

RETURN TO PHILADELPHIA

*BY THOMAS E. BRENNAN

A case for the calling of an amendatory convention under Article V of the Federal Constitution.

I. CALLING FOR RENEWAL

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹

Alexander Hamilton began, as early as 1780, to call for a convention to establish a strong charter for an American nation.² Other voices were heard, urging the same course.³ Still, it took seven years and a disastrous experiment with an impotent and discredited confederacy, before delegates convened in Philadelphia to embark upon the great work.

As we approach the bicentennial of that convention, there is a salutary reawakening of interest in the process of democratic constitution making. Responsible citizens, first timidly and lately bolder, are beginning to wonder aloud about the need for constitutional renewal—to reaffirm fundamental principles too often ignored, and to remedy ancient defects too long endured.⁴

Article V of the Constitution of the United States provides:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on

* Thomas E. Brennan is President of the Thomas M. Cooley Law School and is a former Chief Justice of the Michigan Supreme Court.

1. U.S. CONST. preamble.

2. From headquarters at Liberty Pole, New Jersey, in September of 1780, Hamilton wrote his friend Duane a now famous letter—his first clear exposition of the need for a constitutional convention. Covering seventeen printed pages, the letter is an amazing document from anybody's pen, let alone a man in his early twenties, born outside the continent. It was impossible, wrote Hamilton, to govern through thirteen sovereign states. A want of power in Congress made the government fit neither for man nor peace. "There is only one remedy—to call a convention of all the states."

C. B. BOWEN, *MIRACLE AT PHILADELPHIA* 7 (1968).

3. Although not a member of the New York Legislature, in 1782 he persuaded them to pass a resolution urging a convention. See also, letter from George Washington to James Madison (Nov. 5, 1786) reprinted in 4 *AMERICA: GREAT CRISES IN OUR HISTORY TOLD BY ITS MAKERS* (Americanization Dept., V.F.W. 1925). See also BOWEN *supra* note 2, at 8.

4. W. EDEL, *A CONSTITUTIONAL CONVENTION, THREAT OR CHALLENGE* (1981).

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.⁵

Since 1789, there have been more than 450 communications from the several state legislatures requesting the Congress to call a convention for proposing amendments under Article V.⁶ Most of these have come in the last 20 or 30 years.⁷ Every state in the Union has requested a convention at one time or another.⁸ Texas has made at least 15 separate requests; Illinois-14; Louisiana and Montana-13.⁹ Indeed, 36 states have each made 6 or more requests for a convention to propose amendments to the Federal Constitution.¹⁰ Recently, Alaska became the 31st state to request a convention for proposing an amendment to require a balanced federal budget. If three more states pass similar resolutions, a convention under Article V will, in the view of many, be constitutionally mandated.¹¹

It is the purpose of this paper to explore the need for an amendment of our federal constitution and to advance the proposition that a convention for proposing amendments, as provided for by the framers of Article V, should now be called.

The seriousness and importance of such an undertaking are instantly obvious. The notion is novel, and prudence is always wary of novelty. The topic itself is not new. Indeed, a substantial literature on the subject of constitutional amendment by the convention method is to be found in American libraries,¹² but very little of it espouses the notion of calling a convention.¹³

5. U.S. CONST. art. V.

6. ABA Special Constitutional Convention Study Committee, Amendment of the Constitution by the Convention Method Under Article V (hereinafter cited as ABA Study), app. B, at 59-61 (1974) lists 356 U.S. Constitution Article V applications between 1789 and 1973. J.N. Stasny (unpublished app. available in Thomas M. Cooley Law School Library) lists 76 additional state memorials under U.S. Constitution Article V in the period 1974-1980.

7. Brickfield, *Problems Relating to a Federal Constitutional Convention*, COMM. ON THE JUDICIARY, 85th Cong., 1st Sess. (Comm. Print 1957), app. table 1 at 84-91 lists 191 U.S. Constitution Article V applications between 1787 and 1957.

8. ABA Study, *supra* note 6, at 60-61.

9. *Id.*

10. *Id.*

11. Perry, *Congress Pushes a Balanced-Budget Amendment With Spending Limits to Beat States to the Punch*, Wall St. J., February 26, 1982, at 42 cols. 1-3.

12. See generally, extensive bibliography in ABA Study, *supra* note 6.

13. Tuller, *A Convention To Amend the Constitution—Why Needed—How It May Be Obtained*, 193 N. AM. REV. 369-387 (1911). See also, W. MACDONALD, A NEW CONSTITUTION FOR AMERICA (1921).

This writing supports such a call; contends that it is necessary, desirable, and feasible; invites further writing, debate, and discussion by scholars, lawyers, editorial writers, and public officials; and urges action by state and federal legislators. Few events could have greater positive impact upon the vitality of the American nation than the concurrence of the decade of the 1980's with a vigorous and pervasive national dialogue on the subject of constitutional reform and renewal.¹⁴

Symbolically, the 1980's have been anticipated as the decade of George Orwell's "1984",¹⁵ a time when the marvels of science shall have made obsolete the axioms of human freedom and self government. By and large, the tension between scientific advancement and democracy has not been obvious. The extremes of Orwellian imaginings have not come to pass, nor are they likely. But the appearance of Big Brother in recognizable form is not the only test for the existence of anti-republican forces in society. The sheer enormity of the twentieth century knowledge explosion, the sheer complexity of modern civilization, carry implications for changed relationships between people and the institutions of government.

As more and more things become more and more complicated, they are understood by fewer and fewer people. There was a day when young men bought old cars, tore them apart, and put them back together. Automobiles are now far too sophisticated for the weekend mechanic. Even if the average motorist could figure out how to disassemble an engine these days, he would not have the special tools needed to do the job. A homely example indeed, but the age of specialization is not confined to things mechanical. Lawyers limit their practices to narrow areas of expertise, finding along the way that there are esoteric problems in every field sufficient to hold the attention of the most facile minds. The medical profession has spawned dozens of specialties, as have dentistry, engineering and the rest. The sale of expert counsel, advice and evaluation, in every conceivable facet of every conceivable field, has become commonplace.

As experts proliferate, the rest of us leave to them more and more of those things that are outside of our own ken. Young people

14. Much has been heard of late as the sanctity of the constitution, and there has been talk of the "Ark of the Covenant." If those who help to mold public opinion shall ever convince the people that the venerable charter is sacred, and that its holy repose should not be disturbed, they will have unwittingly accomplished a mischievous result. It is only in so far as a constitution is alive that it has force, and there is probably no one thing that would do more to stimulate good citizenship than a discussion of that instrument from end to end with a view to determining wherein it should be amended.

Johnstone, *An Eighteenth Century Constitution*, 71 ILL. L. REV. 265, 282 (1912).

15. G. ORWELL, *1984* (1949).

often grow to maturity without acquiring the simplest skills once thought essential for every householder. In an urban society, only the smallest percentage of the population understands the basic process of growing food or preparing it for human consumption. And what citizen could weave the cloth to make a garment for himself? Indeed, the mysteries of polyester are beyond the comprehension of most of those who wear today's synthetic fabrics. Add in the computer, with its incontestable pronouncements, the television with its ubiquitous certainty, and it is little wonder that human beings in the 1980's respond with lemming-like acceptance to whatever is presented as the voice of authority.

To suggest in such times that the average man and woman are capable of understanding public issues and participating in the process of self government is to contest an axiom of our generation: that government is vast, complex, and omnipotent. We see government too big to control, too complicated to be understood, too self-perpetuating to be changed. N.A.S.A. put a man on the moon. Most people had no idea of how it was done. We marveled at the televised pictures of astronauts walking on that eerie dust bowl in space. We accepted what we did not understand, and it gave government a monumental dose of credibility. How often we hear the question, "If we can put a man on the moon, why can't we . . .?" The question can be finished, and has been finished in many ways. Feed the hungry. Whip inflation. Protect the environment. The syllogism seems irresistible. If government can put a man on the moon, then government can do anything. If government can do anything, why does it not do all those things which appear needed and desirable?

Pragmatism is the dominant public mood, if not the orthodox philosophy of our day. The public is less concerned with who does a thing or how it is done than with the result accomplished. A society primarily focused upon "getting the job done", places tremendous pressures on its legal system, and especially upon its constitutional structure.¹⁶ A constitution is, after all, essentially directed toward prescribing means rather than achieving ends. The Constitution answers the question, "How are the people to be governed?", and not, "What is the government expected to accomplish?"

Charles Evans Hughes said in 1907, that the Constitution is

16. Whether imposed by unelected judges or by elected officials conscientious and daring enough to defy popular will in order to do what they believe the constitution requires, choices to ignore the majority's inclinations in the name of a higher source of law invariably raise questions of legitimacy in a nation that traces power to the people's will.

L. H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 1-7, at 9 (1978).

“what the Supreme Court says it is.”¹⁷ To the average American, that proposition is accepted with a shrug of the shoulder. Constitutional law is regarded as a science, much like astronomy, physics, or medicine. Leave it to the experts. Average citizens assume that learned judges do not just make up constitutional law as they go along. With multitudes of law clerks and mountains of law books they must be looking for answers which are written down, answers which are capable of being learned and applied.

Of course, it is not altogether so, as anyone who has been on the inside well knows. Judicial power is not unlike any other power. It tends to corrupt. It holds no special internal mechanism for restraint. Our forefathers had a healthy respect for power.¹⁸ Human power. Political power. They knew that people tend to arrogate power to themselves. They understood that the tendency was the more pernicious because usually followed in good faith. People do not consciously seek power to do evil, but to do good—at least to do good according to their own view of it. Those who wrote the Constitution realized that machinery was needed to place internal tensions, checks, and balances, upon the exercise of political power.¹⁹

Article V was a compromise between the partisans of state government and those who favored a stronger central government.²⁰ It created two ways to amend the Constitution. One gave Congress the power to propose amendments, and the other left the initiative in the states to ask for an amendatory convention.²¹

This work deals with that convention. It looks at the convention as a potential reality. It accepts as a given that there is such a thing as an Amendatory Convention under Article V of the United States Constitution. Although no such convention has yet been

17. Against all such reminders stands Charles Evans Hughes's blunt assertion of 1907, “The Constitution is what the Judges say it is.” “The Supreme Court,” Professor Frankfurter used to tell his law students, “is the Constitution.”

MASON & BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 1 (1959).

18. *THE FEDERALIST*, Editor's introduction, at 29 (Wright ed. 1974).

19. To what expedient, then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied; by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

THE FEDERALIST, No. 51, at 355 (J. Madison) (Wright ed. 1974).

20. Article V, like numerous other constitutional provisions, is a result of compromise . . . One faction did not trust . . . the states . . . the other faction did not trust the national legislature.

Voegler, *Amending the Constitution by the Article V Convention Method*, 55 N.D.L. Rev. 355, 365-366 (1979).

21. Ervin, *Proposed Legislation to Implement the Convention Method of Amending the Constitution*, 66 MICH. L. REV. 875 (1968).

called in the nearly 200 year history of the Nation, still the authorization for the convention is as old, as certain, and as real as the authorization for the existence of Congress or the Supreme Court. This work proceeds upon the assumption that Article V is to be taken seriously, that it is not a joke, nor an illusion.²² In fact, the convention envisioned by Article V is becoming current news. Recently debated on television, and featured in news magazines, the convention is no longer seen as a mere folk tale of American history, a legend or an anachronism. It is not to be dismissed as the literary heritage of some quaint and by-gone political compromise, no longer relevant or valid in our day.²³

It may seem strange that it is necessary to assert the reality and seriousness of an Article of the Constitution. Unfortunately, the snicker and the sneer are powerful weapons of polemics. A symposium at the University of Michigan in 1966 produced this interesting approach to the subject of an amendatory convention:

In the American political circus there are apt to be going on at any given time a number of side shows pretty much unrelated to the action under the Big Top.

The truth of the matter is that I find it hard to take these petitions seriously.²⁴

It is conceded at the outset, of course, that the burden is on the declarer to demonstrate the need for an amendatory convention. James Madison emphasized that conventions ought not to be called for transient reasons:

a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions. Notwithstanding the success which has attended the revisions of our established forms of government, . . . it must be confessed that the experiments are of too ticklish a nature to be unnecessarily multiplied.²⁵

Madison's view echoed the words of the Declaration of Independence: "mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed."²⁶

Few citizens would favor the calling of a federal amendatory convention as a mere civic exercise or a formal observance of the

22. Kauper, *The Alternative Amendment Process: Some Observations*, 66 MICH. L. REV. 903, 904 (1968).

23. Perry, *supra* note 11.

24. McWesky, *Along the Midway: Some Thoughts on Democratic Constitution Amending*, 66 MICH. L. REV. 1001 (1968).

25. THE FEDERALIST No. 49, at 348-369 (J. Madison) (Wright ed. 1974).

26. The Declaration of Independence (U.S. 1776).

constitutional bicentennial. A ceremonial convention or a dramatized reenactment might stimulate patriotism. But the calling of a real convention under Article V, by act of Congress, pursuant to the application of the state legislatures is far too serious a business to be undertaken as a commemorative ritual. It may be that 200 years is a long time to operate a government without structural modernization; but passage of time, unaccompanied by discovered defects in the operation of the system would not warrant so solemn an enterprise.

The discussion which follows addresses itself to that burden of proof. The necessity of an Article V convention will be demonstrated in the context of 20th Century American problems, and politics. The convention is viewed as an extraordinary tool, having extraordinary powers to address the extraordinary needs of these extraordinary times. Starting with that perspective, this work will proceed to develop two main themes:

First, that an amendatory convention should be called to reestablish the integrity and primacy of the written constitution as the charter of our national government, and to preserve the rights of the American people as defined and guaranteed in the plain written words of the Constitution, against encroachment by officials of the national government; and,

Second, that an amendatory convention should be called as a means of reasserting the sovereignty of the people of the several states of the American Union, to reestablish the federal system of government, and to ensure the inviolability of the institution of state government, and its proper jurisdiction in matters of state and local concern, against encroachment by officials of the national government.

Within these two main themes, there will no doubt be heard certain recurring melodies, having application to both. These will emerge as arguments favoring popular constitution-making over elitist constitution-making; a consensual constitution rather than one based upon acquiescence; federalism instead of centralism; and formal deliberated amendment in place of evolutionary re-interpretation.

Finally, it is intended that both the themes and the melodies will be marked by the rhythm of one discernible drumbeat; the need for modernization of the institutions of government; the need to propose thoughtful, carefully drafted amendments to deal with those areas of our national life in which the present structures have proved inadequate; have been ignored as out of date or which threaten to paralyze our national government tomorrow.

It will not be the purpose here to attempt to justify the calling of an amendatory convention on the basis of any single proposal

for amendment of the Constitution, or even on the basis of several such proposals. Indeed, the notion that there must be a national consensus upon the need for a specific amendment to the constitution as a pre-condition justifying the calling of a convention is utterly without foundation in logic or history. Logically, if there is consensus on a particular proposal for amendment, that proposal can be put to the states by the Congress under Article V. Historically, this path has been taken at least 32 times.²⁷ A search for consensus on specific amendments has historically retarded efforts to call an amendatory convention. Indeed, narrowing the focus of debate to the pros and cons of a specific proposal is a ploy which distracts from the convention issue.

It is the thesis of the present work that the convention itself is the issue. That there is an ample agenda for a convention is borne out by the hundreds of state applications which have been delivered to the Congress throughout the history of the Republic, by the thousands of proposals for amendment of the federal constitution which have been, from the very beginning, and continue to be, introduced in the United States Congress, by the dire condition of our national economy, by the malaise within our body politic,²⁸ by the common opinion of our citizenry that something must be done to make our national institutions of government more effective and responsive to the will of the People,²⁹ and by the obvious anachronisms which abound in the nearly two hundred year old charter which was written in Philadelphia.

The convention of 1787 addressed itself to the needs of an agrarian society of three million people, strung out along the Atlantic seaboard.³⁰ The document it presented to the 13 original states was never intended or expected to remain unaltered through all ages.

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility, which would render the constitution too mutable; and that extreme difficulty, which might perpet-

27. There were 32 proposed amendments submitted pursuant to U.S. Constitution Article V prior to 1972.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 92-82, 92nd Cong., 2nd Sess. 856 (1972).

28. Editorial Research Rep. 720 (1980).

29. Sofaer, *The Presidency, War and Foreign Affairs: Practices Under the Framers*, 40 LAW AND CONTEMP. PROB. 12 (1976).

30. The population in 1790 was estimated at 3,929,000 in Table Series A6-8, ANNUAL POPULATION ESTIMATES FOR THE UNITED STATES 1790-1970. H.R. DOC. 93-78 PART 1, 93RD CONG., 1ST SESS., AT 8.

uate its discovered faults.³¹

Madison's statement foretold the Yin and Yang³² of constitution-making which have haunted American political and legal history. We have a constitution which seems nearly impossible to amend, but which many argue is changed at every term of the United States Supreme Court. By its plain language, the constitution requires the ratification of the people of three-fourths of the states to be amended, but in the view of some influential scholars,³³ it can be altered by a single vote in a court split five to four.³⁴

There are those who hold that the process of deliberative constitution-amending cannot be set in motion without the certifiably knowledgeable concurrence³⁵ of the legislatures of two-thirds of the several states, yet who have no difficulty with a process of constitution-changing which can be instigated by a single private litigant. Runaway conventions are feared by some who embrace runaway courts and congresses.³⁶ The titles of many law review articles on the subject reflect a level of hand-wringing which does little credit to a nation supposedly steeped in the democratic tradition.³⁷ It begs the question to enkindle fears of confrontation and constitutional crisis. Every exercise of political power is a confrontation. Every election, every appointment, every recall, referendum, or petition drive involves the active efforts of some people to bring about objectives which are opposed by others.

