-fourth amendment which would outlaw a poll tax in federal elections. And as the celebrated case of *Gomillion v. Lightfoot*¹⁴³ has demonstrated, in a holding which may well be regarded as a corollary of *Baker*, impediments to the exercise of suffrage which may be struck down by the courts under the fourteenth amendment include any which unreasonably tend to reduce the effectiveness of the exercise by preventing the equal impact of the vote upon the electoral system.

While it is true that the provision of article I, section 5, that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" has encouraged Congress under the guise of professional courtesy to overlook circumstances which frustrate the representative process,¹⁴⁴ this does not diminish the validity of the proposition that the intent of the Constitution as a whole—with article IV, section 4, read in the context of the fourteenth, fifteenth, twentieth and twenty-third amendments—is to assert representation as the essence of federalism. For, if the suffrage guarantees are to be of practical effect, the exercise of the suffrage must reasonably have equal effect for all voters. Thus said Mr. Justice Brennan:

These appellants seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 [Tennessee] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . .¹⁴⁵

The circumstances under which the Convention of 1787 accepted the provision which became article IV, section 4—with a question only as to its possible delimiting of the federal power *vis-à-vis* unregenerate state constitutionalism¹⁴⁶—established the principle that a republican form of government was an enforceable requirement of membership in the federal union. Whether "republican" equates with representative

¹⁴³ 364 U.S. 339 (1961).

¹⁴⁴ Corwin 95-96.

¹⁴⁵ 369 U.S. at 207-08.

¹⁴⁶ See note 117 *supra* and accompanying text.

government, and whether this in turn is synonymous with reasonable degrees of equality of effect of the voter's exercise of his suffrage, has presumably been established by the rules in *Gomillion* and in *Baker*. This being so, the proposal of the General Assembly of the States is inimical to the rationale of federalism.

The current proposal is an apt illustration of Hamilton's warning that state legislatures would seek to alter the Constitution only with a view to the increase of their own powers.¹⁴⁷ But, in the context of the preceding section of this discussion, the proposal must be condemned as an improper attempt on the part of the states to intrude upon the area of action which the people of the United States have established as their exclusive domain. These people may, of course, elect to accede to state challenges of the exclusiveness or paramountcy of federal jurisdiction—witness the tidelands oil statute¹⁴⁸ or the Taft-Hartley Act.¹⁴⁹ And they may choose, wisely or unwisely, to limit their own governmental powers—witness the twenty-second amendment. But in each case it is the act of the people of the United States, not of the states or their legislatures. The present proposal, by which the states seek to withdraw from the people of the United States control over an obligation which the people made a condition of state competence within the federal system, can come legitimately only from the party which established the condition originally.

III

COURT OF THE UNION—AN INVITATION TO CHAOS

The most frivolous of all the proposals here being reviewed, and the one which most clearly reveals the objective of subjugating the federal system to state control, is the one seeking to establish a so-called Court of the Union. Merely to describe a fifty-judge court, or even one with thirty-seven judges on its bench if a three-fourths majority for a quorum is involved, is ludicrous enough. To propose that such a court be an extraordinary agency within the federal system¹⁵⁰ would reduce federal judicial processes and administrations to a shambles, not to mention

¹⁴⁷ 1 Farrand 558.

¹⁴⁸ Submerged Lands Act, 67 Stat. 29 (1953), as amended, 43 U.S.C. §§ 1301-15 (1958).

¹⁴⁹ Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958), as amended, 29 U.S.C. §§ 141-87(a) (Supp. IV, 1963).

¹⁵⁰ It would obviously be within the federal system since it would deal with federal questions and, as proposed in one section of the draft amendment, would be financed by Congress.

what it would do to the business of the state courts.¹⁵¹ Its greatest mischief, of course, is in the same error which characterizes the other two proposals: that they seek, singly and collectively, to subvert the entire system of federalism and to presume upon what are the exclusive prerogatives of the people of the United States. The greater evil in the present proposal is its assumption that the states should somehow and for some reason have a particular degree of immunity from the responsibilities of membership in the union.

