

# FACULTY NOTES

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## THE PROPOSED AMENDMENT OF ARTICLE V: A THREATENED DISASTER

CHARLES L. BLACK, JR.†

THREE proposals for amending the Constitution have recently come from the Council of State Governments, and are being propelled down the never before used alternative route of article V—the route *via* state applications to Congress for the calling of a convention.<sup>1</sup> Of the three, one (which would establish a Court of the Union, composed of the state Chief Justices in all their multitude, to meet on extraordinary occasions to review judgments of the Supreme Court)<sup>2</sup> is so patently absurd that it will probably sink without trace. Another, eradicating<sup>3</sup> *Baker v. Carr*<sup>4</sup> concerns a special subject, and hence does not generally affect the federal power or the whole shape of the Union. The third is of supreme interest to students of constitutional law. Its adoption would effect a constitutional change of a higher order of importance than any since 1787—if one excepts (and that only doubtfully) the *de facto* change implicit in the result of the Civil War.

It is wonderful that this proposal—which has already commended itself to a number of state legislatures<sup>5</sup>—has been so little noticed. This is doubtless because the proposed change is in procedure. But a change in the procedure of constitutional amendment—unless it is purely formal, and this one is not—is a change in the distribution of ultimate power. The proposed article V, if adopted, would make it easily possible for a proportion of the American people no greater than that which supported Landon in 1936 to impose on the rest of the country any alteration whatever in the Constitution. The people who could do this would be, by and large, those inhabitants of the less populous states

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1. All are set out in full, with an account of their espousal by the Council, in *Amending the Constitution to Strengthen the States in the Federal System*, 36 STATE GOV'T 10 (1963).

2. *Id.* at 13-14.

3. By abolishing all substantive federal guarantees against malapportionment, thus making action by Congress as well as by Court impossible, and by withdrawing the subject entirely from federal judicial power. 36 STATE GOV'T at 12.

4. 369 U.S. 186 (1962) (fourteenth amendment claim against state legislative malapportionment held within federal judicial jurisdiction).

5. According to information informally received, the legislatures of Arkansas, Florida, Missouri, Oklahoma, Kansas, and Wyoming have already passed the Resolution set out in text accompanying note 13 *infra*. In about an equal number of states, one house has passed it.

who reside in the districts that are over-represented in their own state legislatures. "Unto him that hath it shall be given." This component of the population—to which we are all accustomed to conceding a veto power on constitutional amendment, as on many other matters—would under the proposed plan have something very different from a veto power. It would have the affirmative power of forcing its will on the majority, as to anything which may be the subject of constitutional amendment—that is to say, as to everything. Such a proposal ought to be scrutinized with the very greatest care, and the same careful scrutiny should be given to the method by which its proponents hope to coerce its submission to the state legislatures for ratification as an amendment.

#### THE PROPOSED NEW ARTICLE V.

If this proposal were to win its way through, article V would 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.<sup>6</sup>

It may be convenient to the reader to have set out the text of the present article V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>7</sup>

The proposed plan, it will be seen, abolishes the (never used) "convention" way of amendment, and puts in its place a method wholly under the control, as to substance and procedure, of the state legislatures. It does this by making it mandatory that Congress submit for ratification any amendment called for by the legislatures of two-thirds of the states, and by simultaneously taking away Congress' power to elect the state convention mode of ratification.

6. 36 STATE GOV'T 11-12 (1963); see text accompanying note 13 *infra*.

7. U.S. CONST. art. V.

At present, an amendment may be passed (and all have actually passed in this way) if two-thirds of each national house wants it, and if it is ratified by three-fourths of the states in the manner chosen by Congress. One might also pass if (on proper application of two-thirds of the states) a convention, summoned by Congress and having such structure as Congress thought wise to give it, proposed the amendment, and if it were then ratified in the manner chosen by Congress.

