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Lester B. Orfield

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# THE REFORM OF THE FEDERAL AMENDING POWER

LESTER B. ORFIELD\*

Most treatises on constitutional law dispose of the federal amending power in summary fashion. The commentators have thought fit to stress chiefly the division of authority between the federal government and the states. They have attached a high degree of significance to the dogma of separation of powers. A great deal of attention has been devoted to the doctrines of judicial review, the supremacy of the Federal Constitution, and the Bill of Rights. The taxation and the commerce clauses have come in for their full share of consideration. In recent years extensive studies have been made of the due process clause of the Fourteenth Amendment. As a result, the amending clause has almost been lost sight of. Yet when one stops to realize that the subjects just referred to have to do only with the existing distribution of powers, and that the operation of the amending power may bring about a complete reshuffling of the Constitution, it becomes obvious that one is dealing with a power of a higher grade and of more potential importance than any other power provided for in the Constitution. As John W. Burgess says:

"A complete constitution may be said to consist of three fundamental parts. The first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a constitution. Upon its existence and truthfulness, i.e., its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceful continuity or shall suffer alternations of stagnation, retrogression and revolution. A constitution, which may be imperfect and erroneous in its other parts can be easily supplemented and corrected, if only the state be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of a revolution can save the life of a state."<sup>1</sup>

\* Assistant Professor of Law, University of Nebraska.

<sup>1</sup> I POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 137 (1896). Rep. Lea of California recently said, 72 CONG. REC. 765 (1929):

"This article is the most important provision of the Constitution. The sovereignty of the people, the right to control their government, to change it and make it respond to their will, rests upon the amending clause of the Constitution. The powers of the Executive, the courts, and Congress, and even of the

One may approach the study of the amending power from at least three different points of view: from that of constitutional law, from that of jurisprudence and legal philosophy, and from that of political science and legislation. From the standpoint of constitutional law one may consider the genesis and justiciability of the power,<sup>2</sup> the procedure of amendment may be examined in detail;<sup>3</sup> and the scope of the amending power, which has been the chief topic of controversy in recent years, may be analyzed.<sup>4</sup> From the viewpoint of jurisprudence, the relation of the amending power to the concept of sovereignty may be developed.<sup>5</sup> Finally, from the viewpoint of political science and legislation the reform of the amending process itself may be made the basis of investigation. It is the purpose of this discussion to consider this last subject.

The amending process, under Article V of the Constitution, is divisible into two distinct stages, proposal and ratification. Each one of these in turn admits of being accomplished in either of two ways. Amendments may be proposed by a national convention called by Congress on the application of the legislatures of two-thirds of the states. They may also be proposed "whenever two-thirds of both houses" of Congress "shall deem it necessary." Amendments may be ratified by the conventions of three-fourths of the states. They may also be ratified by the legislatures of three-fourths of the states. It is to be noted that the choice of the mode of ratification is in the absolute discretion of Congress, but that there is no similar discretion as to proposal, although Congress itself may always propose amendments if it so chooses. The first modes of proposal and ratification involve the use of extra-governmental machinery and have never been used except as to the adoption of the Constitution itself. The latter

states themselves are subordinate to the amending power as embodied in Article V of the Constitution.

"It is of vast importance to the future welfare of this country that this power of amending the Constitution shall be exercised in a manner inherently just and that shall command the confidence, respect, and reverence of the people of the United States. The people ought to feel that the Constitution is their Constitution. When they lose faith in it or in its methods of amendment or in their just control over it, they lose faith in their Government itself."

<sup>2</sup> Lester B. Orfield, *The Federal Amending Power: Genesis and Justiciability* (1930) 14 MINN. L. REV. 369.

<sup>3</sup> Orfield, *The Procedure of the Federal Amending Power* (1930) 25 ILL. L. REV. 418.

<sup>4</sup> Orfield, *The Scope of the Federal Amending Power* (1930) 28 MICH. L. REV. 550.

<sup>5</sup> Orfield, *Sovereignty and the Federal Amending Power* (1931) 16 IOWA L. REV. 391, 504.

modes involve the operation of the ordinary legislative machinery of the federal and state governments and have been used in the case of all nineteen amendments.

There has been comparatively little discussion of the reform of proposal of amendments by a national convention.<sup>6</sup> Of the four modes of proposal and ratification this has seemed the one most likely not to be used. While there has been agitation for individual amendments, and such individual amendments have sometimes been of great importance, there have been no widespread tangible evidences of a desire for complete or even substantial revision of the Constitution.<sup>7</sup> It is true that under the wording of Article V such a convention might propose ordinary individual amendments. In fact, Article V provides for the call of a "convention for proposing amendments," and does not refer in express terms to a revision or to the adoption of an entirely new constitution. It has, however, been usual both in the experience of the states and of the nation to view the initiation of specific amendments as the function of a legislative body and that of revision as the function of a convention. Moreover because of the additional expense and because of the increased legal complications and delays involved, it is unlikely that the convention method will often be resorted to for ordinary amendments.

Assuming, however, that there is a popular demand for revision of the Constitution is the present machinery adequate? Probably the true reason that there has been no national convention since the Constitutional Convention itself is that there has been no real demand for it. But at least a partial reason may be the difficulty of obtaining applications from the legislatures of two-thirds of the states. It would seem that the applications must be reasonably contemporaneous in time. It is by no means easy to secure thirty-two legislatures to apply for a convention within approximately the same interval. Possibly, too, the applications must be addressed to the calling of a convention for the same purpose or simply to the calling of a convention

<sup>6</sup> An account of the efforts up to 1889 to obtain a national convention is set out in HERMAN V. AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* (1897), at pp. 281-284. The recent attempts are discussed by Wayne B. Wheeler, *Is a Constitutional Convention Impending?* (1927) 27 ILL. L. REV. 782; *How Long is a State Petition for a Constitutional Convention Good?* (1931) 17 A. B. A. J. 143; also appearing in CONG. REC. 71st Cong., 3rd Sess., 2924, Jan. 23, 1931, and SEN. DOC., 71st Cong., 2nd Sess., 78.