It would be foolhardy to think that a convention might be

31. THE FEDERALIST No. 43, at 315 (J. Madison) (Wright ed. 1974).

32. The phrase relating to Yin and Yang originated in the neo confucianism school of Tson-Yan, 400-200 B.C. D. IUNES, DICTIONARY OF PHILOSOPHY 341 (1960).

33. The very persistence of such evocative, rather than sharply definitive, phrases, attests the strength of our natural law inheritance as authority for legal change. A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).

34. Howard, *Is Our Constitution Adequate for Present Day Needs?*, 23 WASH. U.L. Q. 47, 78-79 (1937).

35. Before summoning a convention, Congress ought to be confident that those who applied for the convention did so with a proper understanding of the convention's authority. See also, Gunther, *Constitutional Roulette: The Dimensions of the Risk*, in MOORE & PENNER, THE CONSTITUTION AND THE BUDGET 5 (1980); Dillenger, *The Recurring Question of the Limited Constitutional Convention*, 88 YALE L. J. 1623, 1637 (1979).

36. The first-named and hitherto always used method of amendment-passage by two-thirds of each House of Congress and ratification by three-fourths of the States-would seem prima facie adequate to every real need, and entirely likely to be responsive to that clearly predominant popular will which ought to exist before a constitution be amended. Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 200-201. See also, letter from Professor Charles L. Black to Senator Edward Kennedy (D. Mass.) reprinted in 32 OKLA. L. REV. 626 (1979).

37. Gunther, *supra* note 35. See also, Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957; Comment, *Amendment by Convention: Our Next Constitutional Crisis*, 53 N.C.L. REV. 491 (1974); Long, *Tinkering With The Constitution*, 24 YALE L. J. 573 (1914); Gunther, *Constitutional Brinkmanship, Stumbling Toward a Convention*, 65 A.B.A.J. 1046 (1979).

called by unanimous consent of the American people. Indeed, it would be a dangerous thing to proceed to so important a work without the benign restraint of a vigorous devil's advocate. But certainly of naysayers there have been many,³⁸ and there will be many more. In spite of them, demands for a convention for various reasons have multiplied in recent years.³⁹

A constitutional convention is the last bastion of public sovereignty. It is perhaps the sole remaining device by which the people of the states can act together as the people of the United States; not as citizens or subjects of a supreme national government, but as the sovereign ultimate political authority from which springs the consent of the governed and the constitutional legitimacy of all public institutions and officers.⁴⁰

The novelty of the notion of a convention to propose amendments to the Federal Constitution will not deter open-minded people from fair consideration of its merits. But there are many whose oxen might be gored if a convention is called. Members of Congress, career civil servants employed in the various departments of the Executive branch of government, members of the Federal judiciary and those who depend upon such officers for their livelihood in one way or another, may well see an amendatory convention as a threat to their personal financial security, and political power. To them, the convention is an unknown factor; a new thing, apart from the establishment, and immune from accustomed sources of control and influence.⁴¹

The convention's power to examine the workings of the federal government afresh, and from the outside, coupled with the convention's acknowledged power to propose basic structural reforms by constitutional amendment, may discompose the federal bureaucracy far more than sunset legislation and zero based budgeting techniques. An Article V convention may be regarded as the fourth branch of government.⁴² A convention can do something. It has power. It can affect the way things happen by proposing structural alterations in the government of the United States, which would never be proposed through ordinary political channels.

The creation of a new instrument of political power will surely

38. *Id.*

39. *See*, table at 60-61, ABA Study, *supra* note 6.

40. Our form of government obviously requires that the will of the people of the United States be expressed through their state organizations.

Smith, *Shall we Make Our Constitution More Flexible?*, 194 N. AM. REV. 657, 664 (1911).

41. *Constitutional Convention Procedures, Hearings on S.3,S.520 and S.1710 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 96th Cong., 1st Sess. 444 (1979) (statement of Kenneth Kofmehl).

42. *Id.*

be opposed by those whose present political power is thereby threatened or diminished.⁴³ But it will also be opposed by those who, although holding little or no political power themselves, are conscious of exercising substantial influence upon those who do wield the authority of the federal government.⁴⁴ Lobbyists and special interest groups come immediately to mind. The vast community of Washington hangers-on who make their way by exploiting associations within government, are sure to be suspicious of any new beginnings made at the constitutional level. Another powerful group which opposes the convention comes from certain of the nation's universities. These law professors, recognized as constitutional scholars, have a stake in the constitutional status quo. They are the oracles of what is. Their writings influence what happens. Their students slip behind the velvet curtain and participate in judicial decision-making.⁴⁵

Much of what has been written on the subject of Article V has been protecting the turf of this professoriate. That turf includes the entire spectrum of judicial pronouncements, and the literature of academic analysis and criticism which have come to be known collectively as constitutional law. And, of course, the spectre of an Article V convention cannot but be regarded with a jaundiced eye by the federal judiciary itself. Even the most cautious strict constructionists among the members of the United States Supreme Court will prefer to declare the limitations of their own authority rather than have such limits set by an outside force.⁴⁶

It is only logical that those who occupy the hallowed chairs behind that august bench would be loyal to the institution of the Supreme Court. They are unlikely to concede that any other agency of constitution-making or constitution-declaring can be quite as legitimate or as attuned to the best long-range interests of the nation as the Court itself. Whatever their reservations about past Court decisions, they are certain to be confident of their own abilities and comfortable with the rectitude of their own purposes. So the Supreme Court and its supporters can be expected to oppose an Article V convention. But the role of the Supreme Court of the United States, as policy maker or protector of the system; as construer of constitutional language or expounder of fundamental values; is precisely the kind of structural, constitutional issue that

43. The new alignment of liberals and conservatives in opposition to convention regulations reflects a growing fear of the convention system as such.

W. EDEL, *supra* note 4, at 121.

44. Lewis, *Foreward to A. M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS*, at viii (1978).

45. WOODWARD & ARMSTRONG, *THE BROTHERS* (1979).

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) per Marshall C.J.

needs to be addressed by a convention chosen for proposing constitutional amendments.

If the responses of the legislative and judicial branches are fairly predictable, assessing the likely reaction of the President to the idea of an Article V convention is not so easy a task. Whether any particular President would support the notion would perhaps depend more on prevailing political winds than on any institutional considerations.⁴⁷ It is true that as the most concentrated seat of power, the White House may be expected to be chary of any new arm of public sovereignty. The possibility that some diminution of executive prerogative might be proposed is real. Still, the positions taken by any American President on current, vital public issues are heavily influenced by the perceived immediate effects. Constitutional amendments take a long time to be developed, to be publicized, to become the object of general consensus. It is unlikely that any particular President is apt to see the convention as a threat to his own administration. Indeed, there is always the possibility that a President might conclude that the calling of a convention during his term of office would be an historic event of great import, to be recorded as a significant accomplishment of his presidency.

Whatever their tendencies, of course, in the long run, professors, Presidents, senators, congressmen and judges will all be part of that informed American public which must come to understand, appreciate, and accept the establishment of an Article V amendatory convention before it will ever really come to pass. When the great mass of the American people are convinced that a convention ought to be called; that it will serve their interests; that constitutional reform and renewal are inevitable in a changing world; that review, re-establishment, and modernization of the institutions of government are among the highest, non-delegable duties of a free people, then the calling of the convention will be widely accepted, even by those who may have opposed it for reasons of self interest in the beginning. That acceptance will begin to come about when there is a substantial public focus upon the convention as an institution.

After all, the convention is its own best argument.

The fact that a convention is, by definition, an exercise of

47. There was a movement afoot to call a convention shortly before the Civil War. Abraham Lincoln supported it, saying: I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others not especially chosen for the purpose, and which might not be such as they would wish either to accept or refuse.

Reprinted in D.N. LOTT, *THE PRESIDENTS SPEAK* 122 (1969).

public sovereignty makes it an intrinsically desirable thing. The fact that a convention is a solemn deliberative body, concerned—at the constitutional level—at the structural level—with all of the vital issues of today and the critical concerns of tomorrow, makes it per se useful, and worthy of support. The fact that a convention is an extraordinary agency, established to take the long view of public affairs should attract to its benches the most able of our citizens.⁴⁸ No one should doubt that as the United States of America looks to a future endangered by nuclear war, shocked by international terrorism, worried by limited resources, amazed by exploding technology, baffled by moral dilemmas and still agonized by human suffering, the counsel and the service of the best people are needed.

The great mass of the American people should see that their constitution gives them a right to an amendatory convention. It is an instrument designed to curb runaway bureaucracy; it is an instrument capable of preventing abuses of power; it is an instrument especially suited to define the proper functions of federal and state governments, and of the President, the Courts, and the Congress.

Whenever the subject of an Article V amendatory convention is raised, the natural tendency is to ask why such a convocation is necessary. What is its purpose? Why do we need it? Such questions cannot, of course, be answered completely in a few words. But it is the function of a preamble to state briefly the purposes of a constitution, and surely the purpose of an amendatory convention must be related to the purposes of the Constitution itself. The constitution is amended to make it work better; to make it fulfill its purpose more nearly, more efficiently, more perfectly.

The Constitution of 1787 was written to accomplish six broad purposes. They are the six basic priorities of the national government; Union, Justice, Tranquility, Defense, Welfare, and Liberty.⁴⁹ These are the great objects of the Constitution of the United States. Equal in importance and equally essential to the definition of national purpose, they are nonetheless listed in an order pregnant with significance.

The first priority is Union. Unless the states be united, there can be no United States. Whatever the other priorities of any government may be, they cannot be the priorities of the government of the United States, unless there is a uniting of the states in the

48. [S]trongest and ablest men in the nation should and probably will be selected by their respective states as delegates to the convention.

Tuller, *supra* note 13 at 386.

49. Yates, *Letters of Brutus, 1788, reprinted in MASON & BEANEY, supra* note 17, at 279.

first instance.

It is often said⁵⁰ that the indissolubility of the United States was determined on the battlefields of the Civil War. It is a dramatic assertion, and one which appears supported by history. Still, it may better be said that the Civil War only proved that the North won the last battle, and the Union is neither more nor less indissoluble for want of a successful dissolution in the past. North Carolina, Rhode Island, and Texas all existed as independent states at one time in their history.⁵¹ Logic and experience tell us that human institutions are not eternal. What man has joined together, man can put asunder. If the Union of the American States is indissoluble, it must be so in point of truth, by reason of intrinsic reality, unrelated to questions of historical event or happenstance.

Abraham Lincoln, arguing like the canny country lawyer he was, concluded that the Union of the United States was indissoluble by means of a kind of syllogism which would have brought cheers from an Illinois Jury.⁵² The Articles of Confederation, said Lincoln,⁵³ call for a perpetual Union. The Constitution took the place of the Articles of Confederation. The Constitution was established in order "to form a more perfect Union." If the Union of the United States was more perfect than the perpetual Union of the Confederacy, Lincoln argued, it simply had to be indestructible.⁵⁴

The truth is, that the Union of the American States is permanent for a much simpler reason. It is permanent by definition. It is permanent because the Constitution by which the states are bound together is itself a permanent charter, containing, within itself the mode of its own amendment. Thus the Union is indissoluble because the discontinuance of the Union destroys the nation. What would emerge from any severance is not the United States of America, but some other nation. Just as self preservation is the first order of all life, so the existence and continuation of the organized state is the first priority of every government.

50. C.J. Chase in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

51. T. M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 8-9 (1868 and photo. reprint 1972).

52. A. Lincoln, *First Inaugural Address*, reprinted in D.N. LOTT, *THE PRESIDENTS SPEAK* 119 (1969).

53. *Id.*

54. [A]ll the then thirteen states expressly plighted and engaged that it should be perpetual, by the Articles of Confederation . . . one of the declared objects for ordaining and establishing the Constitution was to "form a more perfect Union". But if destruction of the Union by one or by a part only of the states be lawfully possible, the Union is less perfect than before, the Constitution, having lost the vital element of perpetuity.

Id. at 119 (1969).

After Unity, the founding fathers specified Justice as the second purpose of the Constitution. Justice cannot precede Unity since there can be no justice in the civil sense unless there is civil authority. There can be government without justice, but there can be no justice without government. The former is the tyranny of the King, the latter is the tyranny of the mob.⁵⁵

The third object of the Constitution is domestic Tranquility. Tranquility follows from Justice, and where justice is not established, domestic peace and order are threatened. All men thirst for justice, by their nature, and given sufficient provocation, they rebel against rampant injustice. Quiet streets and an orderly population maintained by martial law, without justice, and with only the force of arms standing against violent uprising are hardly the hallmarks of domestic tranquility. But given national unity and the establishment of justice, our forebearers regarded safe and peaceful homes for themselves and their families as the next order of business.

Some may dispute that either justice or tranquility merit higher priority than defense. Yet the preamble to the Constitution places provision for the common defense in the fourth priority, and a careful consideration of the implications of that ordination reveals that it is right. Injustice has no proper season in the American tradition. The government must be just, even in time of war. A nation whose manhood perceives it to be in the wrong—supporting unjust causes, treating its citizens despotically—is a nation hard pressed to defend itself. Similarly, the maintenance of domestic peace precedes the defense of a nation from its external enemies. A government unable to keep the peace at home cannot wage war. It is a priority manifest to rulers, and history bears out that armies are brought home when domestic tranquility is interrupted.

Given a unified and just society, peaceful at home, and secure from its enemies, the next great object of government is to promote the general welfare.

It should require little discourse to show that the general welfare can never be advanced at the expense of justice, at the sacrifice of internal peace nor at the cost of failure to defend the common inheritance. Yet this fifth priority permeates the conscious efforts of so many people in government and so occupies the news of the day and the speculations of the future, that it often seems to be the primary function of the federal establishment. Still, the economy, jobs, housing, food, transportation, are, in the day to day affairs of ordinary people, matters of proximate concern, and their proper position in the priorities of the government of the United States requires general understanding and broad consensus, if they

55. BERGER, *GOVERNMENT BY JUDICIARY* 289 (1977).

are not to be perceived disproportionately.

Finally, there is Liberty. Liberty, the adrenalin which quickened the American revolution and led to the creation of the American nation. Liberty, the treasured birthright of everyone who answers to the name American. Liberty, unalienable and fundamental as life itself, is expressed as the residual benefaction of the preamble to the Constitution. If it be the final priority, it is so because our forefathers never fought for the liberty of unfettered license, nor intended to establish the nation upon a purist creed of classical liberalism in which the common good was to be served only as the by-product of attention to self interest.⁵⁶ In a unified, just, peaceful, secure, prospering nation, that liberty which is a blessing and which merits preservation for and transmission to posterity, is a liberty inextricably entwined with patriotism, civic duty, compassion, and commitment. Liberty under law, it is so commonly said,⁵⁷ is the only liberty worth having. And liberty without responsible citizenship, or regarded as paramount to the demands of responsible citizenship, is illusory.

The reconsideration of these six national purposes; the rediscovery of them; a vigorous public discourse, and widespread private reflection upon them are urgently needed if the nation is to remain conscious of its missions and keep faith with its future. A people reawakened to their purposes can approach the task of renewing and reevaluating their institutions with confidence.

A renewed and reiterated consensus on the priorities of the federal government ought to precede every great undertaking of public legislation. But this kind of civic fundamentalism mixes poorly with the congressional function. When there is a clamoring in the lobby for air bags and tax breaks, and crop subsidies, there is little opportunity for resort to first principles.⁵⁸ The convention is the place for getting the big picture. It is the place of retreat, in which the right people can devote proper attention to assessing the ravages of time, dusting off old keepsakes, preparing purposefully

56. THE FEDERALIST No. 76, at 483-484 (A. Hamilton) (Wright ed. 1974).

57. Conflict between the demands of ordered society and the desires and aspirations of the individual is the common theme of life's development. We find it in the family, where first, the child is disciplined to accommodate himself to the needs of living with others, and then, as the years go by, he begins the painful process of achieving for himself relative freedom of action and a separate identity. The same is true in any organized society. The achievement of liberty is man's indispensable condition of living, yet liberty cannot exist unless it is restrained and restricted. The instrument of balancing these two conflicting factors is the law.

Abe Fortas, *The Limits of Civil Disobedience*, N.Y. Times, May 12, 1968 (Magazine), at 92.

58. The convention has no succession. The delegates are reasonably independent of such influences and considerations which do, more or less, affect members of a legislative body.

Needham, *Changing the Fundamental Law*, 69 U. PA. L. R. 223, 235 (1921).

for the future.

The convention will not come about by the sterile operation of Article V, with Congress stiffly acknowledging the formal applications of 34 state legislatures. The convention as an institution will culminate a popular convention movement. That movement will bring together a great many diverse interests and view points. Citizens who have heretofore sought unsuccessfully to invoke Article V's convention procedure as a means of achieving some specific amendment will come to realize that their objectives can be served by making common cause with others similarly frustrated.

A generous disposition toward the objectives of others may be nurtured by the confidence that every proposed amendment must gain the approval of the convention, and thereafter muster ratification in three-fourths of the states. More importantly, as proponents of various amendments come together, they may discover that their campaigns have been directed toward similar ends; that certain fundamental, structural reforms lie at the base of apparently disparate public grievances; and that a forum for discussing, debating, and drafting proposed constitutional amendments can do what no unitary political thrust can achieve.⁵⁹

But the leadership for that consolidated convention movement will not come from within the federal governmental establishment. The impetus for the Convention of 1787 came from those who favored a stronger national government, and who assumed the title Federalists to emphasize their desire for federation as opposed to mere alliance among the states as the basis of our national union; the impetus for the Convention of 1987 will come from those who favor strengthening state and local government, and who would describe themselves as Federalists to emphasize their desire for federation as opposed to total centralization as the operative principle of American government.

The pendulum that swings endlessly in public affairs has swung to its limit, overreaching the objectives intended by Madison, Hamilton, and Washington. It is time for a downswing, redirected to first principles.