Along the new route opened by the proposed article V, Congress would control neither substance nor procedure. Three-fourths of the state legislatures, without the consent of any other body, could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for public office, and move the national capital to Topeka. These are (in part at least) cartoon illustrations. But the cartoon accurately renders the *de jure* picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody. Some amendments—*e.g.*, something like the Bricker Amendment—would be very likely of early passage. At present the main dangers would be to civil and political rights, to national conduct of foreign relations, and to the federal taxing power. But (particularly since the proposed change would be absolutely irreversible, thirteen states being enough to block its reversal) the cartoon does not exaggerate the possibilities of the long future. A country in which the large majority would have to dread and sometimes submit to constitutional innovations appealing only to a minority could not call itself, even poetically, a democracy, and the possible tensions between consensus and Constitution would be dangerous in the extreme.

At present, when an amendment passes the House and the Senate by two-thirds, there is fair ground for the inference that there is national consensus upon it; at least the means of ascertaining that crucial fact, though rough, are fairly well adapted to the end. If the national convention method, under the present article V, were ever to be used, Congress, in setting up the convention, could ensure that it be so representative as to be likely to express a national consensus. Congress even retains control over the ratification process; if the state legislatures were in its view to come to be dangerously unrepresentative, Congress could provide for ratification by state conventions so chosen as accurately to reflect the views of each state's people. Properly used, the present article V can ensure that no constitutional change be effected which is disliked, deplored, or detested by a distinct majority of the American people.

What is the situation under the proposed new article V? Here one must talk numbers—even statistics of a rough kind. Let us note first that the thirty-eight least populous states, whose legislatures could under the proposed article V repeal the full faith and credit clause, contain about 40 per cent of the country's population.<sup>8</sup> That really ought to be enough. That these particular people should, in the name of federalism, have a veto power, is acceptable; at least it

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8. Calculated from the 1960 Census, 1963 WORLD ALMANAC 255. The author is ill at reckoning, but the figures given here are not far off.

is accepted beyond change. What rational ground could there be for giving them, in addition, the power affirmatively to govern the rest of the people?

But of course one cannot stop there. The power given by the new article V is not in the states but in their legislatures. It cannot be too strongly stressed that one need not approve of *Baker v. Carr*<sup>9</sup> in order to accept the fact, as a fact, that the state legislatures do not accurately represent the people of their states—that a majority in each house of most state legislatures can be made up of votes representing a distinct minority of the state's people. This situation may have a certain romantic appeal;<sup>10</sup> even if one does not appreciate its beauty, one may not think the remedying of it a fit job for the federal courts. But neither of these judgments supports the conclusion that the uncontrolled power of federal constitutional amendment should be turned over to bodies so constituted.

So back to numbers: In the best table accessible,<sup>11</sup> relevant data are given for thirty-four of the thirty-eight least populous states of the Union. On the average, it takes 38 per cent of the people in one of these states to form the constituencies of enough state senators or representatives to pass a measure through the *more* accurately representative house of the state legislature. Taking this figure as good enough for present purposes, if the proposed article V were in force, the income tax could be abolished, by repeal of the sixteenth amendment, if about 15 per cent of the American people were represented by legislators who desired that result.<sup>12</sup>

Now of course it can be replied that such a coalition cannot be formed without the implication that a good many other people are like-minded with it. Granted. But the margin is enormous. If the right 30 per cent of the people favored some amendment, its chance of passage would be very great indeed, whatever the other 70 per cent might think. And it is very important that the distortion is not random but systematic—it is a distortion operating steadily in favor of rural districts and small towns. It is not too much to say that the proposed article V would enable the inhabitants of such districts to effect any change they persistently wanted in the Constitution of the United States. They may be better and wiser than the rest of us; perceptive fiction and the exacter sociology are not clear on this, but let us assume it is so. Does that justify turning the Constitution over to them, affirmatively and negatively, to keep or to change as they will?