<sup>7</sup> A somewhat plausible though not convincing argument is made in MACDONALD, *A NEW CONSTITUTION FOR A NEW AMERICA* (1921).

for general revision. Hence if one application is for securing an amendment to abolish polygamy and another to secure woman suffrage, perhaps these applications cannot be counted together, especially where the latter is afterwards obtained under the usual amending process. The number of reforms suggested of this part of Article V has not been large. Most of them have looked in the direction of making it easier to secure the call of a convention. During the Civil War period and previously although there was much discussion of holding a convention, the constitutional difficulties of securing such a convention were too great. It has been suggested that application by the legislatures of a majority of the states should be sufficient.<sup>8</sup> Some have advocated an even lesser number of applications such as those of twelve states.<sup>9</sup> In defense of these changes it may be said that whereas proposal by Congress is one important step of two, involving the initiation of an actual specific amendment, the application of the legislatures is simply one step of three, involving the call of a convention which really proposes the amendment, which then must be ratified by the states. Gouverneur Morris suggested at the Constitutional convention that Congress be permitted to call a federal convention whenever it chose.<sup>10</sup> Another change which might be desirable would be to provide some method to force Congress to issue the call when the requisite number of states have applied, or to drop out Congress and provide that some executive official issue the call since there seems to be no legal remedy if Congress fails to act.

<sup>8</sup> Senator Henderson, of Missouri, 38th Cong., 1st Sess., Globe 145, 553, 1313, Jan. 11, 1864; Rep. Berger of Wisconsin, 62nd Cong., 1st Sess., H. J. R. 71, April 19, 1911; Senator Owen of Oklahoma, CONG. REC., 66th Cong., 1st Sess., 5700, Sept. 22, 1919, Rep. Lea of California, 71st Cong. 2nd Sess., H. J. R. 168, Dec. 16, 1929 and, W. K. Tuller, *A Convention to Amend the Constitution—Why Needed—How It May Be Obtained* (1911) 193 No. AM. REV. 369, 385. Rep. Porter of Virginia, 42nd Cong., 3rd Sess., Globe 538, 1873, or the application of legislatures of any number of states embracing three-fifths of the enumerated population of the several states.

<sup>9</sup> Rep. Chandler of New York, 64th Congress., 2nd Sess., H. J. R. 315, Dec. 9, 1916, one-fourth of states.

<sup>10</sup> 5 ELLIOTT, DEBATES, (1866) 498. It has been suggested that Congress already has this power. McDONALD, *op. cit. supra* note 9, at 225. It was held, however, in *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. ed. 899, 10 A. L. R. 1304 (1920) that the modes of ratification stipulated in Article V are exclusive, and the same reasoning would probably apply to the modes of proposal. Rep. Porter of Virginia on Jan. 13, 1873, 42nd Cong., 3d Sess., Globe 538, proposed that a three-fifths majority of Congress should be empowered to call a convention; Rep. Berger of Wisconsin, 68th Cong., 1st Sess., H. J. R. 246, April 17, 1924, would allow a majority of each House of Congress to call a convention; Rep. Berger, 69th Cong., 1st Sess., H. J. R. 274, June 8, 1926; Rep. Berger, 70th Cong., 1st Sess., H. J. R. 281, April 23, 1928.

Under the Wadsworth-Garrett amendment, the Convention would also be empowered to select the mode of ratification, whether by legislatures or by conventions, whereas under Article V this power is vested in Congress. Burgess has recently proposed that in view of the tendency of legislative bodies to confuse matters of a statutory nature with matters of fundamental constitutional law, the legislative mode of proposing amendments should be done away with entirely and only a national convention should be allowed to propose.<sup>11</sup> It has been suggested that it might be desirable to have federal conventions periodically to revise the Constitution.<sup>12</sup>

Until recent years most of the amendments offered to Article V have been directed at the mode of proposing amendments by Congress. This is easily intelligible in view of the fact that it is at this stage that proposed amendments have failed.<sup>13</sup> Of some three thousand amendments introduced in Congress only twenty-four were actually submitted to the states and only five of these failed of ratification in the states. The obstacle of having to pass both houses of Congress has resulted in the failure of comparatively few amendments up to 1923, sixteen having passed the Senate and not the House, and the same number having passed the House and not the Senate. Relative to the total number of amendments adopted, however, this total is high. The criticism is often made that the excessive majority required for proposal, namely, two-thirds of each House, is

<sup>11</sup> BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY (1923) 107, 112.

The first proposal at the Constitutional Convention was to leave Congress out of the process, for fear that it might ignore the wishes of the people. 5 ELLIOTT, DEBATES (1866) 128. The committee of detail, in its first draft of the instrument proposed that a convention should be called by Congress upon application by the legislatures of two-thirds of the States. *Ibid.*, p. 381. But nothing was said as to whether the legislatures were to propose and the convention to adopt, or whether the convention was to do the whole thing. Lincoln in his first inaugural address stated that proposal by a convention was preferable to that by Congress since the people should have the power to originate as well as to approve amendments.

<sup>12</sup> Needham, *Changing the Fundamental Law* (1921) 69 U. OF PA. L. REV. 223, 236 (every ten years). Seba Eldridge proposes that every twenty years a popular vote should be taken on whether or not a federal convention should be called. Rep. Chandler of New York, 64th Cong., 2nd Sess., H. J. R. 315, Dec. 9, 1916, proposed that conventions be held every thirty years.

<sup>13</sup> The amendments proposed from 1789 to 1889 are set out in AMES, *supra* note 6, while those offered after that date up to July 2, 1926, are to be found in SEN. DOC. 93, 69th Congress, 1st Sess., PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, arranged by Charles C. Tansill. There is a yet unpublished continuation of Ames' account by Jacob Tanager of Pennsylvania State College.

an insuperable barrier. In fairness, however, two things should be observed. In the first place, it has been held that only two-thirds of a quorum and not two-thirds of the members elected is sufficient.<sup>14</sup> Of even greater importance is the fact that many of the amendments offered would not command even a majority of Congress.<sup>15</sup> That is to say most of the amendments offered have been killed in Committee and have never come to a vote of the entire House sitting as such. Such liberals as Senator Norris have found no objection to the present mode of proposal.<sup>16</sup>

Nevertheless it is entirely conceivable that amendments desirable in every respect will fail to obtain the necessary two-thirds majority although a simple majority might be gotten. Certainly it is clear that, as to the ratification of treaties by the Senate, and the overriding by Congress of the presidential veto, there are numerous instances of failures where there would have been approvals if only a simple majority had been required. The matter of amending the constitution is not so fundamentally different from these matters that over a long period of time at least, the same failures will not occur. Even under the Articles of Confederation apparently a majority might propose. It is not surprising therefore that there have been many proposals both in Congress and by commentators that a lesser majority be required.<sup>17</sup> Most of the alternatives offered have agreed on a simple majority of each House of Congress as enough.<sup>18</sup> The state con-

<sup>14</sup> National Prohibition Cases, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. ed. 946 (1920).