Redirection takes new leadership. New points of view must be expressed, new voices heard. The logical source for that new leadership, the platform from which those new voices can speak, is the institution of state government.⁶⁰ There are presently employed in the fifty capitals of the states of the American Union, many capable, well informed, well grounded public servants, both elected and

59. Dillenger, *supra* note 35, at 1633.

60. R. Leach, *A Quiet Revolution*, THE BOOK OF THE STATES, 1976-1977 at 21-27 (1976).

appointed. In recent years state officials have demonstrated a capacity for innovation and reform, which invites emulation at the Federal level.⁶¹

Beyond them, and ready to answer their call, lies a veritable army of leaders. Doctors, scientists, householders, lawyers, businessmen, teachers, editors, labor leaders, shopkeepers, tradesmen, and farmers; people who are active and retired, young and old, liberal and conservative; people who are oriented to their own states and local communities, who are willing and able to define the goals and pursue the purposes of state and local governments in terms of their own economic well-being and security, and to make the states and their municipal components equal to the task of regulating and encouraging the business, industry and commerce of their residents; assuming only that they are not frustrated in doing so by a cumbersome, monolithic, well intended but helpless national bureaucracy.

These state-centered citizens have only to see their mutual advantage in making common cause, and the convention will arise as the agency of their self-help. The alternative amendment process of Article V was intended to be their prerogative, to be asserted as the need should appear. That need can be demonstrated. It is a need to rescue a constitution obscured by jargon, twisted by misuse, and rendered moribund by exaggerated reverence for symbols and uncritical repetition of slogans.

II. ON THE NATURE OF THE CONSTITUTION

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land. . . ."⁶²

With characteristic thoroughness, Thomas M. Cooley, author, teacher, scholar, lawyer, and judge, begins his *Treatise on the Constitutional Limitations* by reminding the reader of a few classic definitions:

A state is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength. The terms *nation* and *state* are frequently employed, both in the law of nations and in common parlance, as importing the same thing; but the term *nation* is more strictly synonymous with *people*, and while a single state may embrace different nations or peoples, a single nation will be sometimes

61. *Id.* at 25-27.

62. U.S. CONST. art. IV, 2.

so divided as to constitute several states.

In American constitutional law, the word state is applied to the several members of the American Union, while the word nation is applied to the whole body of the people embraced within the jurisdiction of the Federal government.

Sovereignty, as applied to states, imports the supreme, absolute, uncontrollable power by which any state is governed.⁶³

Judge Cooley points out that in the American constitutional scheme of things, there is a division of the powers of sovereignty between the national and state governments by subjects, with the national government having supreme power over certain matters throughout all of the states, and states having complete power, within their respective territories over other subjects.⁶⁴

He follows with this general definition of a constitution:

A constitution is sometimes defined as the fundamental law of a state, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.⁶⁵

Finally, Cooley describes a written constitution, as that term is understood in our country:

In American constitutional law the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, until it shall be changed by the authority which established it, and in opposition to which any act or rule of any department or officer of the government, or even of the people themselves, will be altogether void.⁶⁶

In the *political sense*, the Constitution is the charter of our government. It is that contract by which the people agree to be bound by the lawful actions of those who are selected to exercise civil authority in accordance with its terms.⁶⁷

63. COOLEY, *supra* note 51, at 1.

64. *Id.* at 2.

65. *Id.* at 3.

66. *Id.*

67. As the people are the only legitimate fountain of power and it is from them that the constitutional charter, under which the several branches of government hold their power is derived. . . .

THE FEDERALIST No. 49, at 348 (J. Madison) (Wright ed. 1974).

The Declaration of Independence, promulgated on July 4, 1776 expresses the American political tradition:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. . . .⁶⁸

A written constitution is the formal expression of the consent of the governed. It is the solemn act of the people by which a government is called into being, and which renders government legitimate and stable as a matter of practical politics.⁶⁹

The reality of this political definition of the Constitution is better appreciated when our Constitution is considered in the *archaeological sense*.

The original Constitution of the United States, along with the Declaration of Independence and the Bill of Rights, is kept in a specially designed exhibit case and vault in the Exhibition Hall of the National Archives Building in Washington, D.C. Two pages of the Constitution are on display when the Hall is open to visitors; every day of the year except Christmas and New Year's Day. The other pages are kept in the vault except on September 17, when all four pages are brought out in celebration of Constitution Day.⁷⁰

To protect the documents as much as possible, each of the leaves of parchment on which they are written is kept in a separate sealed case of Thermopane glass and bronze containing only the inert gas, helium, and a carefully measured amount of water vapor. Dust, moisture, and mold; as well as free oxygen, sulphur, and other contaminants in the air are, by this means, effectively excluded. The danger of abrasion, which might result from handling or accident, is virtually eliminated.

To shield the documents from ultraviolet rays, special filters of laminated glass made with a yellow cellulose acetate inner layer have been installed in the display cases and over the spotlights illuminating them.

Beneath the display cases of the great documents, a fireproof, bombproof vault has been constructed to house these "charters of freedom" when they are not on display and in times of special dan-

68. The Declaration of Independence (U.S. 1776).

69. Legitimacy deals with a very practical fact of politics: a stable and enduring government rests only upon the acceptance, if not the active consent, of most of the people who live under it.

J. W. HURST, *THE GROWTH OF AMERICAN LAW* 201 (1950).

70. Information concerning the national archives has been supplied through correspondence with the office of James B. Rhoads, Archivist of the United States.

ger. This vault, which lies about 20 feet below the floor of the Exhibition Hall, is constructed of steel and reinforced concrete with floor, walls, and lid each 15 inches thick. Inside, the vault measures 5 feet by 7 feet 6 inches, and is 6 feet 2 inches deep.

An electrically operated mechanism lowers the encased documents and their supports into the vault in about one minute. The same mechanism closes the massive lid after the documents have been lowered. A stand-by mechanism will lower the documents and close the vault in case of power failure. The vault is located approximately in the center of the building. It is therefore shielded on one side by four solid masonry walls and by three such walls on each of the other sides. Above it are five floors and a roof of reinforced concrete, with a combined thickness of 46 inches of concrete. When the documents are on exhibit, they are always under guard and no photographs may be taken in the Exhibition Hall with flash bulbs.

In the *archaeological sense*, then, our Constitution is a most hallowed piece of paper, reflecting its political significance as a compact between the people and their government.

But if the Constitution is both a political compact and a revered relic, it may also be seen as a significant written composition. In this *literary sense*, the Constitution is largely the handiwork of Gouverneur Morris of Pennsylvania, who wrote much of the final draft⁷¹ in consultation with William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Rufus King of Massachusetts and James Madison of Virginia. These five were chosen as a Committee on Style and Arrangement by ballot of the Constitutional Convention.⁷²

The final draft was made, however, from a transcript of convention action kept by James Madison, fourth President of the United States, often called "The Father of the Constitution."⁷³ Much of what we know about the process by which the Constitution was formed comes to us from the writings of Madison, who, as a delegate from Virginia, kept copious notes through the deliberation of the 1787 Convention.

Published in 1840, four years after Madison's death, the notes contain this introduction:

I chose a seat in front of the presiding member, with the members on my right and left hand. In this favorable position for hearing all that passed I noted in terms legible and in abbreviations and

71. . Butler, *The Constitution One Hundred Forty Years After*, XII CONST. REV. No. 3 at 125, (1928).

72. *Id.* at 124.

73. MASON & BEANEY, *supra* note 17 at 191.

words intelligible to myself what was read from the chair or spoken by the members. . . .⁷⁴

Without missing a single day, Madison recorded the doings of the Convention throughout the summer of 1787. He was a man who well understood the influences of human passions and interests upon the decision making process.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-esteem, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.⁷⁵

Madison recognized that "the causes of faction are thus sown in the nature of man."⁷⁶ He had no illusions that the delegates gathered in Philadelphia may have been miraculously exempted from the natural laws of self-interest and self-delusion. For that reason he concluded that "a faultless plan was not to be expected."⁷⁷ And because the drafting of a constitution was itself a novel undertaking, the most the convention could do, he felt, was to "avoid the errors suggested by the past experience of other countries."⁷⁸

He had a clear vision of the difficulty of the draftman's task.

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive and judiciary. . . .

The real wonder is that so many difficulties should have been surmounted and surmounted with a unanimity almost as unprecedented as it must have been unexpected. It is impossible for any man of candor to reflect on this circumstance without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it a finger of that Almighty hand which has been so frequently and signally extended to our relief in the critical stages of the revolution.⁷⁹

It would be a mistake to attribute to this last statement any purpose on Madison's part to lay claim to Divine inspiration in the writing of the Constitution.

Exactly the opposite was true. What Madison saw as astonish-

74. MASON & BEANEY, *supra* note 17 at 189.

75. THE FEDERALIST No. 10, at 130 (J. Madison) (Wright ed. 1974).

76. *Id.* at 131.

77. THE FEDERALIST No. 37, at 266 (J. Madison) (Wright ed. 1974).

78. *Id.* at 267.

79. *Id.* at 239.

ing and indicative of the special protection of Providence was the unanimity of acceptance among diverse and factious persons of an admittedly imperfect, human document. In another essay,⁸⁰ Madison argues forcefully that the Constitution, despite its shortcomings, was at least better than the Articles of Confederation, and ought therefore to be ratified.

Alexander Hamilton, an ardent supporter of the Constitution, and, along with Madison and John Jay, an author of *The Federalist*, concedes the shortcomings of the charter in these words:

I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed.⁸¹

The notion that our Federal Constitution was divinely inspired would not have been subscribed by Thomas Jefferson, third President of the United States. He observed in a letter to Samuel Kercheval, dated July 11, 1816:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book reading; and this they would say themselves, were they to rise from the dead.⁸²

As a work of literature, the Constitution is not the inspired or revealed word of God, but the expression of human experience and expedient compromise between diverse interests.

However the Constitution may be described by political scientists, archaeologists, or students of letters, the definition contained within the Constitution itself is its meaning in the *legal sense*:

This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.⁸³

80. THE FEDERALIST No. 38, at 278 (J. Madison) (Wright ed. 1974).

81. THE FEDERALIST No. 85, at 544 (A. Hamilton) (Wright ed. 1974).

82. Letter from Thomas Jefferson to Samuel Kercheval, reprinted in MASON & BEA-NEE, *supra* note 17, at 397.

83. U.S. CONST., art. VI, 2.

All federal and State legislators and executive and judicial officials are required to take an oath to support the Constitution. They are oath-bound to support the Constitution, because the supremacy of the Constitution is the first principle of the organized society and the basis for the validity of every act performed by public officers. The definition framed by Judge William Peterson expresses this primacy:

What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles or fundamental laws are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. What are legislatures? Creatures of the constitution, they owe their existence to the constitution—they derive their powers from the constitution. It is their commission, and therefore all their acts must be conformable to it, or else void. The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity.⁸⁴

At bottom then, the Constitution is Law. It is the Supreme Law of the land. Law has been defined as

that which is laid down, ordained or established. A rule or method according to which phenomena or actions co-exist or follow each other. Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. *United States Fidelity and Guarantee Co. v. Guenther*, 281 U.S. 34 (1930), 50 S. Ct. 165, 74 L. Ed. 683. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law. Law is a solemn expression of the will of the supreme power of the state. Calif. Civil Code, 22.1.⁸⁵

Thomas Aquinas defined Law as an ordinance of reason, for the common good, promulgated by him who has the care of the community.⁸⁶ An ordinance is a thing which is ordained. By “ordained”, is meant that laws are enacted, solemnly decided upon, made effective by an act of adoption.⁸⁷ By “promulgated”, is understood that every law must be published; announced, made known to the people who are to be bound by it.⁸⁸ This process of being ordained and promulgated, enacted and published, has long been accomplished by use of the written word.

84. *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1775).

85. BLACK'S LAW DICTIONARY (rev. 5th ed. 1979).

86. INTRODUCTION TO SAINT THOMAS AQUINAS 615 (Anthony Pegis ed. 1948).

87. *Id.*

88. *Id.*

The written word not only embodied the results of the first revolutions in human history, but in its application to legal institutions was in itself revolutionary. The Law may be described as the science that lives by the written word. To speak of law today is to speak of books, big and little books, of whole libraries of books containing legislative acts, codes, digests, judicial decisions, forms of legal documents. Other arts and sciences have, of course, produced great libraries which, however, merely record their contribution to human knowledge. But in the books of the law the words themselves have magic properties, powers to loose and bind. The words themselves are the subject matter of the science, the words *are* the law.⁸⁹

Moses, of course, presented tablets bearing the Ten Commandments. The King of ancient Babylon also realized the impact of written law:

Hammurabi wrote his laws in the everyday Akkodian speech and inscribed them on a pillar which was to stand in the temple courtyard where it might be read by all men. Thus would force and oppression be prevented. Thus would justice prevail. That this was his great contribution to legal technique Hammurabi tells us in the epilogue of his Code, and it is worth repeating: "the oppressed who has a lawsuit shall come before my image as King of justice. He shall read the writing of my pillar; he shall perceive my precious words. The word of my pillar shall explain to him his cause, and he shall find his right."⁹⁰

One has only to visit the National Archives to be reminded that the mystical force of written law remains deeply ingrained in the human experience. That mystical force has an operative effect in the practical affairs of men and women in the United States in the decade of the 1980's. The force and efficiency of government depends upon its credibility. The extent to which each citizen believes in his government, and the extent to which he abides unquestioningly by its commands, depend in large measure upon the extent to which he perceives that his fellow citizens also accept and submit to its authority.⁹¹

Nobody likes to be the maverick, the voice crying in the wilderness, the lone protester in a sea of compliance. Few people are willing to rock the boat. Moreover, when common opinion is combined with long standing practice, the public inertia becomes nearly overwhelming. In a democratic society there is a conservative or reactionary bias which has nothing to do with the usual connotation of those terms. It is a bias in favor of doing nothing. It

89. W. DEAGLE, *MEN OF LAW FROM HAMMURABI TO HOLMES* 14 (1947).

90. *Id.* at 24.

91. *THE FEDERALIST* No. 49, at 349 (J. Madison) (Wright ed. 1974).

is a prejudice against any change, which is especially acute against complicated or subtle change.

It matters not whether the change proposed is "conservative" or "liberal" in the common political sense of those words. Conservative people often oppose conservative measures, and liberal voters often defeat liberal proposals simply because they are perceived as departures from the status quo. The status quo, with all its faults, is at least a known condition.

Voters, and indeed office holders, invited to read and study new ideas, innovative solutions to nagging public problems, or untried procedures, tend to get fidgety. Any risk makes them nervous. When ignorance combines with fear, the resulting inertia is unreasoning and can be destructive. These are the "prejudices of the community" which Madison said a "national government will not find it a superfluous advantage" to have on its side.⁹²

It is in the context of the public conception of the United States Constitution that this consideration of the nature of the Constitution has been undertaken. Certainly, no consideration of a constitutional convention can go far without first forming an accurate conception of what a constitution is.⁹³

A citizenry embued with half-learned notions of the nature of the federal constitution; a public which equates the United States Constitution with the Ten Commandments, the Bill of Rights, the Declaration of Independence, the Gettysburg Address and the Sermon on the Mount; a people who think of the Constitution as a mystical, historical, political event have already lost the power of self-governance, the preservation of which is, at bottom, the true office of a written constitution.⁹⁴

This starry-eyed perception of the constitution relates to that phenomenon which de Tocqueville describes so chillingly under the heading "Despotism in Democratic Nations."⁹⁵ "[T]hat species of oppression by which democratic nations are menaced . . ." is thus described by the noted Frenchman as

an innumerable multitude of men, all equal and alike, incessantly endeavoring to procure the petty and paltry pleasures with which they glut their lives. Each of them, living apart, is as a stranger to the fate of all the rest; his children and his private friends constitute to him the whole of mankind. As for the rest of his fellow citizens, he is close to them, but he does not see them; he touches them, but he does not feel them; he exists only in himself and for himself

92. *Id.*

93. J. JAMESON, CONSTITUTIONAL CONVENTIONS 67 (1887 and photo reprint 1979).

94. A. de Tocqueville *quoted in* 2 AMERICA, *supra* note 3, at 316.

95. *Id.* at 318.

alone; and if his kindred still remain to him, he may be said at any rate to have lost his country.

Above this race of men stands an immense and tutelary power, which takes upon itself alone to secure their gratifications and to watch over their fate. That power is absolute, minute, regular, provident, and mild. It would be like the authority of a parent if, like that authority, its object was to prepare men for manhood; but it seeks, on the contrary, to keep them in perpetual childhood: it is well content that the people should rejoice, provided they think of nothing but rejoicing. For their happiness such a government willingly labors, but it chooses to be the sole agent and the only arbiter of that happiness; it provides for their security, foresees and supplies their necessities, facilitates their pleasures, manages their principal concerns, directs their industry, regulates the descent of property, and subdivides their inheritances: what remains, but to spare them all the care of thinking and all the trouble of living?⁹⁶

The tutelary power, he sees as reducing the free agency of man. By a "network of small complicated rules" through which the most original minds cannot penetrate; the will of man is softened, bent. Such a power does not destroy or tyrannize, but enervates and stupifies a people.⁹⁷ De Tocqueville fears such tutelage might be established in the name of public sovereignty; that people yearning for strong leaders while wishing to remain free might think they have protected their freedom by shaking off their dependence just long enough to vote in a new set of masters.⁹⁸ He adds that such a people will lose the faculties of thinking, feeling, and acting for themselves, and "soon become incapable of exercising the great and only privilege which remains to them."⁹⁹

Against those 150 year old predictions, the conditions of this decade have a familiar aura. A few years ago, a popular news magazine carried a feature entitled, "Is Democracy Dead?"¹⁰⁰ A contemporary article asked, "Is Capitalism Working?"¹⁰¹ Those questions and others of similar import must surely be answered pessimistically if it be true that the United States Constitution is a stultified relic. If, as suggested, our political system has failed to contain social demands within tolerable limits,¹⁰² then our system needs new-modeling. If democracy carries the seeds of its own de-

96. *Id.*

97. *Id.*

98. *Id.* at 321.