Reference was made above to the result of the Civil War. The proposed article V rests on the theory, at least in part, that that result ought to be revised. The several states now have a crucial part in the process of constitutional amendment; the new proposal would (as far as one alternative method is con-

9. 369 U.S. 186 (1962).

10. See Perrin, *In Defense of Country Votes*, 52 YALE REV. 16 (1962), especially at 24.

11. Compiled by The National Municipal League, N.Y. Times, March 28, 1962, p. 22, col. 3.

12. This figure is arrived at by taking 38% (the percentage of people in the relevant states necessary, on the average, to control the legislature) of 40% (the percentage of the American people residing in the thirty-eight least populous states).

cerned) give it entirely into their hands, setting at nothing the concept of national consensus among the American people considered as a whole people. It is a proposal for state rule only, on the basis of state-by-state count only, and through state institutions only, with the popular and national principles altogether submerged. If history has any lessons, our history teaches that such a location of ultimate power would put us in mortal danger.

It should only be added that this proposal, as a corollary to its discard of the concept of national consensus as a prerequisite to amendment, does away with national consideration and debate as a part of the amendment process. Under the present article V, any amendment must be examined and considered in a fully national forum—whether Congress or Convention—before it goes out to the several states. Such debate focusses national attention on something which is above all of national concern. Under the proposal, the only public debate would be in fifty separate state legislatures; the rest of the process would be ministerial only. This short-circuiting of national deliberation is actually one of the most offensive features of the plan.

#### THE MODE OF PROPOSAL

The plan of the proponents of this amendment is to see it introduced into each of the state legislatures, in the form of a resolution in the following terms:

##### A (JOINT) RESOLUTION\*

Memorializing Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States relating to Article V thereof.

Resolved by the House of Representatives, the Senate concurring, that this Legislature respectfully petitions the Congress of the United States to call a convention for the purpose of proposing the following article as an amendment to the Constitution of the United States.

#### "ARTICLE ———

"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

\*This resolution 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.<sup>13</sup>

13. 36 STATE GOV'T 11-12 (1963).

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."

BE IT FURTHER RESOLVED that if Congress shall have proposed an amendment to the Constitution identical with that contained in this resolution prior to January 1, 1965, this application for a convention shall no longer be of any force or effect.

BE IT FURTHER RESOLVED that a duly attested copy of this resolution be immediately transmitted to the Secretary of the Senate of the United States, the Clerk of the House of Representatives of the United States and to each member of the Congress from this State.

The hope is that, if two-thirds of the legislatures submit such a petition, Congress will consider itself bound, under the present article V, to call the "convention" requested.

#### QUESTIONS PRESENTED

A number of questions arise; some of these will be considered here—not as judicial questions, but as questions sure to come into the mind of any Congressman or Senator conscientiously seeking to do his duty.

*Is the Document Quoted Above an "Application" Within the Meaning of Article V?*

Article V lays down that Congress shall "call a Convention for proposing Amendments," on "Application" of the legislatures of two-thirds of the states. The "Application" which can raise a conscientious obligation on Congress' part must be one that asks it to "call a Convention for proposing Amendments." (Emphasis added.) A good case can be made for the proposition that the quoted document is not such an "Application," but an application for something quite different—for a "Convention" to consider whether an amendment already proposed shall be voted up or down.<sup>14</sup>

The process of "proposal" by Congress, contained in the *first* alternative of article V, obviously includes the process of plenary deliberation upon the whole problem to which the amendment is to address itself. It entails choice among the whole range of alternatives, as to substance and wording. It is "proposal" in the most fully substantial sense, where the proposer controls and works out the content and form of the proposition. It is very doubtful whether the same word two lines later, in the description of the *second* alternative, ought to be taken to denote a mechanical take-it-or-leave-it process. Under the procedure followed by the draftsmen and proponents of the present "application," the "convention" would be in true function a part of the process of *ratification*.

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14. Even this much is more than the Resolution literally allows; it asks for a convention "for the purpose of proposing" the amendment set out. Is it possible that the sponsors think the convention's role can be made ministerial?