<sup>15</sup> Of more than 1800 proposals introduced from 1789 to 1889 more than half never got beyond their reception and reference to a committee. The rest were either reported or received further discussion, but only a very small percentage of these were brought to a vote.

<sup>16</sup> 65 CONG. REC. 4942 (1924); letter of June 10, 1931, to the author of this article.

<sup>17</sup> A simple majority in two successive sessions of Congress, Smith, *Shall We Make Our Constitution Flexible?* (1911) 194 No. AM. REV. 657, 667; Johnstone, *An Eighteenth Century Constitution*, (1912) 7 ILL. L. REV. 265, 283. A simple majority of Congress as an aggregate group in two successive sessions, I BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* (1893) 152.

<sup>18</sup> Senator Henderson of Missouri, 38th Cong., 1st Sess., Globe 145, 553, 1313, Jan. 11, 1864; Senator Owen of Oklahoma, 62nd Cong., 1st Sess., S. J. A. 42, July 26, 1911; Rep. Crumpacker of Indiana, 62nd Cong., 3rd Sess., H. J. R. 375, Jan. 2, 1913; Senator Thompson of Kansas, 63rd Cong., 1st Sess., S. J. R. 9, April 7, 1913; Senator Owen, 63rd Cong., 1st Sess., S. J. R. 20, April 15, 1913; Rep. Lafferty of Oregon, 63rd Cong., 1st Sess., H. J. R. 60, April 17, 1913; Senator LaFollette, 63rd Cong., 1st Sess., S. J. R. 24, April 21, 1913, or upon application of ten states; Rep. Chandler of New York, 63rd Cong., 1st Sess., H. J. R. 95, June 10, 1913, or by one-fourth of the states having at least one-fourth of population of United States; Rep. Bryan of Washington, 63rd

stitutions generally permit proposal by a simple majority of each House of the legislature. Sometimes the proposition is that a simple majority of a quorum of each House shall be the required majority, while at other times it is that it be a majority of the members elected to each House. Possibly it would be wise to safeguard the amending process by departing from the rule governing the passage of ordinary legislation that only a majority of a quorum is necessary, and laying down the latter rule.<sup>19</sup> However, on occasion that might make the amending process even more difficult than it now is since two-thirds of a quorum may be less than a majority of all the members elected to Congress. To illustrate, two-thirds of a quorum of the Senate would be thirty-three, whereas a majority of the members elected to the Senate would be forty-nine.

Under the present system each house of Congress votes separately as to proposal. Burgess has suggested that the two houses sit together as a single body when proposing amendments, a majority of the aggregate group to be sufficient to adopt.<sup>20</sup> In France the Constitution is actually amended by such a joint session. The wisdom of adopting such a plan in the United States, however, is questionable because of the federal nature of our government. The states are represented according to population in the House of Representatives and as states in the Senate. Hence to combine the two bodies for amending purposes would be to decrease the influence of the less populous states. Moreover Article V provides that no state shall be deprived of its equal suffrage in the Senate without its consent. It is

Cong., 3rd Sess., H. J. R. 422, Feb. 15, 1915; Senator Owen, 64th Cong., 1st Sess., S. J. R. 9, Dec. 7, 1915, or upon application of legislatures of majority of states; Rep. Chandler of New York, 64th Cong., 3rd Sess., H. J. R. 315, Dec. 9, 1916; Senator Owen, 65th Cong., 1st Sess., S. J. R. 8, April 4, 1917; Senator Owen, 66th Cong., 1st Sess., S. J. R. 33, May 28, 1919; Senator Owen, 67th Cong., 1st Sess., S. J. R. 14, April 12, 1921; Senator Owen, 68th Cong., 1st Sess., S. J. R. 27, Dec. 10, 1923; a proposal by Senator Brookhart was voted down in the Senate, 65 CONG. REC. 4929 (1924), and the speech at p. 4556. See also, Potter, *The Method of Amending the Federal Constitution* (1909) 57 U. OF PA. L. REV. 589, 609; Thompson, *The Amendment of the Federal Constitution* (1912) 3 ACADEMY OF POL. SCI. PROC. 65, 75, with alternative of proposal by a majority vote of one house in two successive Congresses; Edward S. Corwin, letter of May 27, 1931, to the author of this article.

<sup>19</sup> Senator Henderson of Missouri, 38th Cong., 1st Sess., GLOBE 145, 553, 1313, Jan. 11, 1864; Senator Owen of Oklahoma, 66th Cong., 1st Sess., CONG. REC., 5700, Sept. 22, 1919; Senator Brookhart of Iowa, 65 CONG. REC. 4564 (1924). Rep. Porter of Virginia, on Jan. 13, 1873, 42nd Cong., 3rd Sess., GLOBE 538, introduced an amendment for proposal by three-fifths of Congress. Edward S. Corwin, in a letter of May 27, 1931, to the author of this article, favors the former rule.

<sup>20</sup> BURGESS, *op cit.* *supra* note 17, at 152.



therefore arguable that such a provision would be in violation of the equal suffrage clause. Since, however, Congress might be dropped out of the amending process, since each state would still have its two senators, and since under the twelfth amendment the two Houses sit jointly to count the electoral vote, this argument is not thoroughly convincing. The more fundamental objection, then, is that already stated,—the violation of the federal concept.

Because of the difficulties of obtaining the concurrence of both houses of Congress, it has occasionally been suggested that a proposal by one house should be effectual. These proposals invariably contemplate that the resolution must twice pass the house proposing in two consecutive sessions before the amendment can go to the states.<sup>21</sup> This plan has a number of merits. It prevents hasty action, it permits an indirect popular referendum by requiring action by a subsequently elected house, and it prevents the dominance of one house of Congress over another, especially where the house not concurring is affected by the amendment. For example, the Seventeenth Amendment providing for the popular election of Senators passed the House of Representatives several times before it was finally approved by the Senate. As has been previously pointed out sixteen resolutions have passed the Senate but failed in the House, and a similar number have passed in the House but failed in the Senate. Such a provision is not found in the state constitutions, but it is employed in another federal constitution, that of Australia. Under the Australian Constitution if an amendment twice passes one house of Parliament and is twice rejected by the other House, the second rejection occurring at least three months after the first one, the amendment is then to be submitted by the Governor-General to the states.

Under the present Article V Congress is vested with a considerable degree of power in connection with both the submission and adoption of amendments. As was seen in the discussion of national conventions, there have been a number of suggestions looking in the direction of taking away some of those powers. The seeming lack of any way to compel Congress to call a convention even though there have been applications by the requisite number of legislatures has been the subject of strictures.<sup>22</sup> Objection has also been raised to the

<sup>21</sup> Senator Owen, 63rd Cong., 1st Sess., S. J. R. 20, April 15, 1913; Senator Owen, 66th Cong., 1st Sess., CONG. REC. 5700, Sept. 22, 1919; Thompson, *op. cit.*, *supra* note 18, at 65, 75.