99. *Is Democracy Dying, Verdict of 8 Leading World Scholars*, 80 U.S. NEWS AND WORLD REP., March 8, 1976, at 50-67.

100. Taber, *Capitalism: Is it Working*, TIME, April 21, 1980, at 40-55.

101. COMM. ON THE JUDICIARY, BALANCED BUDGET-TAX LIMITATION CONSTITUTIONAL AMENDMENT, S. DOC. NO. 151 97th Cong., 1st Sess. 26 (1981).

102. See U.S. NEWS AND WORLD REP., *supra* note 99.

struction in the tendency of ruling constituencies to vote themselves unilateral prosperity at the expense of the common good, as feared by some, then fundamental, structural remedies are needed; new faces are not enough.¹⁰³

These concerns draw attention to the nature of the constitution. If the constitution is a one-time happening, an isolated historical event, then it does not and cannot speak directly to the needs of today. Even a constitution seen as a set of enduring principles which have applicability to all ages, has a static quality requiring the intervention of some expert agency to interpret or apply those principles to present circumstances.

In fact, the constitution is not static, any more than any body of law can be static so long as the law maker is alive and well. The Constitution of the United States is the Supreme Law of the Land, given by the people; not given once and for all by the people who lived in the 18th century, but given continuously by the people of every generation. So long as Article V remains the law of the land, the constitution can be amended by the people. So long as the constitution can be amended by the people, every word which at any point in time remains in it does so at the sufferance of the people of the United States.

The Congress of the United States is empowered, for example, to "grant letters of Marque and Reprisal" not because Madison and Morris and Franklin said so in 1787 or because conventions in the 13 original states agreed to those words. The Congress of the United States is empowered to grant letters of Marque and Reprisal because the people of the United States, living today, by choosing not to exercise their amendatory prerogative under Article V, are continuing to express the intention that Congress should have such power. As a grant of power, the constitution always speaks in the present tense.

Jameson defines a constitution as the make-up of a political organism: "the outcome of social and political forces in history, as an organic growth or . . . as a fact."¹⁰⁴ He speaks of the Constitution as being cumulative and unwritten, as well as enacted and written,¹⁰⁵ and observes:

This constitution may differ much from that inscribed in the volume of the laws. Thus, there may have been wrought out fundamental changes in the structure of a government by the usurpations of its functionaries, followed by the acquiescance of the sovereign society, in which case, those changes would become part of the constitution

103. JAMESON, *supra* note 93, at 67.

104. *Id.* at 75-76.

105. *Id.* at 68.

as fact.¹⁰⁶

To be sure, Jameson emphasizes that the enacted, written compact must prevail over the organic growth of existing social forces; that to say otherwise would be to propound doctrines subversive of all regulated liberty;¹⁰⁷ but he points out that the people bear two relationships to the Constitution. They are both its masters and its servants.¹⁰⁸ They are subject to existing provisions of the Constitution, but they are, at the same time, capable of, and responsible for, altering the constitution as, from time to time, changes are needed.

Written Constitutions, he wrote, are often too inflexible.¹⁰⁹ They need frequent amendment, lest they become inadequate. They should have efficient machinery for amendment. More importantly, "there should be developed a political conscience impelling to make amendments . . ." whenever the force of events have caused important political changes to be consummated.¹¹⁰ This might be called the need to play constitutional catch-up. A modern constitution requires revisions reflecting changes in society and in the practical relations of people and their government. Says Jameson:

Why embarrass the courts and fly in the face of destiny by refusing to recognize accomplished facts? A point of honor should in such cases be cultivated, compelling the citizen to acquiesce in the decrees of the Almighty as written in events¹¹¹

Although Jameson wrote with a particular concern for the need to legitimize the cataclysmic changes wrought by the Civil War, the principles of constitutional catching-up remains significant to our day. A constitution which speaks in the present tense must use relevant terms and address relevant subjects. If the constitution is to be, and to be understood as being, a current, subsisting grant of power to the government of the United States, founded upon the consent and sustained by the allegiance of the generation of Americans now living, it must be a grant of real powers, to do significant things of current interest having application here and now.

There are instances in which the Constitution deals mightily with indifferent matters and deals not at all with affairs of great consequence.

106. *Id.* at 73.

107. *Id.* at 74.

108. *Id.* at 80.

109. *Id.* at 83.

110. *Id.*

111. Needham, *Changing the Fundamental Law*, 69 U. PA. L. REV., 223, 235 (1921).

For example, the Congress is specifically empowered to grant letters of Marque and Reprisal,¹¹² while the states are expressly forbidden to do so.¹¹³ Whatever meaning those words may have had at one time, they are surely not as important in 1982 as the question of the power of either the president or the congress to initiate covert military operations in Nicaragua, to support the insurgents in Afghanistan, to train government forces in El Salvador, or to launch an amphibious landing in the Bay of Pigs.

There are cases where the Constitution addresses, sometimes in quaint, unfamiliar words, a problem or one aspect of a problem while giving no direction on related, more pressing concerns. The old fashioned word "militia" is used four times in the Constitution and twice in the Bill of Rights.¹¹⁴ The words *draft* or *conscription* are never mentioned.

The militia is defined as "the body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a standing army."¹¹⁵ In Michigan, the unorganized militia consists of all able bodied citizens between the ages of 17 and 60.¹¹⁶ Under federal law, the unorganized militia is all able bodied males from 17 to 45.¹¹⁷ Congress is empowered "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."¹¹⁸ Presumably, this phrase states fully the government's power of military conscription. There are no words expressly enabling the Congress or the president to provide for the drafting of able bodied citizens to serve overseas in aid of military operations designed to execute the laws of our allies, or to suppress Insurrection and repel Invasions upon their soil. Neither does it appear that the quoted article was intended to authorize conscription for the maintenance of a standing army.¹¹⁹

These and other issues addressed by our forefathers have not gone away in 200 years of living under the Charter of Philadelphia. The nature of the Constitution as understood by the authors of the Federalist papers was an explicit grant of powers to a Federal government by the sovereign authority of the people.¹²⁰

112. U.S. CONST. art. I, § 8.

113. U.S. CONST. art. I, § 10.

114. U.S. CONST. art. I, § 8 (mentioned three times). U.S. CONST. art. II, § 2. U.S. CONST. amend. II. U.S. CONST. amend. V.

115. BLACK'S LAW DICTIONARY 896 (rev. 5th ed. 1979).

116. MICH. COMP. LAWS ANN. 32.509 (1977) (MICH. STAT. ANN. 4.678 (109) (Callaghan 1977)).

117. 10 U.S.C.A. 311.

118. U.S. CONST. art. I, § 8.

119. THE FEDERALIST No. 8, at 123 (A. Hamilton) (Wright ed. 1974).

120. THE FEDERALIST No. 32, at 241 (A. Hamilton) (Wright ed. 1974).

If the people of the present age hold fast to that same understanding, they will see a convention as no threat to their security, but as a long overdue opportunity to restate the words of conveyance, making the grant of national authority more certain, more recognized, more responsive to the exigencies of the third century of the Union.

III. WRITTEN VS. EMPIRICAL CONSTITUTION

The Senators and Representative before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.¹²¹

The significance of the Constitution of the United States as a written constitution needs to be reasserted and contrasted with the unwritten British constitution. The Founding Fathers had been British subjects. They were familiar with the legal and political traditions of England. They knew that, in the British system, Parliament is all powerful. Blackstone describes it this way:

The legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first the King; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society.¹²²

James Madison criticized as "dangerous practices", the changing of fundamental articles of government by the British Parliament, which had continued its own members in office by changing the period of election from three to seven years.¹²³

The American Constitution makers understood that the enactment of a written constitution was a giant departure from their English heritage. Recognizing that theirs was a unique opportunity in all of human history to write a whole constitution, as it were, on a clean piece of paper, Hamilton observed:

It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and their example, to

121. U.S. CONST. art. VI.

122. 1 COOLEY'S BLACKSTONE 51 (4th ed. 1899).

123. THE FEDERALIST No. 53, at 365 (J. Madison) (Wright ed. 1974).

decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.¹²⁴

George Washington was given to more elegant expression. On June 12, 1783, he wrote Governor William Livingston:

[t]he citizens of America . . . are now . . . possessed of absolute freedom and independency. They are . . . the actors on a most conspicuous theatre, which seems to be peculiarly designated by Providence for the display of human greatness and felicity. . . . [T]his is the time of their political probation—This is the moment when the Eyes of the whole World are turned upon them. . . .¹²⁵

The eyes of the world were indeed upon Philadelphia in 1787, and the written document which emanated from the convention held there was intended by its framers to be read, understood, and adopted by the citizenry. The *Pennsylvania Packet* printed the complete text of the Constitution within a few days after the adjournment of the Convention.¹²⁶ So did other newspapers throughout the land.¹²⁷ People talked about it, argued over it.

Caleb Strong, a delegate from Massachusetts, defended the words of the Constitution against the claim that its provisions were ambiguous. "For my part," he said, "I think the whole of it is expressed in the plain, common language of mankind."¹²⁸ The words of the Constitution were disseminated among the people, because it was the people who were to adopt the constitutional language as their own. They regarded this process as peculiarly American.

The important distinction so well understood in America, between a constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country.¹²⁹

Being adopted by the people, the Constitution is seen as expressing the will of the people, more directly and authoritatively than their will is expressed through their elected representatives. "[T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."¹³⁰

Judge Cooley's powerful pen put the rule of proper construc-

124. THE FEDERALIST No. 1, at 89 (A. Hamilton) (Wright ed. 1974).

125. MASON & BEANEY, *supra* note 17, at 159.

126. BOWEN, *supra* note 2, at 255.

127. *Id.*

128. *Id.* at 231.

129. THE FEDERALIST No. 53, at 365 (J. Madison) (Wright ed. 1974).

130. THE FEDERALIST No. 78, at 492 (A. Hamilton) (Wright ed. 1974).

tion in this way:

A cardinal rule in dealing with written instruments is that they shall receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principle share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to use than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving construction to a written constitution not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity of bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced by temporary excitements and passions among the people to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced.¹³¹

No more blunt condemnation of constitutional activism could be pronounced than Cooley's unequivocal assertion that preferring public sentiment to the intention of the founders in construing a written constitution amounts to "reckless disregard of official oath and public duty."¹³²

131. COOLEY, *supra* note 51 at 54-55.

132. COOLEY, *supra* note 51, at 54.

The framers of the Constitution supplied a means for changing the fundamental law through amendment as provided in Article V. They could easily have provided that the Congress or the Supreme Court might declare new constitutional principles as the change of national circumstances should require. They did not. They could have provided for some variation of the British constitutional system, with which they were so familiar. They did not. They provided instead for a solemn oath to bind every state and federal official to support the Constitution as it is written.¹³³

No reasonable reading of the American Constitution will yield any conclusion other than that it was intended to be a written law, adopted by the supreme authority of the people of the United States and expected to remain effective and in force, according to the plain, original meaning of its words, unless and until it would be amended pursuant to Article V. Hamilton said it this way:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act.¹³⁴

In his farewell address, George Washington echoed the view:

"The basis of our political systems is the right of the people to make and to alter their Constitutions of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government."¹³⁵

Still there are those who refuse to submit to the reality that the United States of America has a written constitution. They argue from convenience and necessity. They argue from acquiescence. They argue from custom and tradition. They cast the argument, as did one writer,¹³⁶ in language suggesting that adherence to the words of the constitution is but one approach to the judicial function. The implication is that other approaches are just as legitimate.

To label Cooley's view as "the pure interpretive model"¹³⁷ as though a judge's duty to support the Constitution was akin to se-

133. See, *Wuebker v. James*, 58 N.Y.S. 2d 671 (1944).

134. *THE FEDERALIST* No. 78, at 494 (A. Hamilton) (Wright ed. 1974).

135. George Washington's Farewell Address, reprinted in 4 *AMERICA*, supra note 3, at 218, 219.

136. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975).

137. *Id.*

lecting a suit of clothes from a haberdasher's rack or a sedan from the auto dealer's showroom floor, is to reveal a disregard for the primacy of the sovereign will of the people as expressed by them in their constitution.¹³⁸

If indeed, courts may appropriately "apply values not articulated in the constitutional text"; if they are to act as "expounders of basic national ideals of individual liberty and fair treatment, even when the context of those ideals is not expressed . . . in the written Constitution," as urged by Thomas C. Grey,¹³⁹ then it is literally true, as asserted by Philip B. Kurland, that the Supreme Court exercises veto power over the actions of state legislatures, executives, and judiciaries, and that the Court is "a continuing constitutional convention, updating the meaning of the Constitution as new times and new situations demand"¹⁴⁰

There are those who hold that the American Constitution is not a written law at all, but is rather the sum total of all those customs, traditions, institutions and practices which have grown up over the years, and which influence or control the workings of our national government.¹⁴¹ In this view, the Constitution is considered coextensive with the governing Establishment. It is the way things are. It is the distribution of power, as it actually exists and is effectively exercised in modern American society. This might be termed the *empirical constitution*, by which the nature and extent of the powers of officers and institutions are deduced from observing the actual exercise of power. Supporters of this view often call themselves, "Realists".¹⁴²

The Constitution we now have is much more than the few hundred words of the Philadelphia draftsmen. It is the entire fabric of usage, understanding, political behavior, and statutory implementation, erected on that base and compounded with the glosses of many judicial decisions. Evolution has brought changes which habit has confirmed.¹⁴³

Custom is, of course, the most ancient source of law. It has a pervasive, undeniable kind of primacy. A sign says "Keep off the Grass." Next to it, a well-worn footpath testifies to the force of custom. The vulnerability of written law to erosion is not a recent phenomenon:

138. COOLEY, *supra* note 51, at 28.

139. Grey, *supra* note 136.

140. 1 P. KURLAND, AN AMERICAN PRIMER 134 (1966).

141. L. H. TRIBE, *supra* note 16, at iii. See also, Murphy, *Foreward* to A.S. MILLER, THE SUPREME COURT, MYTH AND REALITY, at x-xi (1978).

142. Llewellyn, *The Constitution as an Institution* 34 COL. L. REV. 1 (1934).

143. Carson, *Disadvantages of a Federal Constitutional Convention* 66 MICH. L. REV. 921, 928-929 (1968).

But written words could be bent and twisted, too, and controversies which were not governed precisely by any of the written words contained in the laws always seemed to be arising. Sometimes the written words themselves were contemptuously disregarded by the mighty. When the next generation came to examine its heritage of words, it was never quite certain what the fathers had meant. The meanings of the words themselves, or the conditions to which they had to be applied, seemed to be constantly changing. The words themselves remained unaltered, but life itself was not static but dynamic—the stream of experience was in flux. The provisions of the Code of Hammurabi survive upon his stone monument, but their meaning is sometimes obscure and enigmatic, for we no longer have an entirely clear conception of the conditions which gave them life. The unhistorical age of antiquity found it impossible to guard against tampering with the laws. The scribes, who were usually priests, introduced forgeries into the written laws for their own purposes, and some such forgeries have been found in virtually every archaic code. The readiness of the common people to believe that all their laws were given by one great lawgiver only made it easier for the priests to conceal the traces of their handiwork. The written laws were not infrequently abrogated by contrary usage, which is only another way of saying that the great primary source of law was constantly reasserting its immemorial sway.¹⁴⁴

It may be that every written code or constitution is eventually eroded by conflicting customs. It is, however, peculiar to the American experience that disregard and diminishment of our written Constitution has been a work of great sophistry, combined with an incongruous deference to the original text.¹⁴⁵ We have paid lip service to the immutable words of the Constitution.¹⁴⁶ We have demonstrated great resistance to constitutional amendments proposed through the processes established by Article V.¹⁴⁷ At the same time, our courts have shown blithe disregard for the intent of the authors of the Constitution and the obvious purposes and understanding of those who ratified the Constitution, whenever it has seemed practical or expedient to do so. This tendency has so prevailed that Grey attempts to make out a “practical case” against sticking to the text of the Constitution as the source of constitutional law by showing that “an extraordinary radical purge of established constitutional doctrine would be required” in order to re-

144. DEAGLE, *supra* note 89, at 29-30.

145. Coudert, *Judicial Constitutional Amendment as Illustrated by the Devolution of The Institution of the Jury from a Fundamental Right to a Mere Method of Procedure*, 13 YALE L. J. 331, 341 (1904).

146. *Id.*

147. Scheips, *The Significance and Adoption of Article V of the Constitution*, 26 NOTRE DAME L. REV. 46 n. 1 (1950).

turn the nation to the principle of constitutional supremacy announced by Chief Justice Marshall in *Marbury v. Madison*.¹⁴⁸

Mason and Beaney begin their work on *The Supreme Court in a Free Society* with a chapter entitled, "The Court is the Constitution."

The Constitution of 1787 and its twenty-two amendments can be read in about half an hour. One could memorize the written document word for word, as many school children did a generation ago, and still know little or nothing of its meaning or implications. The reason is that the formal body of rules known as constitutional law consists primarily of decisions and opinions of the United States Supreme Court—that is, the gloss or veneer the Justices have spread on the formal document itself. "The gloss, not the text, is the thing."

Yet the historian Charles Warren cautions us not to forget that, "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is law and not the decisions of the Court." The Constitution itself, Justice Frankfurter declares, is the "ultimate touchstone of constitutionality." Against all such reminders stands Charles Evans Hughes' blunt assertion of 1907, "The Constitution is what the Judges say it is." "The Supreme Court", Professor Frankfurter used to tell his law students, "is the Constitution."¹⁴⁹

More than ten years ago, the American Enterprise Institute sponsored a debate between Senator Sam J. Ervin, Jr. and former attorney general Ramsey Clark. The subject was the *Role of the Supreme Court: Policymaker or Adjudicator*.¹⁵⁰ These articulate spokesmen demonstrated the dichotomy which exists among learned Americans, not only upon the role of the Supreme Court, but more fundamentally upon the definition of the Constitution itself.