The proposal for a Court of the Union would do violence to the basic framework upon which the three major branches of national government were devised in the Constitution, as well as to the mature system of operation which has grown from 175 years of experience. It would first of all, unsettle the organization of the judiciary as set forth in the first section of article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." It would further, as would the second section of the proposed malapportionment amendment, delimit section 2 of article III by introducing a negative proviso into the statement of jurisdiction.¹⁵² Finally, it would contradict the logical and well-proved process, provided in article II, section 2, for appointment of judicial officers of the United States by the President, by and with the consent of the Senate.

Debate at the Constitutional Convention bore directly upon decision-making at the stage of last resort—the power of the Supreme Court over state actions affecting the federal constitution. It was the ultimate stage of an orderly and balanced federal system; if the Court of the Union proposal were accepted, it would tip that balance in the direction of inconsistency and chaos. As will be seen in the next succeeding paragraphs, the convention proceedings lay bare, in three separate series of discussions, progressively logical reasons why a supreme tribunal should be established. First, that as a general proposition, there should be some body to pronounce legislative acts void; that body was the judiciary. Second, that either the Congress or the federal judiciary should have the power to negative state legislative acts; a proposal so to empower the Congress was defeated. And finally, that only a single supreme tribunal could settle with sufficient finality and consistency, the issues arising from the several and diverse state jurisdictions.

¹⁵¹ See Chandler, McConnell, & Tolman, *Administering the Courts: Federal, State and Local*, 42 J. Am. Jud. Soc'y 13 (1958).

¹⁵² Cf. Corwin 543-44, 554-55, 578-82, 592-610.

That review of all acts of the federal and *state* governments which raised a question of federal constitutionality would be a responsibility of the federal judiciary was assumed by Hamilton, who argued in support of article III:

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.¹⁵³

Perhaps the most significant discussion of the ultimate nature of the federal judicial power took place at the Convention of 1787 in connection with the debate on the powers of *Congress*. The proposal which precipitated the discussion was that Congress should have the following right: "To negative all laws passed by the several States contravening in the opinion of the Nat: Legislature the articles of Union, or any treaties

¹⁵³ The Federalist No. 78, at 524-25 (Cooke ed. 1961) (Hamilton).

subsisting under the authority of ye Union.”¹⁵⁴ Madison favored this proposal declaring that:

The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. . . . They can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legisre or *be set aside by the National Tribunals*.¹⁵⁵

But Gouverneur Morris opposed vesting the power in Congress stating that a law which ought to be repealed “*will be set aside in the Judiciary department* and if that security should fail; [it] may be repealed by a National Law.”¹⁵⁶ There being no contradiction of this observation, the proposed congressional review power was voted down by the Convention, seven states to three.¹⁵⁷

To the Founding Fathers, it seemed obvious that a single supreme tribunal was required to settle the issues raised from such a diversity of jurisdictions as even thirteen states presented. The principle was very simply stated by Hamilton:

A circumstance, which crowns the defects of the confederation, remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State, a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judiciaries, all nations have found it necessary to establish one court, paramount to the rest—possessing a general superintendence, and authorized to settle and declare in the last resort, an uniform rule of civil justice.

This is more necessary where the frame of the government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts. In this case if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from difference of opinion, there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend, that the provisions of the particular laws might be preferred to those of the general laws; for nothing is more natural

¹⁵⁴ 2 Farrand 27.

¹⁵⁵ Ibid. (Emphasis added.)

¹⁵⁶ Id. at 28. (Emphasis added.)

¹⁵⁷ Ibid.

to men in office, than to look with peculiar deference towards that authority to which they owe their official existence.¹⁵⁸

One hundred and seventy-five years later, there is little to add to Hamilton's statement.