<sup>22</sup> On Jan. 28, 1861, Mr. Florence of Pennsylvania proposed that the "right of the people in three-fourths of the States to call and form a convention to

power of Congress to select the mode of ratification even though proposal is by a convention. It has been suggested that the only mode of proposal should be by a convention. Under the decision of *Dillon v. Gloss*, Congress may prescribe a reasonable time limit for the ratification of an amendment by the states, although the decision of the court was really dictum since the amendment involved itself contained a time limit proviso.<sup>23</sup> There have been numerous suggestions that Article V be amended so as to fix a definite time limit, such as six, eight, or ten years. A provision for automatic proposal of an amendment is that by Representative Doolittle of Kansas that whenever any law of the United States be declared invalid by the decree of any court the law shall be submitted along with a proposed constitutional amendment covering the same, acceptance of the law and amendment to be by the legislatures of three-fourths of the state.<sup>24</sup>

While most of the suggestions looking toward direct popular participation in the amending process have been with respect to ratification, there have been a number of proposals that the people themselves should be allowed to initiate amendments or that the legislatures should be allowed to apply for specific amendments as well as for a national convention.<sup>25</sup> It is claimed that the people participated, at

alter, amend, or abolish the Constitution shall never be questioned." 36th Cong., 2nd Sess., Globe, 479, 398.

<sup>23</sup> 256 U. S. 368, 41 Sup. Ct. 510 65 L. ed. 994 (1921), commented on by Ernst Freund, *Legislative Problems and Solutions* (1921) 7 A. B. A. J. 656.

<sup>24</sup> 63rd Cong., 2nd Sess., H. J. R. 221, Feb. 19, 1914.

<sup>25</sup> Senator Cummins in 1913 suggested proposal by legislative resolutions of sixteen states, certified to the President of the United States or on the petition of fifteen per cent of the voters in twenty-four states. His proposal was adversely reported to the Senate by the Senate Judiciary Committee in 1914, 63rd Cong., 1st Sess., S. J. R. 26, April 24; 64th Cong., 1st Sess., S. J. R. 33, Dec. 10, 1915. Senator LaFollette the same year advocated proposal on the application of ten state legislatures, or by the application of ten states through a popular vote provided a majority of the electors voting on the question favor, or by a majority of both Houses of Congress, in addition to the existing modes of proposal. 63rd Cong., 1st Sess., S. J. R. 24, April 21, 1913. Previously on Aug. 5, 1912, 63rd Cong., 2nd Sess., S. J. R. 131, he had advocated proposal on the application of ten states. Rep. Johnson of Kansas suggested proposal on the application of the legislatures of one state, 63rd Cong., 2nd Sess., H. J. R. 350, Aug. 12, 1912; Rep. Chandler of New York, 63rd Cong., 1st Sess., H. J. R. 95, June 10, 1913, one-fourth of the states having at least one-fourth of population of United States; Rep. Doolittle of Kansas, 63rd Cong., 2nd Sess., H. J. R. 220, Feb. 19, 1914, legislature of one state; Senator Owen, 64th Cong., 1st Sess., S. J. R. 9, Dec. 7, 1915, legislature of majority of States; Rep. Gray of Indiana, 64th Cong., 1st Sess., H. J. R. 294, Aug. 11, 1916, legislature of two-thirds of states, or majority vote in two-thirds of states; Senator Owen, 68th Cong., 1st Sess., S. J. R. 27, Dec. 10, 1923; majority of state legislatures; Rep. Lea of Calif., 71st Cong., 2nd Sess., H. J. R. 168, Dec. 16, 1929, majority of state legislatures.

least indirectly, when the constitution itself was proposed by a national convention instead of by Congress. The use of the initiative among the states not only with respect to statutes but also constitutional amendments has naturally resulted in a demand for its use in national politics. It has been suggested that a petition signed by some such number as 500,000 voters should operate as the proposal of an amendment to be voted on at the next general election, while a petition signed by a somewhat larger number, such as a million voters should be acted on even earlier.<sup>26</sup> This plan ignores the federal scheme by neglecting to provide that such petitions must be somewhat uniformly scattered throughout the states, though this is not particularly serious since the amendment still remains to be voted on. A number of other proposals require that the petitions be concurred in by a certain percentage of the voters in a certain number of states.<sup>27</sup> It is notable that another federal country, Switzerland, provides for the use of the constitutional initiative, and that its experience has shown that while the initiative is not a universal panacea on the other hand it has not been productive of serious ills. The new German Constitution permits the use of the popular initiative in amending. The experience of the states in our own country has not been such that one can lay down dogmatically that the popular initiative is either desirable or undesirable.<sup>28</sup> Doubtless in some states at some times the use of the initiative has resulted in hasty, ill-considered and excessive constitutional changes. On the other hand, one can point to many cases where it has been used but moderately and in a deliberate

<sup>26</sup> Rep. Gray of Indiana, 64th Cong., 1st Sess., H. J. R. 294, Aug. 11, 1916, majority vote in two-thirds of states; Senator Pomerene of Ohio, 66th Cong., 1st Sess., S. J. R. 22, May 23, 1919, proposal of 500,000 voters; Rep. Emerson of Ohio, 66th Cong., 1st Sess., H. J. R. 60, May 24, 1919, proposal on petition of 500,000 voters; Rep. Emerson of Ohio, 66th Cong., 1st Sess., H. J. R. 123, June 18, 1919, proposal on petition of 500,000 voters, to be submitted at next congressional election, and proposal on petition of 1,000,000 voters to be submitted to voters at special election; Rep. Morin of Pa., 67th Cong., 1st Sess., H. J. R. 110, May 6, 1921, the same; Rep. Dyer, 70th Cong., 1st Sess., H. J. R. 281, the same.

<sup>27</sup> Rep. Berger of Wisconsin, 62nd Cong., 1st Sess., H. J. R. 79, April 27, 1911, five per cent of the voters in each of three-fourths of the states. Rep. Igoe of Missouri, 63rd Cong., 2nd Sess., H. J. R. 319, August 13, 1914, ten per cent of voters of majority of states.