Senator Ervin excoriated the Warren Court for many of its decisions, pointing out among other considerations, that the Court's frequent refusal to apply its own holdings retroactively constituted a public admission that the Justices were intending to *amend* rather than *interpret* the Constitution.¹⁵¹

For his part, Clark eschewed what he called the metaphysical debate over rules of constitutional construction, preferring to focus on the results to be achieved by court decisions. Saying that "Our problems, actual and immense, cannot be solved by such conjury,"

148. 5 U.S. (1 Cranch) 137 (1803).

149. MASON & BEANEY, *supra* note 17, at 1 (1959).

150. S.J. Ervin Jr. & R. Clark, *Role of the Supreme Court: Policymaker or Adjudicator?* in RATIONAL DEBATE SEMINARS (1970).

151. *Id.* at 43, 44.

Clark went on to tick off the concerns which he felt the Supreme Court should address: Population. Technology. Mass Society. Urban Poverty. Racism. Vast Industry. Huge Labor Unions. Tall Skyscrapers. Automobiles. Jet Aircraft. Television. Nuclear Energy. Environmental Pollution. Mass Assemblies and Protests. The Interdependence of Nations and Individuals.¹⁵²

"Life changes," said Clark. "The meaning of words change, the needs of man change."¹⁵³ And later, "The words of the Constitution matter greatly, but they do not suffice to solve the problems of another day."¹⁵⁴ And again, "How many of us are really prepared to have our Constitution construed solely by its words and their intention when written? There is, after all, not a word in the Constitution about many of our most important protections."¹⁵⁵ "Words of immutable meaning cannot be adapted to crises." Clark declared, "and nations bound to them fail."¹⁵⁶ Chronicling the dynamics of modern society, Clark asked, "Midst such sweeping change, such vast turbulence, can we hope for mere words—antique phrases—a Constitution, a Bill of Rights—to preserve liberty?"¹⁵⁷

Again emphasizing pragmatic considerations, Ramsey Clark points out a fact which has become central to the defense of judicial activism in America:

The United States Supreme Court, inherently the most conservative institution within our system of government, has addressed itself to the present and future more effectively than any other agent of our society. Somehow, these last 20 years, it has detected the greatest needs of our times in the cases that have found their way to its forum and has acted to meet those needs.¹⁵⁸

The Ervin-Ramsey debate was an open forum. One questioner posed the ultimate conundrum for judicial activists. What happens when a new batch of judges are appointed who see the needs of society differently?¹⁵⁹

Given the example of *Brown v. Board of Education*,¹⁶⁰ as an activist decision which might be reversed by a later court, Clark's response was a chilling reminder of the thinness of the veneer of civilization: "I think we would find how very fragile the rule of law

152. *Id.* at 24.

153. *Id.* at 19.

154. *Id.* at 22.

155. *Id.* at 23.

156. *Id.* at 25.

157. *Id.* at 29.

158. *Id.* at 27.

159. *Id.* at 78.

160. *Brown v. Board of Education*, 349 U.S. 294 (1955).

and constitutional government is in terms of the feeling of people and the emotion of the times."¹⁶¹ Referred to *Miranda v. Arizona*,¹⁶² however, the former attorney general indulged in so such speculation, insisting that the public does not understand that case.¹⁶³

Those inconsistent responses expose one difficulty with the view that the Supreme Court should make policy. Clark teaches that the Supreme Court's power stems not from the Constitution, but from the popularity of its decisions; not from the sovereign expression of the people's will contained in the charter of government which created the court and defined its duties, but in currently perceived evidences of general public approval of its mandates, which Lawrence Tribe calls "The outcome."¹⁶⁴ Seen as justified by the outcome, all Supreme Court decisions are vulnerable. If *Brown v. Board of Education*,¹⁶⁵ announces a rule of constitutional dimension only because a large segment of the American population would riot in the streets if it were to be overruled, then *Miranda v. Arizona*,¹⁶⁶ will only be jurisprudentially defensible until its opponents rise up in armed rebellion.

In truth, of course, these tests are irrelevant. The legal authority of a court is not to be confused with its prestige or popularity. Neither can the judgment of history nor the consensus of the legal community be any guide for a court's actions, since such matters are never known until after the fact.

Moreover, if outcome, or popular acceptance of the Court's decisions were the proper measure of their legitimacy, then it would follow that some reliable method of measuring that outcome belongs in the structure of the governing process. Yet, popular election and recall of the Justices have always been thought unwise precisely because courts are often called upon to make unpopular judgments. Who, indeed, is to pronounce the judgment of history? When is its measure to be taken? In a decade; a generation? And if a consensus among the community of legal scholars is to be the test of the proper exercise of the authority of the Supreme Court, its writ would run nowhere with certainty. Both the justice and the utility of every decision is debatable.¹⁶⁷

It is argued that the policymaker role of the Supreme Court,

161. Ervin and Clark, *supra* note 150, at 80.

162. *Miranda v. Arizona*, 384 U.S. 436; 86 S. Ct. 1602; 16 L. Ed 2d 694 (1966).

163. Ervin and Clark, *supra* note 150, at 80.

164. TRIBE, *supra* note 16 § 3-6, at 52.

165. *Brown v. Board of Education*, *supra* note 160.

166. *Miranda v. Arizona*, *supra* note 162.

167. J. S. Mill, *Utilitarianism*, reprinted in, *THE GREAT LEGAL PHILOSOPHERS, SELECTED READINGS IN JURISPRUDENCE* 376 (C. Morris, ed. 1959).

whether logical or not, whether historically justifiable or not, exists today as a matter of observable fact. By this assertion, it is claimed that the policymaking role of the Court is an article of an *empirically* defined constitution. The empiricist argues, with the nicety of the debater's technique, that Judge Cooley himself defines a constitution alternatively as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised."¹⁶⁸ Therefore, if the rule or maxim, observable from experience is that the President of the United States does, in fact, habitually send troops to war on his own authority;¹⁶⁹ or the Supreme Court does, in fact, regularly create new constitutional rights;¹⁷⁰ or the Congress does effectively require the State Legislatures to enact certain laws; or the various administrative agencies of the Federal Government do actually, and with public support, declare and enforce policies never enacted by Congress, then they must do so in the exercise of some portion of the fundamental sovereignty of the people which has been delegated to them by custom and tradition. The empiricist argues that such customs and traditions comprise the true Constitution of the United States; that such customs and traditions are, in fact, the Supreme Law of the Land, entitled to the full support and obedience of the citizenry, until such time as new customs and traditions should arise by common consent and general usage.

The argument is spurious.¹⁷¹ Not every human action is controlled by law, rule, or maxim. Liberty is one of the unalienable rights of human beings. The fact that all men may tell lies, most drivers may exceed the speed limit, or many spouses may be unfaithful does not support the conclusion that such actions are taken in response or obedience to a law or rule. Liberty supposes the capacity for free choice. Any one person may violate the law. Any number of people may violate the law. In fact, it may be that conscious, deliberate violation of some laws is itself the common practice or custom of the people.¹⁷²

The Constitution is not whatever Congress enacts, for congressional enactments can be unconstitutional.¹⁷³ The Constitution is not whatever the President does, for the President can overstep

168. COOLEY, *supra* note 52, at 2.

169. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 75-88 (1974).

170. *See generally*, Roe v. Wade 410 U.S. 113 (1973).

171. The practice of a ruling power in the state is but a feeble proof of its legality.

BERGER, *supra* note 169, at 375 quoting from Stockdale v. Hausard 112 E.R. 1112, 1171 (Q.B. 1839).

172. Witness the fate of United States Constitution Amendment XVIII. *See generally*, 45 AM. JUR. 2D *Intoxicating Liquors*, § 67 *et seq.*

173. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) Cranch.

the proper constitutional bounds of his office.¹⁷⁴ Neither is the Constitution whatever the Supreme Court says it is, for the Supreme Court can be wrong.¹⁷⁵ It is, after all, only a human institution. The framers of the union were aware of these possibilities. Usurpation, tyranny, despotism; these were all words well known to them. They were the very evils sought to be guarded against in the balanced system of government devised at Philadelphia.

It was to be a government of laws, and not of men. But a government of laws must be administered by human agency; it is not self-executing. How to insure the faithfulness of that human agency; this was the foremost consideration throughout the summer of 1787.¹⁷⁶ It is the foremost consideration in the science of statecraft in every season. No system of government can survive the onslaught of infidelity. Banal politicians, corrupt officials, haughty judges, self-seeking legislators; these and their ilk undo the most sagacious plans of governing. Article VI calls for every state and federal legislative, executive, and judicial officer to be bound upon oath or affirmation "to support this Constitution."¹⁷⁷ It was the final admission that the scheme of government was to be entrusted to the integrity of those who were to serve under it. It was a requirement for mutual commitment to the common bond of the union.

In the context of identifying and defining the American Constitution, a reflection upon the phrase "this Constitution" as used in Article VI is useful. What precisely is meant by the words "this Constitution"? Do they imply that government officials were to support only the text of the charter as written in Philadelphia, or as it may read when the oath is taken? Clearly this was not to be the case. Article V presupposes that Congressmen, Senators, and State Legislators will, from time to time, take action to change the constitution by process of amendment. It follows that "this Constitution" can be supported even in the act of changing the words which comprise it. "This Constitution" which officers are sworn to uphold includes not only the Constitution as written, but also the deliberate, formal scheme of constitutional amendment which it contains.

The oath or affirmation required by Article VI commits those who enter upon offices of public trust to the political compact. It is the only loyalty oath Americans require of themselves. The Pledge of Allegiance to the Flag, however noble and chauvinistic, does not

174. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

175. *See*, *U.S. v. Darby* 312 U.S. 100 (1941), which overruled *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

176. *See*, *THE FEDERALIST* No. 65, at 426 (A. Hamilton) (Wright ed. 1974).

177. U.S. CONST. art. VI.

express the foundational undertaking of American citizenship. We are not bound in service to a King, nor committed in loyalty to a flag, a symbol, or a particular governing administration. Rather, our public servants are bound to support the Constitution; the agreement; the understanding; the contract by which we are held together as a nation. It is only by means of this obligation that we can—to answer Ramsey Clark—“hope for mere words—antique phrases—a Constitution, a Bill of Rights—to preserve liberty. . . .”¹⁷⁸

The words of the Constitution as it stands at any given moment of time, may not, as Clark insists, suffice to solve the problems of the day. But to whatever extent our people are competent to solve their problems, faithfulness to a scheme of government founded upon a written constitution, and changeable only by deliberate amendment offers the surest hope for solving them.

The growth of our population; advances in high technology; poverty in the cities; racism; pollution; the threat of nuclear annihilation; these and all the other urgent concerns of today and tomorrow can only be addressed by a government which functions consistently, efficiently, and legitimately. Government can only function steadily and smoothly, and with the mark of legitimacy, if the several officeholders who carry on its work perform their respective duties. No one man, nor group of men and women; no one institution is charged with the overall duty of “solving our problems.” Judges are to judge. Legislators are to legislate. Executive officers are to carry out the laws faithfully.

The necessary rule in human life is to do today one’s nearest duty. The ancient admonition, “a cobbler should not judge above his last,”¹⁷⁹ applies with special force to the science of government. It is the very definition of despotism that one in power or authority assumes the God-like function of “solving all our problems.” This is the image of a Fuhrer—a leader—capable, with a wave of the hand, of marshalling the united effort of his people, and bending them to the task at hand. No such agency exists in the American constitutional scheme. It is a plan of divided power. It is an engine of disparate parts, each having a limited, but contributing function, each responding in its own fashion to its own stimuli. The design which establishes the relationship between the parts, and defines the function of each is the Constitution.

Words of immutable meaning may not be adapted to crises, as charged by Ramsey Clark, but words of mutable meaning are without any force at all. What else do we have but words; how else can

178. Ervin and Clark, *supra* note 150, at 29.

179. Appelles, *quoted in* BARTLETT’S FAMILAR QUOTATIONS 102a (14th ed. 1968).

men come together and act for their common good but through rational human communication, and how else can we understand each other, but by words of ascertainable meaning? Surely there are other words, new words, to be spoken, to be written, to be solemnly proclaimed, adapting our institutions to new conditions and solving new problems.

Clark appeals to pragmatic instincts when he observes, "Life changes. The meaning of words change, the needs of man change."¹⁸⁰ But these are not reasons to ignore the words of the Constitution or the meaning they were intended to convey. It is precisely because life does change; because the meaning of words do change; because the needs of man do change, that faithfulness by public officials to the principle of the sovereignty of the expressed will of the people is so necessary. Surely the oath required by Article VI was not intended simply to frustrate those who disagreed with the original wording of the Constitution. It is primarily because life is dynamic, and language evolves, and times change that those entrusted with making, interpreting, and executing the laws need to be constrained and directed in their duties by a constitution mutually obligatory, universally applicable and commonly understood.

The oath prescribed by Article VI is not an affair of the heart, but of the head. It commands no emotional display of loyalty, but knowing, deliberate, conscious assent and agreement.

IV. THE NEED FOR PERIODIC AMENDMENT

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."¹⁸¹

It is a curious fact that those who regard the Constitution as immutable most favor its amendment; while those who see the Constitution as flexible, are most opposed to change.

Putting it another way, the disciples of Ramsey Clark, who are concerned with meeting the needs of today, with solving the problems of our dynamic modern society, and who are most critical of the inadequacies of the "antique phrases" of the Constitution, are least enthusiastic about eliminating or amending those "antique phrases." Indeed, there is a complete reversal of roles. The conservative who prefers a fixed constitution, advocates amendment, while the progressive who demands an adaptable constitution, most vigorously resists change.

180. Ervin and Clark, *supra* note 150, at 19.

181. U.S. CONST. amend. VII.

In truth, of course, nearly everyone would agree with Thomas Jefferson's assessment that

laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the time.¹⁸²

Jefferson, in fact, espoused the periodic review of constitutions. Pointing out that mortality tables then predicted a new majority among the population every 19 years, he urged the inclusion in the Virginia Constitution of a provision requiring a constitutional convention every 19 or 20 years.¹⁸³ Jefferson wrote: "Let us follow no such examples, [as the bloody French Revolution] nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs."¹⁸⁴ Many state constitutions call for periodic consideration of a constitutional convention.¹⁸⁵

The Chief Justice of the United States recently reminded us of the need for periodic review of the basic structure of our federal government.¹⁸⁶ In remarks made at a seminar on Legal History at the National Archives in 1978, Warren E. Burger called for a national period of constitutional study and dialogue, to correspond with the bicentennial of our Federal Constitution. Specifically, Chief Justice Burger called for a three-year project which would focus on Article I in 1985, Article II in 1986 and Article III in 1987. Such a study would give year-long attention to each of the three branches of government. This exhaustive examination would conclude with a period of overview, taking the entire Constitution into consideration. "[W]e should examine the changes which have occurred over two centuries and ask ourselves whether they are faithful to the spirit and the letter of the Constitution, or whether with some, we have gone off on the wrong tracks."¹⁸⁷

Justice Burger points out that the United States House of Representatives began with 45 members, and now has 435; that the

182. Letter to Samuel Kercheval from Thomas Jefferson, July 12, 1816 *reprinted in* MASON & BEANEY, *supra* note 17.

183. *Id.*

184. *Id.* at 397.

185. The question of calling a convention must be submitted to the electorate every 10 years in Alaska, Hawaii, Iowa and New Hampshire; every 16 years in Michigan; every 20 years in Connecticut, Illinois, Maryland, Missouri, New York, Ohio, and Oklahoma.

C. E. BROWN, STATE CONSTITUTIONAL CONVENTIONS, at xxiv n. 6 (1973).

186. Burger, *The Constitution After 200 Years*, 65 A.B.A.J. 203 (1979).

187. *Id.*

Senate, which originally consisted of 26 members, has grown to 100. Congressional staffs have expanded to the size of George Washington's army. Floor debate in Congress no longer occupies the role envisioned by the framers of the Constitution. Constituent services, committee work, and management of administrative staff have all grown in importance, dwarfing the parliamentary function of congressmen and senators. At the same time, because of the growth of our population from three million to nearly a quarter billion, each congressman and senator must represent vastly more citizens than originally intended. The corollary of that proposition, of course, is that each citizen is vastly more remote from the national legislature than Madison and Hamilton assumed would be the case. The volume of congressional business is so great that members are physically unable to read all the bills they are expected to vote upon.¹⁸⁸

Not only have there been massive changes in the operations of our national government in 200 years, and in the physical and cultural environment, but changes in concepts or beliefs concerning the nature of our federal system have reached such proportions that one writer could say: "[t]oday it is patently clear that the present structures of the states are anachronisms"¹⁸⁹; and call for an end to the "fiction of state sovereignty."

It is hardly necessary here to recount the myriad ways in which the federal government has grown in power and prerogative since 1787. Whether or not one agrees with William E. Colby's off-hand dismissal of the role of state government today—"State government has tended to wither in artificial boundaries and lose the attention of a busy citizenry."¹⁹⁰—it must generally be conceded that national preemption of economic and social regulation and taxation and public expenditure, have accelerated the centripetal movement of government power.¹⁹¹ Thus, the much debated conundrum of the Constitution's bicentennial period: as the central government grows more powerful, it becomes less representative.

The forthcoming bicentennial of the Constitution has attracted the attention of scholars in the fields of history and political science, as well as those in the law. *Project '87*, a joint undertaking of the American Historical Association and the American Political Science Association, proposes a period of constitutional

188. See generally, the vast amount of materials comprised in the Budget of the United States Government for Fiscal Year 1983. See also, Appendix to the Budget of the United States Government for Fiscal Year 1983.

189. Colby, *Renew the Constitution: The Bicentennial Challenge to the Legal Profession*, 65 A.B.A.J. 209 (1979).

190. *Id.* at 210.