The renowned Judiciary Act of 1789, drafted by the first Congress in implementation of, and within recent memory of, the intentions of the supremacy concept in article III, section 2, stipulated that in the case of final judgment in a state court,

where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution . . . [the judgment] may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.¹⁵⁹

Such issues are validly presented to the Supreme Court, said John Marshall, "whenever its correct decision depends upon the construction of [the Constitution]. . . ."¹⁶⁰ The thread of jurisprudence from *Marbury v. Madison*¹⁶¹ to the present has been unbroken, and is too well established in constitutional history to require repeating here.

Thus, diversity of state opinion having been resolved in favor of the establishment of a supreme tribunal, and the authority of the Supreme Court continually being implemented, it remained for the proponents of the Court of the Union to concoct this confederating example of state arbitration over federal constitutional questions. With specific reference to all of the proposed amendments, state courts are probably even less competent than state legislatures to participate in a process of federal government. The sole competence of any state court, on a constitutional question, lies in adjudicating the issue in terms of its own jurisprudence. If—as the Constitution, the Judiciary Act of 1789 and the overwhelming weight of judicial doctrine¹⁶² throughout our history has set out—the question then requires adjudication in terms of the federal constitution, it goes beyond the area of state court competence. The proposal for a so-called Court of the Union is in the highest degree irrational; either its intention is to give all the state courts of last resort a right to review the question on which one state court had the sole competence in terms

¹⁵⁸ The Federalist No. 22, at 143-44 (Cooke ed. 1961) (Hamilton).

¹⁵⁹ 1 Stat. 85 (1789). The current provision in 28 U.S.C. § 1257 (1958) is more comprehensive in scope.

¹⁶⁰ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821).

¹⁶¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁶² Cf. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), an opinion which, of course, substantially expanded the influence of state common law in federal litigation.

of its own jurisprudence, or it is intended to give these fifty courts a collective right of review of certain federal decisions which can really vest their competence only in one supreme federal court. The proposed amendment flouts the fundamental concept of any government under law, and a concept which the states regard as fundamental in their own constitutional systems—that the ultimate determination of the validity of any government function within that system is to be made by the highest court within that system. After that determination, when the only remaining question is one of validity within the federal system, the United States Supreme Court alone can properly make such a determination.

To pursue this matter further would only serve to belabor it. The proposal, which would destroy the basic operating principle of American federalism that the ultimate determination of federal constitutional questions rests with the Supreme Court of the United States, would, indeed, lead to chaos.¹⁶³

CONCLUSION

Surely, the inherent dangers of these three proposed amendments are brought to the fore just as much when they are considered as a package as when they were considered individually in the light of constitutional history. Whatever the merits of the arguments based on the non-use of the convention proviso, the “political thicket” of reapportionment cases, and the ever changing and ever changeable Supreme Court, the manner in which these proposed amendments collectively seek to remedy ascendant federalism is **alarmingly regressive**. The interests of the “people of the United States” would be subjected to the still prevalent parochial interests of fifty diverse state sovereignties.

The road to chaos, or the whirlwind to be reaped, has not been brought across the path of the American people with such determination as this since the Civil War. That event of a century ago, indeed, settled, by force of circumstances as much as by force of arms, the fundamental positions of the states and the federal government in the federal system. The matter was settled at that time by a variety of determinants—economic, political and social as well as military—but all pointing

¹⁶³ Cf. Report of the Conference of Chief Justices 4 (1958), and Mr. Justice Holmes' view: “I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” Holmes, *Collected Legal Papers* 295-96 (1920).

ultimately to the proposition that a nation of such size and diversity could not function effectively except as a unit, or a union; and if a union, then subject to the ultimate assumption of power in matters of national concern by the national government. The issue of the sixties of the last century, as one student of constitutional law has put it, was the choice between the jurisprudence of Marshall, which took the supremacy clause as its keynote, and that of Taney, which took the tenth amendment.¹⁶⁴ Or, as the same scholar restates it, the choice was between a competitive concept of federalism and a cooperative concept.¹⁶⁵ If the settled principle of the cooperative concept has developed in the past generation as the prevailing one, it is because the competitive issue has been resolved finally in favor of the national entity. The Supreme Court itself expressed the proposition in 1913 as follows:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the State and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.¹⁶⁶