<sup>28</sup> DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* (1910), 292. "The popular initiative is open to many objections, both theoretical and practical, but the people should have power independently of the legislature, to force changes in their constitutions when such changes are desired. Perhaps the greatest value which the initiative will have is not the direct results which may come from its use, but in its influence in causing legislatures to act upon matters upon which action is desired by the people."

way and for desirable reforms. Certainly no state can claim to be truly democratic which does not provide for its use. The possibility of a resort to it means that there can be no real weight to the charge that it is impossible to secure changes which the people really want, and may spur Congress to act more promptly than it otherwise would. After all the evidence is in, it seems hard to conclude that the experience of the states with the initiative has been so unsatisfactory that its introduction into the federal system would work great mischief. In fairness it should be said, however, that the problems of a nation so large and heterogeneous as the United States may be so different that the experience of the states, limited and controversial as it has been, may hardly serve as a fair basis for recommending its introduction into the federal system.<sup>29</sup> If the people are given a vote on the ratification of amendments, it may be argued that that is a sufficient degree of democracy for practical purposes. If Congress be given the power to propose amendments by a simple majority, that, too, would seem fairly to assure the submission of measures desired by the people.

Next to proposal of amendments by a national convention, the least discussed phase of Article V, is that providing for ratification of amendments by state conventions at the option of Congress. Congress thus far has never chosen to select this mode of ratification, though the original constitution was thus ratified. An Illinois constitutional convention sought to ratify the Corwin amendment although Congress had submitted it to the state legislatures. It has been asserted that as to certain types of amendments, such as those impinging on the police power of the state or impairing alleged inalienable individual rights, must be ratified by state conventions. The Supreme Court, however, recently decided that all amendments are on the same basis with respect to the mode of ratification.<sup>30</sup> Hence

<sup>29</sup> Senator Adams of Colorado, 63 CONG. REC. 4804 (1924) says:

"The weakness is this, that the initiation of measures submitted under the initiative comes from small groups, groups having no authority whatsoever. That is, one may sit down in his office and frame an amendment to the Constitution, or a law, and then, through the process of petition circulation, initiate it."

<sup>30</sup> *United States v. Sprague*, 282 U. S. 716, 51 Sup. Ct. 220 75 L. ed. 289 (1931), overruling 44 F. (2d) 967 (D. N. J. 1930), noted in (1931) 29 MICH. L. REV. 777 and (1931) 79 U. OF PA. L. REV. 807. See also, *United States v. Panos*, 45 F. (2d) 888 (N. D. Ill. 1930); *United States v. Thibault*, 47 F. (2d) 169 (C. C. A. 2d, 1931); speech of Rep. J. J. McSwain, CONG. REC., 71st Cong., 3rd Sess., p. 3002, Jan. 23, 1931; brief of Edmund B. Dunford, CONG. REC., 71st Cong., 3rd Sess., 5819, Feb. 24, 1931.

it now is clear that conventions may ratify only when Congress sees fit to select that mode of ratification.

There has been no substantial criticism of the convention mode of ratification. In fact efforts were made when the recent amendments were submitted to induce Congress to make use of this mode. Likewise at the time when the Civil War amendments were proposed in Congress attempts were made to secure their submission to direct popular vote—quite clearly unconstitutional under *Hawke v. Smith*—or at least submission to conventions. In all of these cases it seems, however, that the reason prompting such demands was not so much that of consulting the wishes of the people as to secure the defeat of the amendments. This is not to say, however, that a good case cannot be made on the merits for submitting amendments to conventions. When an amendment is ratified by the then existing legislature there is not even an indirect reflection of the wishes of the people since the legislature was elected on entirely different issues. A convention is of course chosen after the submission of the amendment so that its members are chosen on the basis of their attitude towards the amendment. Moreover even if an amendment is passed on by a subsequently elected legislature, the members thereof are generally elected only in small part if at all with a view to their stand on the amendment, there being other considerations involved. The members of a convention would of course be elected wholly on the basis of their attitude towards the amendment.

The convention system involves, however, a number of defects. If the object is to secure pure democracy, the logical way, as has often been pointed out in the congressional debates is to provide for a direct popular vote, than which nothing could more accurately reflect the popular will. The convention method is also more expensive and involves greater delay than does the regular legislative mode. Precedent is against its use in the federal amending process. Certain legal complications would also likely arise, it not being clear whether Congress or the state legislatures would have the power to regulate their election, place of meeting, procedure, etc. The conventions adopting the Constitution were regulated by the state legislatures, but the courts in construing Article V have assigned rather extensive powers to Congress. Yet there are many things to be said in behalf of the convention system. It does more directly reflect the wishes

of the people than the legislative mode.<sup>31</sup> The men elected to a convention would in all probability be of an abler sort than those elected to the legislature. And certainly the action of a convention would be more intelligent than that of the mass of voters. The additional expense involved may be defended on the ground that when constitutional changes are made, such expense is warranted. It has sometimes been argued that the present mode of ratification is entirely satisfactory because of the possibility that the convention mode may be used.<sup>32</sup> Experience thus far scarcely justifies this belief since Congress has never resorted to its use even though efforts were made both as to the Civil War amendments and the most recent amendments.<sup>33</sup> Because Congress itself is a legislative body, because of the expenses and delay of using the convention mode, and because of the inertia due to usage, it seems unlikely that Congress will resort to the use of conventions of its own free will. If the convention mode is to be used it would seem to be necessary to amend the Constitution so as to provide that Congress may submit amendments only to conventions. Burgess, who is opposed to the use of the regular governmental machinery in the amending process, favors such a rule.<sup>34</sup> Each convention under his plan would have the relative weight that the population of the state bears to the population of the nation.

It is at the legislative mode of ratification that most proposals for the reform of the amending process have been directed in recent years. The reasons for this are interesting. The fatal step in the amending process for most propositions has been that of proposal, a fact which is easily demonstrable when it is realized that nineteen of the twenty-four amendments which have been submitted by Congress have been ratified, with the status of the Child Labor amendment still in doubt. The proponents of an easier amending process are scarcely pursuing the logical course of action, therefore, when they urge the

<sup>31</sup> Brown, *The People Should be Consulted as to Constitutional Changes*, (1930) 16 A. B. A. J. 404; Needham, *op. cit. supra* note 12, at 223, 228.

<sup>32</sup> Herman v. Ames, *The Amending Provision of the Federal Constitution in Practice*, (1924) 63 PROC. AM. PHIL. SOC. No. 1, 62, 74.

<sup>33</sup> Senator Dixon, 40th Cong., 3rd Sess., 1040, Feb. 9, 1869.