191. Friedrich, *F.D.R.'s Disputed Legacy*, TIME, Feb. 1, 1982 at 20, 43.

study anticipating the 200th anniversary of the nation's charter. Richard B. Morris, Gouverneur Morris Professor of History emeritus at Columbia University and Co-Chair of *Project '87*, describes the undertaking as an open-minded reexamination to find out how the Constitution is working.¹⁹² Possible revisions might result, he concedes. *Project '87* is not a political movement. It invites participation from all hues within the political spectrum. There is little dispute between Liberals and Conservatives that laws and institutions must go hand in hand with the progress of the human mind. Certainly there is agreement that the Constitution must keep pace with the times, must change as our society changes, reflecting new discoveries and new circumstances.

Despite this common agreement on the need to keep the Constitution up to date, however, the subject of constitutional reform is one fraught with controversy. The controversy may be cast in terms of a 'flexible' versus a 'rigid' constitution; in terms of 'liberal' versus 'strict' construction; or it may be seen in reference to divergent points of view on the desirability of certain social and economic policies. But these are not very fixed points of reference. The liberals of one age become the conservatives of another, and underlying the debate over whether the Constitution should or should not be changed in this or that particular, lies the foundational issue of how the Constitution is to be kept alive; how it is to be kept fresh, effective, and potent. Still the debate goes on. That question simply is: whether it is better to alter our fundamental law through a process of judicial interpretation and legislative and executive encroachment, combined with public acquiescence, or whether it is better to change the Constitution through a process of formal amendment, ratified by the legislatures or conventions in three-fourths of the states as specified in Article V.

Both conservatives and liberals, of any age, would agree that thoughtful, pragmatic, responsible review and study of the federal constitution by respected and serious scholars and statesmen, is part of the public process of constitutional evolution which goes on continually. The storehouse of human knowledge grows constantly larger. Public opinion changes. Attitudes shift and tilt with the events and experiences that shape our history. Letters, speeches, and articles present new ideas. People react. Publications and studies lead to committee reports and the resolutions of organizations and representative bodies. Advocates come forward. Forums are found for debate and discussion. Consensus and controversy ebb and flow as the impact of proposed changes upon private and

192. *How America Struggled to Enact a Constitution*, U.S. NEWS AND WORLD REP., March 9, 1981, at 61-62.

public interests surfaces. This public process is natural and informal. It results from the openness of our society. Freedom of speech, freedom of the press, and the right of assembly foster new concepts and the attending impetus for alteration of our institutions.

The public process addresses itself to the formation of public sentiment. Distilled through mass communication and multiplied in millions of private conversations, a prevailing attitude among the generality of people is ultimately identified. We call this phenomenon public opinion. Public opinion is neither constitutional nor unconstitutional. It is *a*constitutional. Public opinion is outside of, and not measured by, the Constitution. Public opinion runs ahead of the Constitution; often contrary to it. Just as public opinion impacts statutes, court decisions, and administrative practices, it can become the wellspring of constitutional change.

But public opinion itself, knows no bounds. Any opinion which any one individual may entertain, may in turn be espoused by several people or embraced by a community, state or nation. Human opinions are founded upon human knowledge and affected by human interest. They are as varied as people. Moreover, public opinion changes rapidly and unpredictably. The emergence and prominence of enterprises engaged in the measurement of public opinion attest to the shifting and uncertainty of popular notions. Every so often, through this natural public process, popular opinion on a given subject wells up to such a level that a constitutional amendment is proposed and adopted.

To a large degree, this is the way in which the United States Constitution has been amended through the first two centuries of our nationhood. The first ten amendments, of course, now heralded as our national Bill of Rights, were proposed by the very first Congress convened under the Constitution of 1787. Demanded from every quarter, these popular guarantees were extracted as the price of ratifying the Constitution itself.¹⁹³

The eleventh amendment, asserting state immunity from suits by citizens of other states, was urged with "vehement speech" as a response to a Supreme Court decision,¹⁹⁴ which angered the citizens of Georgia and other states.¹⁹⁵ The twelfth amendment was adopted as a reaction to the garbled presidential election of 1800, in which Aaron Burr, the vice-presidential candidate, and Thomas Jefferson, the presidential candidate, received tie votes in the elec-

193. Scheips, *supra* note 147, at 61.

194. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92nd Cong., 1st Sess. 1275 (1973).

195. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

toral college. The thirteenth, fourteenth, and fifteenth amendments were prompted by no less a public furor than the Civil War.

The sixteenth amendment came as a direct consequence of a Supreme Court decision holding a federal income tax law to be unconstitutional,¹⁹⁶ thus endangering the solvency of the nation. Adoption of the seventeenth amendment was triggered by a public demand for popular election of U.S. Senators. Supporters of the amendment very nearly garnered sufficient state applications to force the calling of an Article V convention, when the Senate grudgingly voted to submit the proposal to the states for ratification.

The eighteenth amendment is now commonly seen as the work of a vocal minority. Certainly its repeal, after only fifteen years, was almost universally demanded and applauded. The prohibition experiment sheds some light on one weakness of an amendment process that responds primarily to highly visible political movements. Congress often accommodates strident and zealous factions. If their shouts are loud enough, an amendment may be proposed, and sent on for ratification to state legislatures even more attuned to pressure groups. Conversely, it is curious to note that repeal, though advocated by both political parties and most candidates for office did not come about until after the Democratic landslide of 1932.

It took nearly a century of agitation by advocates of women's suffrage before the nineteenth amendment was adopted. On the other hand, the twentieth amendment appears to be an exception to the usual rule. Largely a housekeeping amendment, it changed the dates on which Senators, Representatives and the President take office. The amendment was adopted in 1933, and was framed in the Congress in 1932. There is one possible explanation for this seeming departure from the need for public clamor—1932 was the year of the great Roosevelt revolution. One purpose of the amendment was to insure against the possibility that "a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President. . ."¹⁹⁷ in case no candidate received a majority of the electoral votes.¹⁹⁸

The twenty-second amendment, limiting Presidents to two terms of office was proposed by the 80th Congress, the first Republican controlled congress to be elected after the death of Franklin D. Roosevelt. It was, no doubt, a reaction to Roosevelt's long tenure in office. The twenty-third amendment was adopted as a re-

196. *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895).

197. S. REP. NO. 26, 72d Cong., 1st Sess. 2, 4, 5, 6 (1932).

198. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 194, at 1575.

sponse to the demands of the people living in the District of Columbia, who, despite shouldering all of the burdens and obligations of citizenship were unable to vote in Presidential elections.¹⁹⁹

An endeavor, begun in Congress in 1939 to eliminate the poll tax as a qualification for voting, culminated in the submission in 1962 and adoption in 1964 of the twenty-fourth amendment. That action came as part of the civil rights revolution of the 1960's.

The twenty-fifth amendment was sparked in part by a book written in 1965 examining the problem of Presidential succession highlighted by the assassination of John F. Kennedy.²⁰⁰ The 18 year old vote was incorporated in the Voting Rights Act of 1965 by an amendment in 1970,²⁰¹ and when the Supreme Court found the new age limit inapplicable to the states,²⁰² the twenty-sixth amendment was quickly adopted to relieve election officials from the burden of maintaining two sets of records.

In nearly every case, some fortuitous extrinsic event or hard fought political cause or spontaneous public reaction was the occasion of amending the Constitution. A haphazard approach to constitutional reform at best, waiting for public sentiment to crystallize in favor of a specific amendment, is hardly a reliable way to maintain a modern written charter of government.

Three factors come into play here. First, public opinion, when mobilized, clamors for action. It does not distinguish among the various forms of action which are available. Legislative, executive, or judicial action may be just as effective as constitutional action, at least in the immediate future. A public clamor for constitutional change, if not supported by a popular belief that only constitutional reform will bring about the desired result, may run off the track. In the minds of so-called one-issue activists, constitutional amendment is more a tactic or a strategy than an aim or an objective.

Second, public consensus or popular demand speaks through established channels. People who feel strongly enough about public affairs will write to their congressmen, speak to the local political committee member, or fire off angry letters to the editor of a local newspaper. Officeholders, from the county commissioner on up to the President of the United States are, by definition, part of the governmental structure. They are least likely to have the interest in or the capability of bringing about changes in that structure. The process of intermittent constitutional amendment founded

199. *Id.* at 1586.

200. J. FREDERICK, FROM FALLING HANDS, THE STORY OF PRESIDENTIAL SUCCESSION (1965).

201. 42 U.S.C. 1973b.

202. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

upon urgent public demand is not a dependable means of improving or updating the structure of government.

The third reason why public opinion, directed to occasional constitutional change, is inadequate to preserve a viable written constitution is the simple fact that much of the work which needs doing has no sex appeal. Statecraft is not always interesting nor exciting. It may stimulate intellectuals; it may intrigue philosophers and academics, but often the most troublesome problems of constitutional draftsmanship generate little or no interest on the part of average citizens. Counselling to 'let sleeping dogs lie', those who are in the best position to expose problems of constitutional dimension opt for every available alternative before offering for public debate those troublesome inconsistencies, inapplicable phrases, and outmoded concepts which cling like barnacles to our nation's basic law.

On the other hand, periodic amendment of a constitution is an enterprise of a different sort than occasional or intermittent amendment. Periodic amendment, by definition, ought to be undertaken only after some substantial lapse of time. Its premise should be that times change, that new conditions often require new fundamental rules and structures, and that an open, constructive approach to governmental reform can best be achieved in an atmosphere of calm, deliberative review.

The seventh amendment provides a good example of the need for periodic, formal review, reconsideration, and revision of our federal constitution. The seventh amendment states:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.²⁰³

The necessity for some protection for the right of trial by jury in civil cases was debated at the Philadelphia Convention on September 12, 1787.²⁰⁴ It was urged that the right of jury trial was necessary to guard against corrupt judges.²⁰⁵ Our revolutionary forebears had treasured the right of jury trial as a safeguard of their liberties and of their rights of property during the colonial years.²⁰⁶ But the convention delegates perceived practical difficulties with including a statement of the right of trial by jury in civil cases as part of the text of the Constitution: Delegate Nathaniel Gorham of Massachusetts stated that it is not possible to discrimi-

203. U.S. CONST. amend. VII.

204. 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 438 (1971).

205. *Id.*

206. Coudert, *supra* note 145, at 340.

nate equity cases from those in which a jury was proper.²⁰⁷ Elbridge Gerry of Massachusetts agreed, but insisted that a general statement of principle was necessary to preserve the right. He moved for the appointment of a committee to draw up a Bill of Rights, including the right to civil jury trials. The motion was defeated.²⁰⁸

Three days later, the matter again came to the floor of the convention, this time on the motion of Mr. Charles Pinckney of South Carolina and Gerry to add to Article III—the judicial article—the words “and a trial by jury shall be preserved as usual in civil cases.” This motion was also defeated, after Gorham pointed out that juries are constituted differently in different states.²⁰⁹

As originally proposed, the Constitution contained no guarantee of civil jury trials, but Gerry’s suggestion that a Bill of Rights be drawn up to secure this right and others, was prophetic. In the debates upon the ratification of the Constitution, its want of assurance of civil jury trials was excoriated by anti-federalists. Richard Henry Lee, writing under the pseudonym *The Federal Farmer*,²¹⁰ had this to say:

The common people can establish facts with much more ease with oral than with written evidence; when trials of facts are removed to a distance from the homes of the parties and witnesses, oral evidence becomes intolerably expensive, and the parties must depend on written evidence which . . . seldom leads to the discovery of truth.²¹¹

Lee further argued that, in every free country “common people should have a part and share of influence, in the judicial as well as in the legislative department.”²¹² It was pointed out that all of the states had secured the right of jury trial in civil cases as a means of protecting property rights.²¹³

One particularly telling argument raised by those who opposed the Constitution or insisted upon a Bill of Rights protecting civil jury trials, related to the language of Article III, Section 2, which stated, *inter alia*: “In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact. . . .”²¹⁴ Remarking on this, one anti-federalist observed: “If the court, upon appeals, are to determine both the law and the

207. SCHWARTZ, *supra* note 204, at 461 n. 11.

208. *Id.*

209. *Id.*

210. *Id.* at 472, 473.

211. *Id.* at 473.

212. *Id.*

213. *Id.*

214. U.S. CONST. art. III, § 2.

fact, there is no room for a jury, and the right of trial in this mode is taken away."²¹⁵ The state conventions, called to ratify the Constitution, submitted numerous recommendations for amendments. Seven states urged adoption of an amendment securing the right of trial by jury in civil cases.²¹⁶ Failure to guarantee civil jury trials very nearly brought about the defeat of the Constitution as originally proposed.²¹⁷

Jury trial was then, as it is now, a highly emotional, simplified battle cry. It represents in the minds of many people a sacred and time honored right; a shield against arrogant judges; an assurance that the power of government can be frustrated by the intervention of ordinary citizens. But the right has always been easier to cheer for than to define. The convention avoided the issue because of difficulty in describing the cases to which it applied. The definition finally agreed upon, which stands as the constitutional delineation of the right to this day, has lost whatever force it once had.

Jury trials are assured in suits at common law, but there are no suits at common law within the Federal Judicial System anymore.²¹⁸ Jury trials are assured where the value in controversy exceeds \$20.00. The jurisdictional minimum in diversity cases in Federal courts is now \$10,000.²¹⁹ Modern state constitutions have substantially altered the common law concept of civil jury trials.²²⁰ In England, jury trial in civil cases has all but disappeared.²²¹ With civil litigation mounting, dockets burgeoning, delay piling upon exasperating delay, modern court systems seek new methods of dispute resolution which can more adequately serve the needs of 20th and 21st century society.

The states are the proper agencies for experiment and innovation in such matters. Surely the six man jury and the five person verdict are legitimate descendants of the common law civil jury.

215. SCHWARTZ, *supra* note 204, at 576.

216. 2 SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 938 (1971).

217. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION*, S. DOC. NO. 170, 82d Cong., 2d Sess. 891 (1953).

218. The merger of law and equity into one civil form of action was effectuated in *FED. R. CIV. P. 4*. See generally, Henderson, *The Background of the Seventh Amendment*, 80 *HARV. L. REV.* 289 (1966), Wolfram, *The Constitutional History of the Seventh Amendment*, 57 *MINN. L. REV.* 639 (1973).

219. 28 U.S.C. § 1331, § 1332.

220. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.

MICH. CONST. art. 1, § 14.

The legislature may authorize a trial by a jury of less than 12 jurors in civil cases. *MICH. CONST.* art. 4, § 44. See also, *MICH. COMP. LAWS ANN.* 600.1352 (1970) (*MICH. STAT. ANN.* 27A.1352 (Callaghan 1977)).

221. S.A. DESMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 359 (2d ed. 1973).

They ought to be permitted in federal court wherever they are permitted under state law. Really, preservation of the state defined right of trial by jury in federal courts was all the anti-federalists wanted in 1787. The seventh amendment was a case of a too narrowly drafted constitutional provision. The seventh amendment should have read: *Jury trial in civil causes as defined by state law shall be preserved in the Courts of the United States.* Were it so, a citizen's right to trial by jury in a civil matter would not depend on whether his claim exceeded \$10,000 or whether it was brought in a state or federal court.

But such an amendment has no great constituency, for or against it. It is needed to modernize the Constitution. If presented by a solemn, prestigious body, such as an Article V convention, it may be accepted and approved in regular course by the state legislatures. To wait for a public clamor upon such a matter is to defer action indefinitely.²²²

The alteration is admittedly a minor one, and there are those who may describe such efforts as tinkering with the Constitution. But without such adjustment, we are constrained to concede that the seventh amendment is irrelevant, except as expressing a wish or a hope that somehow, in some cases, some kind of a right to civil jury trial will be provided in federal courts. It is addressed not to the oaths of office holders but to their magnanimity; not to their understanding of what is required, but to their notion of what is preferable.²²³

This disparity between the words of the Constitution and the actually enforceable rights of the citizens contributes to the mysti-

222. (a) An eclectic test. No one has explicitly suggested re-examination of the whole matter with a view of determining what issues or types of issues are best fitted for court trial or jury trial. If all were *tabula rasa*, and some solon were trying to devise an ideal system for the administration of justice, he would probably approach the jury trial problems with just such an inquiry in mind. And it may well guide the future course of those charged with amending or recasting constitutions or, within narrower compass, of legislators. But as a guide for judicial, as opposed to political, action in the matter any such test meets serious difficulties. For one thing the constitutions themselves, as we have seen, impose a different test (namely an historical test which was never guided, even in the making, by the consideration here suggested as ideal). Furthermore, even if the matter is left to the people acting through their legislators, they lack any scientific way of telling what issues are best suited for jury or for court trial, and there is no general agreement (among judges, among politicians, within the profession, or in the community at large) about the matter or even about the underlying premises that should be assumed in making the evaluation. These difficulties seem to this writer quite insurmountable and indeed they should, it is submitted, inhibit judges from feeling free to take the bit in their teeth. Nevertheless it is natural and inevitable that a court's own value judgments will influence its decisions in close and doubtful cases.

Fleming, *Right to a Jury Trial in Civil Actions*, 72 *YALE L.J.* 655 (1963).

223. Coudert, *supra* note 145, at 340.

fication of law. Those who know what the law is become the oracles for those who don't know. There is a merger of law and authority. Instead of obedience to the law, people learn to obey the policemen, obey the judge, obey the computer-printed official-looking notice which comes in the mail.

In the matter of human power, there is a phenomenon which may be called grabbing the brass ring. It involves the assertion of leadership, of authority, or control. That assertion can be made in a multitude of ways, from brandishing a weapon to taking the first place at the dinner table. Whenever dominion over others is asserted, a response follows. If the response is acquiescence, the asserted dominion is established and becomes operative. If the response is resistance, there is conflict, which continues until either the assertion is withdrawn or the resistance subsides. This simple rule, which we all see at work in our personal lives, applies as well to communities and nations. It certainly applies in legal systems and political affairs. This fact alone ought to militate against the principle of legal "realism". Political structures will always gravitate towards the center of power. To accede to an evolutionary constitution is to quit resisting the assertion of control.