This doubt is reinforced by the fact that the delegates who approved this language at Philadelphia were just completing the work of a "convention" of their own. Is it not likely that to them the phrase "convention for proposing amendments" meant a convention with a mandate somewhat like the one under which they had worked—a mandate to consider a set of problems and seek solutions?

The difference here is not merely formal, but sounds the deeps of political wisdom. The issue is whether it is contemplated that measures dominantly of national interest should be malleable under debate and deliberation at a national level, before going out to the several states. Such a conception of the "convention" contemplated by article V makes the second route to amendment symmetrical with the first, in the vital respect that, under both, the national problem must be considered as a *problem*, with a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power. The Congressman or Senator persuaded by this distinction would be justified in concluding that the present "applications," even if two-thirds of the states joined, was not of the sort that obliged Congress to call a convention.<sup>15</sup>

Assuming these "applications" are not within article V, it may still be suggested that a sort of "reformation" might be applied—that Congress, even if not persuaded that the present applications asked for the thing contemplated by article V, ought to call such convention as it thinks it would have been obliged to call if the applications had been of the right sort. This seems clearly wrong, for several reasons. Generally, a high degree of adherence to exact form, at least in matters of importance, is desirable in this ultimate legitimating process; a constitutional amendment ought to go through a process unequivocally binding on all. Congress is given no power to call a constitutional convention when it wants to, or thinks that on the general equities perhaps it should; if Congress desires an amendment, article V very clearly tells how that desire is to be made known. Congress' power as to conventions is not discretionary but strictly conditional, and if the condition is not met Congress not only need not but may not call a valid convention.

It is, moreover, illegitimate to infer, from a state's having asked for a "convention" to vote a textually-given amendment up or down, that it desires some

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15. It should be noted that another and quite independent defect might be thought to vitiate these "applications." They demand the calling of a convention "for the purpose of proposing" an amendment which is, by its own text, to be ratified *by the state legislatures*; Congress can be under a duty to comply with these applications, then, only if such applications in sufficient number can place it under a duty to abdicate its own discretionary function, as clear as anything in the Constitution, of choosing between the modes of ratification, whatever may have been the mode of proposal. It is certain, on the face of Article V, that no applications from any number of state legislatures can put Congress under a moral or legal obligation to do that. This quite patent error ought to lead to some suspicion of the whole theory on which these applications are drawn—the theory that Congress and the desired "convention" can be very narrowly confined in function, and that their work can be done for them in advance by the state legislatures.

other sort of convention. It is not for Congress to guess whether a state which asks for the one kind of "convention" wants the other as a second choice. Altogether different political considerations might govern.

On the whole, then, no member of Congress could be held to have disregarded a conscientious obligation if he took the view that the "application" quoted above, even if sponsored by two-thirds of the state legislatures, did not make obligatory a convention call. Indeed, he might conclude that Congress would be exceeding its powers in calling such a "convention," the condition to such a call, on a fair construction of article V, not having been met.

*If Congress is Obligated to Call a Convention, What Sort Must it Call?*

The short fact here is that neither text nor history give any real help. When and if the article V condition is met, Congress "shall call a Convention . . ."; that is all we know. Fortunately, that is all we need to know, for the "necessary and proper" clause,<sup>16</sup> and the common sense of *McCulloch v. Maryland*,<sup>17</sup> give all the constitutional guidance required. Since Congress is to call the convention, and since no specifications are given, and since no convention can be called without specifications of constituency, mode of election, mandate, majority necessary to "propose," and so on, then Congress obviously may and must specify on these and other necessary matters as its wisdom guides it. (It may be noted that continuing control by Congress of the whole amendment process must have been contemplated, for Congress is given, under article V, the option between modes of ratification, no matter what the method of proposal.)