<sup>34</sup> BURGESS, RECENT CHANGES IN AMERICAN CONSTITUTIONAL THEORY, (1923) 107, 112. Senator Wadsworth, of New York, 68th Cong., 1st Sess., S. J. R. 109, March 28, 1924, by conventions or by popular vote; Senator Shields of Tennessee, 65 CONG. REC. 4801 (1924); Rep. Garrett of Tennessee, 66 CONG. REC. 2160 (1925). See also, Williams, *The Popular Mandate on Constitutional Amendments* (1921) 7 VA. L. REV. 280, 298.

alteration of the ratifying process rather than that of the process of proposal. The real reasons, however, are not far to seek. Many of these proposals are for a direct popular referendum on amendments. They are based on the notion that the people should participate directly in fundamental changes in law and government both because it is the truly democratic method and because measures thus ratified are more likely to be enforced. Many of the proponents of this charge have a more selfish motive, however. They favor a popular referendum because they believe that it will make the Constitution more difficult to amend. The enemies of the Eighteenth amendment, for instance, argue that that amendment was railroaded through the legislatures by the well organized propaganda of a minority. This pressure, it is argued, cannot in the nature of things be brought to bear on the people themselves. It should be observed that the most strenuous opponents of making amendment easier have generally coupled their proposals for popular ratification with clauses providing for legislative participation as well, thus really adding another step to the existing amending process. Manifestly the prime motive of such a scheme is to impede the process rather than to consult the wishes of the people.

One of the changes suggested in the legislative mode is to require something less than the legislatures of three-fourths of the states. Two out of the five amendments submitted by Congress which failed of ratification failed by the vote of a single state. One of the chief defects of the Articles of Confederation was the requirement of unanimity of the states in the adoption of amendments. A single state could therefore veto the wishes of all the other states and so the amending process was rendered well nigh useless. The adoption of the Constitution hence became a revolutionary act since it was made to go into effect when ratified by three-fourths of the states. The present requirement of a three-fourths majority was one of the compromises of the Constitutional Convention. Sherman proposed that every state must concur in the ratification of amendments. James Wilson proposed ratification by two-thirds of the states. It is significant that Wilson's proposal failed by a five to six vote. His later motion providing for a three-fourths majority was then accepted. Patrick Henry in opposing the ratification of the Constitution by the Virginia Convention argued that the negative power given to one-fourth of the states made amendment impossible. The first proposal

for altering the method of amendment was made by the Rhode Island Convention when it ratified the Constitution on May 29, 1790. The proposition was that after the year 1793 no amendment to the Constitution should be made "without the consent of eleven of the states heretofore united under the Confederation." There seem to have been two motives behind the proposals: to make it more difficult to amend, and to insure the preponderance of the original thirteen colonies.

The Rhode Island proposal seems to have been the only one looking in the direction of increasing the majority of states required. Subsequent proposals have all gone in the other direction. On January 11, 1864, in connection with the resolution for the abolition of slavery, Senator Henderson of Missouri introduced a resolution allowing ratification by two-thirds of the states.<sup>35</sup> The constitution of the Confederate States provided for a similar majority.<sup>36</sup> In 1873, Mr. Porter of Virginia proposed that amendments were to be valid, "when approved and ratified by a majority of the electors in the several states voting thereon, and qualified to vote for representatives in Congress."<sup>37</sup> A number of proposals have suggested ratification by a simple majority of the states.<sup>38</sup> Such proposals, however, are almost invariably accompanied by a provision for submission of amendments to direct popular vote. In addition, it is generally provided that there be both a majority of the states and a majority of the votes of the entire nation in favor of the amendment.<sup>39</sup> That is the rule both in Switzerland and Australia. Were only a majority of the popular vote in the entire country required, less than a majority of the states might approve.<sup>40</sup> This could scarcely be acceptable except

<sup>35</sup> 38th Cong., 1st Sess., Globe 145, 553, 1313, or in the alternative by conventions of the same number of states.

<sup>36</sup> Rep. Crumpacker of Indiana, 62nd Cong., 3rd Sess., H. J. R. 375, Jan. 2, 1913; Senator Cummins of Iowa, two-thirds of the states either by the legislature or by popular vote as determined by state law, 63rd Cong., 1st Sess., S. J. R. 26, April 24, 1913.

<sup>37</sup> 42nd Cong., 3rd Sess., Globe 538.

<sup>38</sup> Senator LaFollette of Wisconsin, 62nd Cong., 2nd Sess., S. J. R. 131, Aug. 5, 1912; Senator Thompson of Kansas, 63rd Cong., 1st Sess., S. J. R. 9, April 7, 1913; Rep. Lafferty, of Oregon, 63rd Cong., 1st Sess., S. J. R. 24, April 17, 1913, or majority vote of electors in the several states.

<sup>39</sup> Rep. Igoe, of Missouri, 63rd Cong., 2nd Sess., H. J. R. 319, Aug. 3, 1914; Smith, *loc. cit. supra* note 17; Johnstone, *op. cit. supra* note 17.

<sup>40</sup> For such proposals, see Senator Owen, 63rd Cong., 1st Sess., S. J. R. 20, April 15, 1913; Rep. Lafferty of Oregon, 63rd Cong., 1st Sess., H. J. R. 60, April 17, 1913, or majority of state legislatures; Senator Pomerene of Ohio, 66th Cong., 1st Sess., S. J. R. 22, May 23, 1919; Rep. Emerson of Ohio, 66th Cong., 1st Sess., H. J. R. 60, May 24, 1919; Rep. Emerson, 66th Cong., 1st Sess.,



to those who are prepared to cast aside the federal concept of governmental relations. On the other hand to permit ratification by a mere majority of states might easily result in the passage of an amendment contrary to the wishes of a majority of the electors.<sup>41</sup> Indeed even under the present system it has been pointed out that it is possible to secure ratification by the less populous states representing an actual minority of the population. On the other hand, it is to be remembered that an amendment may be defeated by the twelve least populous states, and that the concurrence of such twelve while not likely is fully as probable as the concurrence of the thirty-six least populous states in ratifying. Moreover the amendment must have been previously concurred in by two-thirds of Congress, the lower house of which is elected on the basis of population. Senator Owen has proposed ratification by a majority of congressional districts and a majority of the aggregate vote.<sup>42</sup> Most of the state constitutions provided for ratification by a majority of the popular vote. Both of these two last proposals would be out of harmony with the federal principle, so that the farthest one upholding the latter principle could go in the direction of majority rule is to accept the Swiss and Australian plan of accepting a majority of the states plus a majority of the electors of the entire country. Perhaps a more conservative plan would be to permit ratification by two-thirds of the states.<sup>43</sup> It is noteworthy that the more recent proposals have accepted the existing

H. J. R. 123, June 18, 1920; Rep. Main of Pa., 67th Cong., 1st Sess., H. J. R. 110, May 6, 1921; Rep. Bryan of N. Y., 68th Cong., 1st Sess., H. J. R. 133, Jan. 10, 1924; Rep. Dyer, 70th Cong., 1st Sess., H. J. R. 229; Professor Edward S. Corwin, letter of May 27, 1931, to the author of this article.