The fact is, as respects the federal power, that it is a power defined in part by the original concept of the Convention of 1787 and of the Congresses which have drafted the various amendments which have been added to the Constitution; and in part by the experience and perspectives reflecting the changes in American society over 175 years. But in all instances, federal questions have been the proper and ultimately the exclusive concern of the federal government—whether it be the legislative, executive or judicial branch. And federal questions include any and all questions which involve the position of the states in the federal system, or the compatibility of state policies with federal policies which they affect. This cannot be otherwise—and it is not a matter of competition or cooperation; for, from the outset the nature of the system proposed by the Constitution has been fundamentally different from that obtaining under the Articles of Confederation.

Consider the fundamental difference between the two constitutions: the one being articles unanimously agreed to by the thirteen states and the other being an instrument drafted by the people of the United States. Article 2 under the Articles of Confederation clearly stated: "Every

¹⁶⁴ Corwin xii.

¹⁶⁵ *Id.* at xiv.

¹⁶⁶ *Hoke v. United States*, 227 U.S. 308, 322 (1913).

State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." Article 3 described the intention of the Confederation: "The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare." The sense of article 3 is the sense of the preamble of the Constitution; figuratively, if not literally, it could be urged that in the preamble the people of the United States themselves announced this undertaking to attain the goals which the states acting in a league of friendship and commerce had been unable to reach. What is more important, however, is that the assertiveness of state "sovereignty, freedom and independence" in article 2 is not repeated in the Constitution of 1787, but only appears in the tenth amendment.¹⁶⁷

Article 2 demonstrates the narrow intentions of the states in creating a "perpetual union"—expressly delegating to the Continental Congress concurrent or joint authority to discharge foreign relations and to wage war (article 6),¹⁶⁸ reserving control of the armed forces in the states (article 7), and providing for the financing of the war and the other national expenses from a "common treasury" to be maintained at "the authority and direction of the legislatures of the several States" (article 8). Coinage was to be made uniform by Congress—but it was both a national and a state coinage; and Congress could regulate trade with the Indian tribes "provided that the legislative right of any state within its own limits be not infringed"; and in recess, the Congress was to appoint an executive "Committee of the States" to discharge national affairs (article 9). There were no executive powers; and as for judicial powers, there were only two of the most limited nature, both set out in article 9. Prize courts were to be set up to deal with capture of enemy merchants during the war; while in the case of interstate disputes a system which resembled a process of arbitration rather than adjudication was elaborately described.¹⁶⁹

To review the basic features of the Articles of Confederation is to demonstrate the fundamental differences between the league of the states and the federal union for which the people themselves ordained and

¹⁶⁷ Jensen, *The Articles of Confederation*, ch. 7 (2d ed. 1948).

¹⁶⁸ Cf. Carson, *The Supreme Court of the United States: Its History*, chs. 4 & 5 (1891). (Appellate cases before the Continental Congress and the prize courts.)

¹⁶⁹ Cf. *id.* ch. 6, on interstate disputes before Congress; also the renowned appendix of unreported Supreme Court opinions and pre-constitutional cases in 131 U.S. (1889).

established the Constitution. The details are familiar constitutional history—although we appear to be courting conditions reminiscent of Santayana's aphorism that those who ignore history must suffer the penalty of repeating it. In the present context, it is worth pointing out that by this Constitution, the people of the United States: (1) granted much more definite and exclusive legislative powers to the national government and vested them in Congress; (2) created a new body of governmental powers—executive—and vested these powers in the President; and (3) established a distinct judicial power and vested it in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Articles of Confederation bound together thirteen sovereignties in certain limited areas of action; the Constitution established a federal sovereignty which was paramount to the state sovereignties in all matters which time and experience should demonstrate to be of national concern. The Confederation failed of full effectiveness precisely at these points where the Constitution provided the essential national strength. The 1963 proposals of the General Assembly of the States would remove that essential strength and return us to the limited capabilities of a Confederation.