The words of our Constitution function as weapons of public resistance to total domination by those in office. They are a formidable barrier to usurpation. Dull those weapons and the resistance is slowed. Jumble those weapons and the resistance is confused. Intersperse among the important, effective, meaningful words of the Constitution archaic phrases, quaint anachronisms, and superseded provisions, and the people's capacity to resist the abuse of public authority becomes overladen and cumbersome.

Why, for instance, should the Constitution of the United States still provide, in 1982, that the importation of slaves may not be prohibited by Congress until 1808? That paragraph lost its force nearly two centuries ago. It is ancient history. It has no place in a constitution which represents the sovereign voice of the people today.

Those who would denigrate the Constitution as the political compact between the people and their government, those who prefer to obfuscate the function of the Constitution as the Supreme Law of the Land, will conveniently adopt the archeological or literary definition of it. They will say those words remain only because they were once part of the Constitution, and the past cannot be undone. What was, was. You can add to the Constitution, but you cannot subtract from it. The argument does not bear up. The power to amend includes the power to repeal. The eighteenth amendment was repealed. The words of the eighteenth amendment are no longer part of the Constitution, having been expressly ex-

punged by the twenty-first amendment.

Unfortunately, other amendments have not included express repealers of inconsistent language. As a consequence, the Constitution has grown unnecessarily. It carries excess verbiage, long since superseded by amendment. By one count, 441 words have been specifically overridden by later amendment.²²⁴ In addition, several paragraphs have expired or ceased to be operative by their own terms. Good housekeeping is important. As an instrument of human communication, the Constitution should be direct, clear, and uncluttered. The Constitution is the message which the people send to their government. That message should be short and to the point.

If we ridicule the notion of school children memorizing the Constitution, we should not be surprised when the adult citizenry fails to recognize the Bill of Rights.

Housekeeping chores, of course, must be tended to periodically. They call for a convention. The congressional route to constitutional amendment is far too politicized to function as a committee on style and drafting. There are other amendments which ought to be considered, if our constitution is to reflect modern standards and values. And which, because of their limited application, are unlikely to become the subject of reformist fervor. Yet they are matters of substance, which, once brought to the head of the people's agenda, are ripe for correction. One prime example: the qualification for election to federal office.

The distinction between native born and naturalized American citizens with respect to eligibility for national office is not one which would likely be written into the constitution today. Yet it is a discrimination which has not attracted much attention. Apparently very few foreign-born citizens wish to seek election to the House of Representatives within seven years²²⁵ of gaining citizenship or consider running for the Senate until they have been citizens for nine years.²²⁶ The total disqualification of naturalized citizens for the presidency²²⁷ operates as a symbolic affront to large segments of our population, and could some day deprive the nation of the services of the best candidate for that office.

Again, the amendments necessary to correct these historic injustices would be best advanced through the agency of a delibera-

224. U.S. CONST. art. I, § 2, para. 3 was superseded by U.S. CONST. amend. XIV and XVI. U.S. CONST. art. I, § 3, para. 1 and para. 2 was superseded by U.S. CONST. amend. XVII. U.S. CONST. art. I, § 4, para. 2 was superseded by U.S. CONST. amend. XX. U.S. CONST. art. II, § 1, para. 3 was superseded by U.S. CONST. amend. XII.

225. U.S. CONST. art. I, § 2.

226. U.S. CONST. art. I, § 3.

227. U.S. CONST. art. II, § 1.

tive body charged with the responsibility of dispassionately reviewing the language of the original Constitution, and proposing, after full, fair, and open consideration, such amendments as are appropriate to improve and revitalize the Constitution.

Beyond correcting those provisions which discriminate against naturalized Americans, and eliminating those shameful vestiges of the era of human bondage which have no more rightful place in our Constitution than they have in our attitudes and our customs, there are a number of paragraphs in the fundamental law which need to be exposed to the light of day, and either discarded or bolstered. Some of these could decisively affect the course of national affairs, since they relate to the basic philosophy of our government, its purposes, its methods, and its objects.

They might be called sublimated constitutional provisions, because they have been forced down, as it were, into our national subconscious, and there ignored or conveniently forgotten. Prime among these sublimated constitutional provisions is the proscription contained in Article I, Section 8: "Congress shall have the power . . . to raise and support Armies, but no Appropriation of Money to that Use shall be for a longer term than two years."²²⁸

Whatever the two year limit on army appropriation may be understood to mean in Washington, D.C. in 1982, it does not seem to have any restraining force with respect either to appropriations or the raising and supporting of armies. Certainly the Pentagon would be stunned to hear that congressional expenditures for land forces were circumscribed by a term limitation which did not apply to naval forces.

With the technological advancements which have changed the entire concept of national defense, the necessity of long range planning, and the commitment of resources over substantial periods of time are commonly accepted. But the argument from modern necessity does not change the plain language of the Constitution. The most ingenious semantic machinations cannot change the meaning of that restrictive phrase.

The limitation of appropriations to raise and support armies to two years came about because the framers of the Constitution distrusted standing armies. Elbridge Gerry argued on August 18, 1787 that as originally proposed, the authority of Congress to raise armies contained no check against standing armies in time of peace. He pointed out that the Congress under the Articles of Confederation had no power to maintain an army. For himself, he expressed the view that an army is dangerous in time of peace, that he would never consent to giving a power to keep up an indefinite

228. U.S. CONST. art. I, § 8.

number. He proposed to limit standing armies to two or three thousand.²²⁹ Gerry's motion was defeated, after a comment by Mr. Williamson of North Carolina urging a "motion for limiting the appropriation of revenue as the best guard in this case."²³⁰ Again on September 5, 1787, when a committee reported the language of the clause as finally adopted, Gerry objected to the two year appropriation, insisting that one year was long enough, and again inveighing against the dangers of standing armies. Mr. Sherman responded, agreeing that there should be a reasonable restriction on the number and continuance of an army in time of peace, but pointing out that the Congress was to be elected every two years, and, as it might not meet each year, the two year maximum would avoid inconvenience.²³¹

What a far cry from the focus and concerns of the framers are the words of 10 U.S.C.A. 2301 *et seq.* describing the process of military procurement. "The head of an agency may enter into contracts for periods of not more than five years. . . ."²³² Detailed citation should not be necessary to support the proposition that American military expenditures are substantial; that vast standing armies are maintained; that appropriations are made for the purpose of raising and supporting armies for longer periods than two years. No distinction is made between the army and the navy, although the Constitution's two year appropriation limit does not apply to the navy. In fact, 10 U.S.C.A. 2309 permits funds appropriated for one agency to be made available for obligation for procurement by any other agency.

The point need not be belabored further. The founders had a real distrust of standing armies. As Madison said: "as armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution."²³³ Since the second world war, the United States has continuously maintained a military establishment consisting of more than three million persons, of which, in 1978, 757,000 were members of the United States army on active duty. The air force accounted for an additional 567,000.²³⁴ It is clear that forces of this magnitude cannot be maintained, equipped, and supplied with short term appropriations.

Obviously, the language which Madison and his colleagues inserted in the Constitution is no longer operating. It is simply being

229. J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, 424 (reprint 1970).

230. *Id.* at 424.

231. *Id.* at 512-513.

232. 10 U.S.C. § 2306 (9)(i).

233. J. MADISON, *supra* note 229, at 565.

234. *Statistical Abstract of the United States*, 1979 U.S. Department of Commerce, at 373.

ignored by the government in Washington. Doubtless, no one now would argue with much enthusiasm for the enforcement of the two year limitation. But a limitation ignored is no limitation at all. We permit our only constitutional protection against standing armies to be ignored. At the same time, we fret about an international arms race that imposes enormous economic burdens on the American people. The founding fathers thought the matter a proper subject for constitutional legislation. If we do not think ourselves competent to such a task at this time in history, we ought to say so in clear terms. If we think the two year appropriation limit too stringent, we ought to remove it, before some elected officials come along and endanger our security by the innocent act of obeying the Constitution.

Jury trials; standing armies; disqualifications for office; these are but a few of the areas sorely in need of constitutional attention. Much of our basic charter has grown pathetically out of date because we have focused upon a few popular phrases which have been seen as flexible. We have been enthralled over the adaptability of due process of law, and equal protection of the law, and we have deluded ourselves into believing that the entire Constitution was miraculously conceived in ageless prose.

It is not so, of course. The Constitution contains many narrow, rigid, outdated terms. It omits many things which could easily be included, if the document is to serve our generation and those to come as aptly as it was conceived to serve those who went before us. There is no call to be shy or timid. Surely after 200 years, we are not premature to consider amendments. If anything, we may be too late.

The matter of occasional and periodic amendment of the federal Constitution was addressed by James Madison in the 49th and 50th Essays of the *Federalist*. Those writings are sometimes erroneously cited in opposition to an amendatory convention. Actually, Madison conceded that a convention, which he considered tantamount to a recurrence to the people, ought to be called whenever "it may be necessary to enlarge, diminish, or new-model the powers of the government"²³⁵; but he opposed recurrence to the people "in all cases for keeping the several departments of power within their constitutional limits."²³⁶

Madison's argument was directed against a proposal of Thomas Jefferson, who had advanced the idea that any two branches of the national government might, at any time, call a convention for the purpose of correcting breaches of the Constitution

235. *THE FEDERALIST* No. 49, at 348 (J. Madison) (Wright ed. 1974).

236. *Id.* at 348.

by the third branch.²³⁷ Jefferson saw the convention as a remedial tool, one to be called upon to reverse unauthorized initiatives of government officers, whenever they occur. Madison opposed this approach, observing that frequent amendatory conventions would suggest that the Constitution was poorly conceived in the first instance. Public confidence would be sapped, and the government would be deprived of "that veneration which time bestows on everything."²³⁸

It may be true that, as Madison argued, "frequent reference of Constitutional questions to the decision of the whole society"²³⁹ might disturb the public tranquility by too strongly interesting public passions, but surely once in 200 years can scarcely be condemned as undue frequency, and the possibility of awakening public interest in constitutional questions in 1982 seems a welcome alternative to an electoral tranquility that borders on collective somnolence.

V. SOVEREIGNTY, STATES, AND THE CONVENTION

"[N]o state, without its consent, shall be deprived of its equal suffrage in the senate."²⁴⁰

Amendment of the Constitution, by whatever means, is the ultimate act of sovereignty. It is an exercise of the most basic political power in human society. It is that "explicit and authentic act of the whole people" of which Washington spoke.²⁴¹

To understand the nature of the amendatory convention contemplated by Article V, it is necessary first to examine the phenomenon of sovereignty in the United States of America. To understand how the convention is intended to function, it is essential to know whose work the convention is doing. Whom does an Article V convention represent? To whom does it answer? Whose convention is it?

If the convention is for proposing amendments to the Constitution, and if the act of amending the Constitution is the ultimate act of political power or sovereignty, then it must be that the convention is designed to serve the sovereign. It follows that the convention is designed to work for and is therefore answerable to the people of the United States, because, in the United States of

237. *Id.*

238. THE FEDERALIST No. 49, at 349 (J. Madison) (Wright ed. 1974).

239. THE FEDERALIST No. 50, at 352 (J. Madison) (Wright ed. 1974).

240. U.S. CONST. art. V.

241. George Washington's Farewell Address reprinted in COPELAND, THE WORLD'S GREAT SPEECHES 248 (1942).

America, sovereignty is inherent in the people.²⁴²

Our Constitution declares itself to be the Supreme Law of the Land, and acknowledges that its source is the people. The preamble uses these operative words: "We the People of the United States . . . do ordain and establish this Constitution. . . ."²⁴³ The Constitutions of the states also recognize the primacy of the people. The Michigan Constitution of 1963 begins with these words:

Preamble

We the People of the State of Michigan grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessing undiminished to ourselves and our posterity, do ordain and establish this Constitution.

Article I—Declaration of Rights

1. *Political Power*

Section 1. All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.²⁴⁴

Abraham Lincoln spoke of a government "of the people, by the people, and for the people."²⁴⁵ The notion that the people are sovereign is deeply imbedded in the American experience.²⁴⁶ But the concept of sovereignty itself is not an American invention.²⁴⁷ In monarchical times, it was argued that the King was sovereign; that he ruled by divine right; that his authority over his subjects came from God. That idea has not entirely disappeared, despite the supposed enlightenment of our times. The Islamic Republic of Iran, in our day, is but one example of a regime which lays claim to direct delegation of authority from the Almighty.

The democratic ideal of public sovereignty, of course, does not negate the underlying, foundational primacy of God as the author of all laws. Our constitutional and revolutionary forefathers did not conceive of a nation insubordinate to Divine Power and authorship. But they believed that the Divine source of human political power and authority is traced through observable natural law.²⁴⁸ Civil authority stems, they believed, from the social nature

242. Platz, *Article V of the Federal Constitution*, 30 GEO. WASH. L. REV. 17, 22 (1961-62). See also, *Yick Wo v. Hopkins*, 118 U.S. 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

243. U.S. CONST. preamble. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 324, 4 L. Ed. 97 (1816).

244. MICH. CONST. preamble. MICH. CONST. art. I, § 1.

245. Address by Abraham Lincoln at Gettysburg reprinted in, MASON & BEANEY, *supra* note 17, at 145.

246. John Adams, *Thoughts on Government*, reprinted in, MASON & BEANEY, *supra* note 17, at 145.

247. DESMITH *supra* note 221, at 65.

248. I think it (government) has an everlasting foundation in the unchangeable will of God, the author of nature, whose laws never vary. Government is therefore most evidently founded on the necessities of our nature.

of man, which in turn is a manifestation of Divine prescription.²⁴⁹

Simply put, the Creator made people to be inter-dependent; to join together naturally for their health, safety and betterment into social orders.²⁵⁰ The first of these natural orders is the family, decreed by the physical laws of nature to be necessary and proper to the procreation, protection, and education of the young. The alliance of men and women in physical, emotional, spiritual, and social relationships, the resultant progeneration of human life and the total dependence upon mother and father by new humans, are all conceded natural phenomena which, in one way or another, surface in every instance of sustained human life upon this planet. The further development of clan, tribe, village or neighborhood into organized communities is an axiom of political science.²⁵¹

The American Revolution had its philosophical roots in the writings of men like John Locke, who saw human societies as the product of a social compact between free people.²⁵² Such compacts were entered upon by people who, in a state of nature, were seen as perfectly free and totally sovereign over themselves as individuals. The power of government was seen as the sum total of the powers relinquished by individual people, in exchange for the benefits of the social compact. In this sense, states and nations are said to be sovereign, for in their proper sphere, they exercise powers derived from the people.

Sovereignty is political power. It is people power. People power is a function of numbers of people. It is also a function of time and place.²⁵³ Indeed, there is no such thing as sovereignty in a people, unless the people be organized. An unorganized populace is not sovereign in the political or legal sense. Unorganized, it has no means to work its collective will. In fact, it has no means to determine or express its collective will. An unorganized populace is merely a crowd or a mob.

The fundamental unit of political organization in the United States is state government. When the Constitution of Michigan asserts that all political power is inherent in the people,²⁵⁴ it does not make an academic statement, or universal observation, true as it

J. Otis, *The Rights of the British Colonies*, (1764), quoted in MASON & BEANEY *supra* note 17, at 94.

249. *Id.*

250. The state of nature for the bee is that of union in the swarm; and so the state of nature for mankind is that of association in political communities, patriarched or other.

JAMESON, *supra* note 93, at 71.

251. *Id.*

252. MASON & BEANEY, *supra* note 17, at 27.

253. COOLEY, *supra* note 51, at 2.

254. MICH. CONST. art. I, § 1.

may be. The Constitution of Michigan is not a mere treatise on political science. It is an operative legal document, a jural act, by which rights are claimed and duties imposed. And so, when the Constitution of Michigan asserts that all political power is inherent in the people, it means that all political power *in Michigan* is inherent in the people *of Michigan*. Cities and counties are mere creatures of the states. They can be abolished, altered, combined, or divided by action of state government; subject, of course, to state constitutional requirements. The states, on the other hand, are not creatures of the federal government. States existed before the federal government.²⁵⁵

The Articles of Confederation were a coming-together of 13 sovereign and independent states.²⁵⁶ Article II of the Articles of Confederation provided: "Each 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."²⁵⁷ Under the Articles of Confederation, delegates to congress were chosen by the legislatures of each state. Their expenses were paid by the states. A state could be represented by not less than two nor more than seven delegates, but each state had only one vote on any question coming before the congress.²⁵⁸ The Constitutional Convention in Philadelphia in 1787 was, likewise, a convention of delegations from the several states, attended by all, save Rhode Island.²⁵⁹

The United States Constitution recognizes that the states are the primary unit of political organization. The tenth amendment of the Bill of Rights says: "The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²⁶⁰ The people to whom the undelegated powers are reserved, the people in whom the residue of undelegated political power abides, are the people of the respective states.

States have their continued existence and integrity assured against the action of the federal government. Article IV, Section 3, of the Constitution provides:

New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state formed by the junction of two or more states, or parts of states, without the consent of the legisla-

255. *Texas v. White Tex.*, 74 U.S. (7 Wall.) 724, 19 L. Ed. 227 (1869).

256. FARRAND, *THE FRAMING OF THE CONSTITUTION*, App. 1 at 211 (29th print 1978).

257. *Id.* at 212.

258. *Id.* at 213.

259. *Id.* at 11-12.

260. U.S. CONST. art. X.

tures of the states concerned as well as the Congress.²⁶¹

Article V concludes with this sentence: "no state, without its consent, shall be deprived of its equal suffrage in the senate."²⁶² Article V recognizes that the states are the true and final agents of the people in the matter of constitutional amendment.

Taken together, Article IV, Section 3 and Article V, demonstrate that the territorial integrity and equal stature of each state of the union are sacrosanct. The sovereignty of the people of all the states, to the extent delegated to the central or national government, does not extend to the elimination of these core attributes of statehood.