<sup>41</sup>For such proposals, see Senator LaFollette, 63rd Cong., 1st Sess., S. J. R. 24, April 21, 1921; Rep. Chandler of New York, 64th Cong., 2nd Sess., H. J. R. 315, Dec. 9, 1916.

<sup>42</sup>62nd Cong., 1st Sess., S. J. R. 42, July 26, 1911, a majority in congressional districts, and in majority of states; 64th Cong., 1st Sess., S. J. R. 9, Dec. 7, 1915; 65th Cong., 1st Sess., S. J. R. 8, April 4, 1917, majority vote in majority of congressional districts; 67th Cong., 1st Sess., S. J. R. 14, April 12, 1921, majority vote in majority of congressional districts.

<sup>43</sup>Senator Cummins of Iowa, 63rd Cong., 1st Sess., April 24, 1913, proposed adoption by two-thirds of state legislatures or by majority vote in two-thirds of states; Rep. Bryan of Michigan, 63rd Cong., 3rd Sess., H. J. R. 422, Feb. 15, 1915; Senator Cummins, 64th Cong., 1st Sess., S. J. R. 33, Dec. 10, 1915, same as earlier proposal, *supra*; Rep. Lea, of Calif., 71st Cong., 2nd Sess., H. J. R. 168, Dec. 16, 1929, majority of people of the nation and a majority of the people in two-thirds of the states ratifying.

"It seems evident, then, that when the check is sought in numbers, a majority is too small, and a unanimous vote too large, for either practicability or safety. Amendment should be sought not liable to these objections, and that not from *a priori* considerations, but from experience." JAMESON, CONSTITUTIONAL CONVENTIONS, (1867) par. 533, p. 488.

rule requiring the approval of three-fourths of the states, and have stressed rather the idea of a popular referendum.<sup>44</sup> In fact under the Wadsworth-Garrett amendment an amendment might have to be ratified not only by the legislatures of three-fourths of the states but also by the popular vote of three-fourths of the states. And even under the Jones amendment to the latter amendment the legislatures would still act as advisory bodies, and would have to vote on an amendment before the popular vote was taken. In view of the comparative ease of securing ratification after an amendment has been submitted, especially as seen in the cases of the last four amendments, it is doubtful that there will be any reduction in the number of states required to concur however desirable that may be theoretically.

Another change which has frequently been suggested in the legislative mode is that ratification be only by legislatures the more numerous branch of which have been elected after the submission of the amendment.<sup>45</sup> Since state senators are frequently elected for a

<sup>44</sup> Rep. Chandler of New York, 63rd Cong., 1st Sess., H. J. R. 95, June 10, 1913; Rep. Gray of Indiana, 64th Cong., 1st Sess., H. J. R. 294, August 11, 1916, majority of electors in three-fourths of states or of legislatures in three-fourths of states; Senator Fletcher of Florida, 65th Cong., 2nd Sess., S. J. R. 182, Nov. 1, 1918; Rep. LaGuardia of New York, 65th Cong., 3rd Sess., H. J. R. 430, Feb. 18, 1919; Rep. LaGuardia, 66th Cong., 1st Sess., H. J. R. 12, May 19, 1919; Rep. Griffin of New York, 66th Cong., 1st Sess., H. J. R. 35, May 19, 1919; Rep. Siegel of New York, 66th Cong., 1st Sess., H. J. R. 36, May 19, 1919; Senator Harrison of Mississippi, 66th Cong., 1st Sess., S. J. R. 48, June 5, 1919; Senator Frelinghuysen of New Jersey, 66th Cong., 1st Sess., S. J. R. 126, Nov. 13, 1919; Rep. Johnston of New York, 66th Cong., H. J. R. 306, March 2, 1920; Rep. MacGregor of New York, 66th Cong., 2nd Sess., H. J. R. 332, April 9, 1920; Rep. Griffin of New York, 67th Cong., 1st Sess., H. J. R. 12, April 11, 1921; Rep. MacGregor of New York, 67th Cong., 1st Sess., H. J. R. 21, April 11, 1921; Rep. Siegel of New York, 67th Cong., 1st Sess., H. J. R. 29, April 11, 1921; Rep. Kissel of New York, 67th Cong., 1st Sess., H. J. R. 118, May 13, 1921; Rep. Cullen of New York, 67th Cong., 1st Sess., H. J. R. 162, June 24, 1921; Rep. Vare of Pa., 68th Cong., 1st Sess., H. J. R. 34, Dec. 5, 1923; Rep. Griffin of N. Y., 68th Cong., 1st Sess., H. J. R. 37, Dec. 5, 1923; Senator Ashurst of Ariz., 68th Cong., 1st Sess., S. J. R. 17, Dec. 6, 1923; Rep. Griffin of New York, 69th Cong., 1st Sess., H. J. R. 18, Dec. 7, 1925; Rep. Griffin, 70th Cong., 1st Sess.; Rep. Lea of California, 71st Cong., 2nd Sess., H. J. R. 168, Dec. 16, 1929; Rep. Andresen of Minn., 71st Cong., 2nd Sess., H. J. R. 348, May 26, 1930, popular vote or conventions as Congress shall prescribe, and see—CONG. REC. 9623 and 10,930; Rep. Griffin, 71st Cong., 2nd Sess., H. J. R. 363, June 11, 1930; see article by Senator Ashurst, *Making Amendments*, SATURDAY EVENING POST, April 25, 1929, reprinted in 72 CONG. REC., 3066 (1930); Senator Norris, in a letter of June 10, 1931 to the author of this article.