If this is accepted, then no Senator or Representative is bound to vote for a convention call which in its form fails to safeguard what he believes to be vital national interests. Specifically, insistence would be thoroughly justified on an allocation of voting power by population rather than by states, on the election at large of a state's delegation or its choice in fairly apportioned districts, and on federal conduct of the election of delegates, to prevent racial and other discrimination. Provision for a "two-thirds" rule might well be thought wise, in order to ensure the same kind of consensus on this branch of article V as on the other. Since the adoption of this proposed amendment would make easily possible the future amendment of the Constitution without anything like popular consent, it is thoroughly reasonable for Congress to insist that this surrender be fully voluntary for at least this generation, unless (as is not true) some positive constitutional command to the contrary prevents.

It will probably be argued that the voting in any convention must be by states, since the voting in the original Constitutional Convention was by states. On this point, the analogy is not persuasive. The states then were in a position of at least nominal sovereignty, and were considering whether to unite. The result of the Convention would have bound no dissenting state or its people; the same was true of the acceptance of the new Constitution by the requisite nine. All these conditions are now reversed. We are already in an indissoluble

16. U.S. CONST. art. I, § 8.

17. 17 U.S. (4 Wheat.) 316 (1819).



union; there is a whole American people. The question in an amending convention now would be whether innovations, binding on dissenters, were to be offered for ratification. The propriety of a vote by states in the one convention surely cannot settle its rightness in the other.

*Has the President a Part in the Convention Call Process?*

Article I, section 7, clause 3 is as plain as language can be:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States, and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Clearly, this language literally applies to actions of Congress taken under article V.

In *Hollingsworth v. Virginia*,<sup>18</sup> it was contended that the eleventh amendment had not been validly proposed, since the resolution proposing it had not been sent to the President. Against this and other arguments, the Court, in a brief opinion not touching substance, upheld the amendment. In the course of argument, Justice Chase remarked: "The negative of the president applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution."<sup>19</sup>

Since that time, the practice has been not to send amendment proposals to the President. These precedents apply, of course, only to the first method prescribed by article V, since that is the only method that has been used. *Hollingsworth v. Virginia* is inherently weak, as the unreasoned decision must be. It introduces an exception by fiat into the entirely clear language of article I, section 7. But it need not be unfrocked in its own parish, since it is possible that the Court may have had in mind a ground for taking the first alternative of article V out of the veto process; since the congressional proposal must be by two-thirds in each house, it may have been thought that the requirement for overriding the veto was already met. This is not perhaps a very good ground, but the point about it here is that it would not exist at all if Congress, by simple majorities, called a "convention" under article V. Unless some other ground (better than Justice Chase's mere assertion) be stated for holding the contrary, it would seem that such a congressional action would fall as clearly as may be under the terms of article I, section 7, clause 3.

If this is right, then the grounds upon which the President might exercise his veto need be no less than those proper in the case of a Congressman voting on a convention call. If the President believed the structure and mandate of the "convention" significantly wrong, and dangerous to the national well-being, then he would surely be justified in vetoing the Resolution.

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18. 3 U.S. (3 Dall.) 378 (1798).

19. *Id.* at 380 n.a.

## SUMMARY

This proposal for amending article V is dangerous. It is to be hoped that it will be defeated in the state legislatures, but they are, after all, voting for or against increasing their own powers. If "Applications," in the form quoted above, reach Congress in sufficient number to force the issue, there is still authentic constitutional ground on which to stand. It may be that these "applications" call for something not contemplated by the second alternative in article V, and hence need be treated, at most, only as memorials to Congress to propose this amendment, a plea addressed entirely to discretion. It is as certain as any such matter can be that no Congressman or Senator is bound to vote for a convention call, even on impeccably proper application, wherein prudent conditions as to mandate, structure, constituency, voting, proper selection of delegates, and all the rest, are not met. There is no real reason why Presidential veto, on the same grounds, is not proper in this matter.

If all this terrain is fought over, then the American people will surrender this ultimate power into the hands of a minority only if they want to, and if they want to nobody can stop them.

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