Sovereignty considered in the context of amending the Constitution, refers to that residue of undelegated political power which abides in the amending authority, and which can be exercised to expand, contract, or alter the powers and functions of the institutions of government. In a democracy, undelegated sovereignty is exercised by voting.²⁶³ In the United States, the conduct of elections is a function of the states. The people of the United States vote in their respective states.²⁶⁴ Votes are counted in the several states, by state officers. In short, the people of the United States are *organized by states* when they assert their political power.²⁶⁵

For the purpose of exercising ultimate sovereignty; that is, for the purpose of determining the *forms* of government, as opposed to carrying out the *powers* of government, the people of the United States have always been organized by states.²⁶⁶

Whether a constitutional amendment begins with a congressional proposal, or with a convention devised proposal, it must receive the approval of the people of three-fourths of the states, in order to become a part of the Constitution. The approval of the people is expressed either by the state legislatures or by conventions in each of the states as one or the other mode of ratification

261. U.S. CONST. art. IV, § 3.

262. U.S. CONST. art. V.

263. The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority.

COOLEY, *supra* note 51, at 28.

264. As a practical fact, the sovereignty is vested in those persons who by the Constitution of the State are allowed to exercise the elective franchise.

Id. at 29.

265. Smith, *supra* note 40, at 664.

266. . . . and, lastly, I believe that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body: meaning by a states' government not its ordinary legislature, but the body of its citizens which appoints its ordinary legislature, and which, the union apart, is properly sovereign therein.

J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 222 (2d ed. 1861).

shall be proposed by the Congress. It is therefore, a concurrence of the people *by states* that works a change of the Federal Constitution.²⁶⁷

By the constitutional mandate, it is the people of three-fourths of the states who ratify amendments; not merely three-fourths of all the people of the United States. The electoral college, by which the President is chosen, similarly calculates by states. The potential difference between the popular and the electoral vote has been a frequent subject of discussion and debate. But despite much agitation and criticism, the electoral college system stands.

Whatever may be argued from majoritarian principles, it remains a fact of political reality that sovereignty is a function of place as well as numbers of people. The Chinese are not thought to have a superior right over matters relating to the Philippines because of the superiority of their numbers. The territorial integrity and equality of stature of the Philippines remain principles of international law, recognized by the world.²⁶⁸

Constitution-making is not a simple matter of majority rule. Indeed, our Constitution cannot be amended except by the concurrent action of super-majorities in the Congress and among the states. The "explicit and authentic act of the whole people"²⁶⁹ requires something approaching consensus. That consensus must not only be broad in terms of numbers of people, but it must also be balanced in terms of the places in which it is accepted by the people. The genius of this mandate is that it frustrates the spirit of sectionalism and assures, with reasonable certainty, the continued unity of the Nation.

It is reasonable to suppose that in any confrontation with recalcitrant or disputatious states, a unified phalanx of three-fourths of the states would be sufficient to hold the union together. A constitution which is accepted in the east and reviled in the west is not a true national charter. Majoritarian principles do not control the constitutional process. Indeed, a constitution, as the "explicit and authentic act of the whole people" announces and defines the rights of minorities and individuals even as against the expressed will of the majority. The organization of the whole people into states, and the requirement of the concurrence of a super-majority of states to amend the Constitution, is the mechanism by which the Constitution retains its national authenticity.

267. *Id.*

268. E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW*, 100 (1920).

269. George Washington's Farewell Address *reprinted in* COPELAND, *supra* note 241, at 248.

But to say that, for the purpose of exercising ultimate sovereignty, the people of the United States are organized by states is not to say that the states themselves are sovereign. The Constitution of 1789 is a federal constitution. It proceeds upon the theory that both state and national governments exercise sovereign powers. The sovereignty of the national government is not second-hand.²⁷⁰ It is not granted by the states, but rather it is granted by the people of the states.²⁷¹ The Constitution was ratified by conventions in each of the original states, and not by the state legislatures.

If the residual sovereign power to amend the Constitution abides in the people of the respective states, then it follows that the amendatory convention provided for in Article V is a convention of the *people of the respective states of the United States*. In this sense, and only in this sense, it is accurate to say that an Article V convention belongs to the states.²⁷²

Hereafter, for convenience of expression, that phrase may be repeated; in the context of a dichotomy between the states and the national government, it states a relative truth. But the full reality is that the convention belongs to the people of the fifty states. It does not belong to the states themselves as corporate political entities.

This discussion of residual sovereignty is intended to lay a theoretical foundation for the concept that an Article V convention is a convention of the people, by states. That proposition is bolstered as well by a review of the history of the present Constitution and the events which led up to its drafting and adoption.

An historical perspective also serves to shed some light on the intent of the framers of Article V. The paucity of detail in the Article itself, which has proved so troublesome to modern statesmen, is better understood in this view. The delegates at Philadelphia were all well aware of the antecedents of their own convention and the basis of its organization and methodology. The most logical and obvious explanation for their failure to spell out the details of an amendatory convention is that they expected any future amendatory convention to be structured very much like their own.

The parallels between the provisions of Article V and the

270. THE FEDERALIST No. 39, at 284 (J. Madison) (Wright ed. 1974).

271. *Id.* at 283.

272. The Constitution of the United States, or the constitution of their general government, was framed by deputies from the several states in 1787. It may (I think) be inferred from the fifth article, that the sovereignty of each of the states, and also of the larger state arising from the federal union, resides in the states' governments as forming one aggregate body.

AUSTIN, *supra* note 266, at 222-223.

events leading up to the Philadelphia Convention are worth noting. Agitation for revision of the Articles of Confederation had begun long before the delegates were finally convened.²⁷³ For nearly a decade, Hamilton and others had, in published and unpublished communications, pointed out the failings and shortcomings of the Articles of Confederation.²⁷⁴

Most glaring was the provision of Article XIII of the Articles of Confederation that the Articles could not themselves be amended but by the unanimous action of the thirteen states.²⁷⁵ No amendments were ever adopted during the ten confederation years, despite several attempts, at least one of which garnered all but one state's ratification.²⁷⁶

As early as May of 1785, a committee of the Congress recommended substantial alteration of the Articles, to make them more workable. But Congress failed to act.²⁷⁷ So it fell to the states to initiate the process of amendment. In January of 1786, the Virginia legislature passed a resolution appointing five commissioners who were empowered to meet with such commissioners as might similarly be appointed by the legislatures of any of the other states, at such time and place as they might agree upon, to discuss mutual problems of trade and commerce.²⁷⁸

After an exchange of correspondence with other states, a meeting was set in the city of Annapolis, Maryland, on the first Monday in September, 1786. Only five states sent delegates to Annapolis: Virginia, Delaware, New York, New Jersey, and Pennsylvania. Four other states, Massachusetts, North Carolina, Rhode Island, and New Hampshire appointed commissioners; but their commissioners failed to attend. Georgia, South Carolina, Connecticut, and the host state of Maryland chose not to participate.²⁷⁹

While the Annapolis meeting did not itself address the important goals for which it was called, one vital step was taken there which moved the process of constitutional reform forward. The delegates present at Annapolis adopted a report which expressed their unanimous belief that it would tend to advance the interests of the Union if their respective states would concur and use their best efforts to secure the agreement of the other states to appoint commissioners, who would meet at Philadelphia on the second

273. MASON & BEANEY, *supra* note 17, at 163.

274. BOWEN, *supra* note 2, at 7, 8.

275. FARRAND, *supra* note 256, at 223.

276. *Id.* at 5.

277. *See generally*, FARRAND, *supra* note 256, at Cu.3.

278. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 115 (1784-1846 ed. photo reprint 1974).

279. *Id.* at 116.

Monday in May, 1787:

to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectively provide for the same.²⁸⁰

The call for the Philadelphia convention was issued from Annapolis. The call was issued by delegates from five of the thirteen states. It was issued by them after the Congress itself had failed to act. Over the next several months, the states began to respond favorably. When it was apparent that a substantial majority of the states would be represented at Philadelphia, the recalcitrant Congress finally acted. On February 21, 1787, five months after the states had agreed in Annapolis to meet in Philadelphia, Congress issued its own belated call for a convention, prudently, selecting the very date and place already announced by the states: Philadelphia, the second Monday in May.²⁸¹

Eventually, every state except Rhode Island sent delegates to the convention. Delegates were commissioned by the legislatures of their home states. Their expenses were borne by the states they represented. Each state sent a delegation of whatever size it deemed appropriate. Virginia sent seven delegates; Pennsylvania, eight. Tiny Delaware sent five representatives, as did New Jersey. Massachusetts, though larger, sent only four. Voting in the convention was by states, with each state having but one vote, irrespective of its size or the size of its delegates.²⁸² All delegates, however, could speak in the convention, and serve on its committees.

The convention was called for May 14, 1787. On that day, only two states had delegates present in Philadelphia. Pennsylvania and Virginia. It would be the 25th day of May, nearly two weeks later, when a quorum could be garnered to convene the assembly. Apparently, all regarded a majority of seven states to constitute a quorum, though the basis of such an assumption remains unclear.²⁸³

At the opening session, each delegate was presented, and his credentials received. These credentials consisted of acts of the state legislatures referring to the call of the convention and naming the state delegates or deputies. They were in no special form or uniform verbiage. Some resolutions specified broad purposes for

280. PRESCOTT, *DRAFTING THE FEDERAL CONSTITUTION* 7 (reprint 1968).

281. FARRAND, *supra* note 256, at 28.

282. Voegler, *supra* note 20, at 360.

283. FARRAND, *supra* note 256, at 56.

which the delegates were sent. Most stated, in the language of the congressional call to Philadelphia, that the convention was to be held "for the sole and express purpose of revising the Articles of Confederation."²⁸⁴

First orders of business included the selection of a presiding officer—George Washington—and the appointment of a committee to recommend rules for the conduct of the convention's affairs. The Philadelphia Convention had no need of procedural guidelines from the Congress. It proceeded to undertake its work according to the instructions which the delegates had been given, the nature of the gathering itself, and general principles of parliamentary bodies as understood by the members.²⁸⁵

The Philadelphia Convention was a convention of the people, by states. That is the way it was understood by all of the delegates at the convention.

When that convention came to consider the question of future amendment of the Constitution it was then formulating, it moved through a series of proposals, substitutions and amendments to arrive at the final language of Article V. In the process, the tension between those who favored a national government and those who were suspicious of the central government was evident.

The first concept was put forward by Edmund Randolph, governor of Virginia. Dubbed the Virginia Plan, it was not so much a proposed draft of a constitution, as it was a series of considerations or principles which the Virginia delegates thought it necessary for the convention to consider. It stated: "Provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto."²⁸⁶

The first actual proposed language for an amendatory article was suggested by Charles Pinckney of South Carolina on May 29. The Pinckney proposal was very much like Article V as finally adopted, with one important omission. It did not provide for ratification of proposals presented by the convention. The Pinckney draft was as follows:

If Two Thirds of the Legislatures of the States apply for the same the Legislature of the United States shall call a Convention for the purpose of amending the Constitution—Or should Congress, with the Consent of Two Thirds of each house, propose to the States amendment to the same—the agreement of Two Thirds of the Legislatures of the States shall be sufficient, to make the said amend-

284. ELLIOTT, *supra* note 278, at 126-139.

285. BOWEN, *supra* note 2, at 35.

286. 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 22 (1911).

ments Parts of the Constitution.²⁸⁷

Pinckney's plan was never debated; still his concept prevailed during the early consideration of Article V. The Committee on Detail presented this draft for consideration on August 6, 1787: "On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose."²⁸⁸

Madison, among others, argued against this notion of a convention. What would be the force of its acts? Was the convention to be empowered to change the Constitution, or merely propose changes?²⁸⁹ Clearly, the Committee on Detail's plan did not entrust the Congress with the power to amend the Constitution. But it did empower two-thirds of the state legislatures to ratify a congressionally proposed amendment. Presumably it was thought that a convention demanded by two-thirds of the states could safely be given the same power as two-thirds of the state legislatures would have.

The resemblance between the August 6 proposal and the events leading up to the Philadelphia Convention is striking. The mischief perceived by Madison—what would be the effect of the convention action?—remained. But of course on August 6, 1787, the same uncertainty existed with respect to the force of the actions which were then being taken by the Philadelphia Convention itself.

The whole proceedings of the Philadelphia Convention are viewed by many as a bargaining session, resulting in a series of compromises between those who favored state supremacy and those who wanted national supremacy. This dichotomy was never more evident than in the debate over Article V. It was argued that the proposal of the Committee on Detail left the power of amendment too much with the state legislatures.

Madison was heard to observe: "I consider the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty and a constitution."²⁹⁰

He focused not so much on the issue of who formulates or proposes amendments to the Constitution, as upon the question of who approves or ratifies amendments. On September 10, 1787, Madison presented this draft of Article V:

The legislature of the United States, whenever two-thirds of

287. 3 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION*, app. D. at 601 (1911).

288. 2 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 188 (1911).

289. See generally, MADISON, *supra* note 229.

290. BOWEN, *supra* note 2, at 219.

both houses shall deem necessary or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States.²⁹¹

In a way, the Madison draft was an effort at compromise. It strengthened the hand of the national congress by permitting congressionally proposed amendments, and further, permitting the Congress to by-pass the state legislatures in favor of ratification by state conventions. At the same time, Madison left some power to propose amendments in the state legislatures, and permitted state legislative ratification, at least with the approval of the Congress.

Colonel George Mason of Virginia, who ultimately refused to sign the Constitution, spoke against the Madison draft. It was his view that the states and the people had in effect been left out of the amending process altogether.²⁹²

“[T]he whole people of America can’t make, or even propose alterations to it; a doctrine utterly subversive of the fundamental principles of the rights and liberties of the people.”²⁹³

Elbridge Gerry and Gouverneur Morris combined to propose an amendment to Article V, requiring that a convention be called upon the application of two-thirds of the states.²⁹⁴ The article, in its present form, providing for “a convention for proposing amendments” was thereupon adopted.

With a facile disregard for this legislative history, some students of Article V now insist that a convention cannot be called on the basis of state-by-state representation. The recently evolved standard of “one-person, one-vote” is urged as essential to the organization of any amendatory convention.²⁹⁵

The American Bar Association’s Special Constitutional Convention Study Committee argues for the proposition in these words:

Elaborating its views on one person, one vote, the Committee believes that a system of voting by states at a convention, while patterned after the original Constitutional Convention, would be unconstitutional as well as undemocratic and archaic. While it was appropriate before the adoption of the Constitution, at a time when

291. PRESCOTT, *supra* note 280, at 688.

292. 2 FARRAND, *supra* note 288, at 629.

293. *Id.* at 629 n. 8.

294. *Id.*

295. A.B.A. Study, *supra* note 6, at 34.

the states were essentially independent, there can be no justification for such a system today. Aside from the contingent election feature of our electoral college system, which has received nearly universal condemnation as being anachronistic, we are not aware of any precedent which would support such a system today. A system of voting by states would make it possible for states representing one-sixth of the population to propose a constitutional amendment. Plainly, there should be a broad representation and popular participation at any convention.²⁹⁶

Although nominally a study committee, the ABA panel undertook to go beyond a search for the applicable law. Expressing its opinion and policy preference, the committee dismisses the electoral college as anachronistic, and brands the voting system used by the Philadelphia Convention as unconstitutional, undemocratic, and archaic.

The Committee then recommends that the convention be organized like the United States House of Representatives. Admitting that such a plan would not satisfy the one-person, one-vote test either, they concede that true representation by population is unfeasible, unrealistic and expensive.²⁹⁷

Of its three condemnations, the committee's charge of unconstitutionality is the most curious. How a system of voting actually used by the constitutional framers can be seen as violating the very Constitution which they produced is not clear. Surely the members of the ABA committee did not suppose that the delegates to the 1787 Convention regarded themselves improperly organized. Perhaps the ABA committee presumed that a state-by-state voting system in the convention would somehow violate constitutional principles engrafted on the original document by the Supreme Court in one or more of its reapportionment opinions.²⁹⁸

The difficulty with that conclusion is that the United States Constitution cannot, itself, be unconstitutional. The composition of the United States Senate, however derided by modernists as out-dated or out-moded, remains a vital part of the Constitution. In fact, the inclusion of the "equal suffrage" language in Article V suggests that representation in the Senate is not subject to amendment in the ordinary way. The method of calling an Article V convention remains tied to a state-by-state counting of legislative petitions. The process of ratifying a constitutional amendment is still accomplished on a state-by-state tabulation. The one-person, one-vote standard has never had any direct application on the federal

296. *Id.* at 35.

297. *Id.* at 36.

298. *Id.* at 34.

government. Even in the House of Representatives, minimum representation is accorded to each state, irrespective of its population. In the arena of constitution-amending, the one-person, one-vote slogan is irrelevant. Constitution-making goes beyond the notion of majority rule—it has to do with a consensus “of the whole people.” It rests upon super-majority criteria, measurements of popular acceptance, and public support that transcend majoritarianism, protect minorities and define the rights which even individual citizens can assert against the majority and against the government itself.

The protection of minorities is neither undemocratic, nor archaic. Moreover, it must be borne in mind that the convention does not adopt constitutional amendments, it only proposes amendments. The convention is a forum for debate, distillation, and compromise. Larger states, with greater resources, may choose to send larger delegations. The extent of their participation in the work of the convention is for the convention itself to decide. The true principle, and the only precept which is consistent with the purpose of the convention alternative written into Article V, is that the convention itself decides whether to adopt a population ratio, the unit rule, fractional voting or some combination. A convention judges the qualification and credentials of its own members. A convention establishes its own agenda. A convention organizes itself upon such principles as it deems just and reasonable.

In an Article V amendatory convention the people of the states are brought together in their most sovereign capacity. Such a convention would be an awesome and august assemblage. It would bring a new, responsible dimension to American politics.