<sup>45</sup> Senator Buckalew of Pa., 40th Cong., 3rd Sess., Feb. 3, 1869, as part of the Fifteenth Amendment; Senator Davis of Kentucky, 40th Cong., 3rd Sess., Globe 1309, Feb. 17, 1869, as part of the Fifteenth Amendment; Senator Hendricks of Indiana, 40th Cong., 3rd Sess., Globe 543, 1311, as part of the Fifteenth Amendment; Rep. Woodward of Pa., 40th Cong., 3rd Sess., Globe 1426, Feb. 20, 1869; Rep. Garrett, of Tenn., 67th Cong., 1st Sess., H. J. R. 69,

longer term than state representatives the principle of subsequent election is generally confined in the proposals to the House of Representatives. In the case of some of the Civil War amendments it was suggested that Congress provide in its resolution of proposal and submission that the amendment be submitted only to subsequently elected legislatures. Four or five states have constitutional or statutory provisions providing for ratification of federal amendments only by such legislatures, but these provisions have recently been held unconstitutional.<sup>46</sup> All of the recent amendments have been ratified by legislatures which were in existence when they were proposed, including even the Bill of Rights. An existing legislature might of course of its own accord by a sort of self-denying ordinance fail to act on an amendment. The pressure is generally so great, however, for immediate action, often involving even special sessions, that the only way to secure ratification by a subsequent legislature is to provide for it in the federal constitution.<sup>47</sup> The chief argument of the proponents of this reform is that the sentiment of the people will be more directly reflected since the legislators will be elected on the basis of their attitude towards the amendment. Moreover greater time for deliberation will be provided. The arguments on the other side, however, seem more convincing. Doubtless to some extent a subsequently elected legislature will better represent popular opinion. The chances are, however, that the legislators are elected on their attitudes towards other issues. If the popular will is to truly be reflected this can be much better accomplished by the use of conventions elected with reference to the single issue involved. Or even better, why not provide for a popular referendum if the real object is to consult the people? As Senator Borah says, "Let us not have homeopathic

April 21, 1921; Rep. Garrett, 67th Cong., 4th Sess., H. J. R. 429, Jan. 31, 1923; Senator Wadsworth of N. Y., 68th Cong., 1st Sess., S. J. R. 4, Dec. 6, 1923; reported with amendments, debated, and recommitted; Rep. Garrett, 68th Cong., 1st Sess., H. J. R. 68, Dec. 10, 1923, debated; Rep. Garrett, 67th Cong., 1st Sess., H. J. R. 15, Dec. 7, 1925; Senator Wadsworth, 69th Cong., 1st Sess., S. J. R. 8, Dec. 8, 1925; Rep. Garrett, 70th Cong., 1st Sess., H. J. R. 143, Jan. 9, 1928; Ames, *supra* note 32; Jacob Tanger, letter of June 17, 1931, to author of this article.

<sup>46</sup> *Leser v. Garnett*, 258 U. S. 130, 42 Sup. Ct. 217, 66 L. ed. 505 (1922).

<sup>47</sup> Senator Morton of Indiana, on Mar. 17, 1869, 41st Cong., 1st Sess., Globe 102, introduced a resolution prescribing the procedure to be followed by the legislatures in ratifying. See AMES, *op. cit. supra* note 6, at 290. Mr. Shanks of Indiana introduced the same amendment in the House, March 29, 1869, 41st Cong., 1st Sess., Globe 334. Mr. Juul of Illinois, 66th Cong., 1st Sess., H. J. R. 242, Oct. 30, 1919, introduced a resolution regulating voting strength in state legislatures when ratifying amendments.

doses!"<sup>48</sup> The amending process is already difficult enough. To require ratification by later legislatures is simply to add one more obstacle, as a delay of at least one and generally two years will be required. Couple this delay with a provision for a popular referendum in addition to the action of the legislature, as did the Wadsworth-Garrett amendment, and an almost insuperable barrier against amendments is set up. It is hard to escape the conclusion that the proponents of action by subsequent legislatures are more interested in preventing amendment than they are in securing popular representation.<sup>49</sup>

A problem which has arisen on several occasions is that whether or not a state may rescind its action on an amendment. If three-fourths of the states have ratified an amendment, it then seems clear that there can be no effective repudiation of prior action. On the other hand, at any time prior to such ratification the rule is in greater doubt. It appears that a state may then repudiate a rejection and accept an amendment, and such acceptance will be valid and binding. On the other hand, it seems that when a state has accepted an amendment, it cannot later withdraw such acceptance.<sup>50</sup> A number of proposals have been made that until the necessary majority of acceptances have been obtained, a state should be free to change its prior action whether such action was affirmative or negative.<sup>51</sup> This is one of the provisions of the Wadsworth-Garrett amendment. But that amendment goes a step further and provides that if more than one-fourth of the states have repudiated that shall bar the further consideration of the amendment by the legislatures. Both of these provisions seem undesirable. They are designed to add to the difficulties of the already existing process, and are likely to result in confusion in the counting of the ratification. And to allow thirteen states to kill an amendment will obviously mean that the opponents of an amendment will concentrate on a small number of states early in the fight and perhaps kill the amendment before it has had a chance

<sup>48</sup> 65 CONG. REC. 4562 (1924).

<sup>49</sup> Senator Norris, 65 CONG. REC. 4941 (1924), says:

"Some people want to make it more difficult to amend the Constitution. Others want to simplify it. There is argument on both sides. I concede absolutely that there is good argument each way, but I can not conceive of any argument that simply calls for delay, and that is what I think we have done with this amendment."

<sup>50</sup> Orfield, *op. cit. supra* note 3, at 439.

<sup>51</sup> Rep. Garrett, 70th Cong., 1st Sess., H. J. R. 143, Jan. 9, 1928.

for consideration.<sup>52</sup> It is bad enough to allow thirteen legislatures to hold up an amendment under any conditions. It is simply making matters worse to let them destroy it at the outset. Until at least some provision is made permitting ratification by a lesser majority of the states it would seem that the proposals should be rejected.

The chief proposal for the alteration of the amending process to receive serious consideration in the past decade has been that for a popular referendum.<sup>53</sup> It is felt that the people themselves should participate at some stage in the amending process. Some of the proposals go so far as to say that the people should be allowed even to initiate amendments, as is done in Switzerland and in some of our states. These proposals, however, have not been strongly pressed and attention has been increasingly centered on securing confirmation by the people. Popular suffrage has been vastly extended from what it was when the Constitution was drafted. Although popular referenda were unknown in 1787 the states have used the popular referendum as the exclusive mode of ratification of amendments to and revision of the state constitutions ever since about 1830. The extension of suffrage to the negroes by the Fifteenth Amendment and to women by the Nineteenth Amendment, both under the Federal Constitution has kept the idea of popular participation in government in the public eye. The provision of the Seventeenth Amendment for the popular election of senators more than almost anything else has stimulated the demand for popular participation in the amending process. The suggestions for ratification only by subsequently elected legislatures is indicative of the trend, as is that for the abolition of the electoral college. But perhaps the most immediate impetus which has been given to the movement came from the adoption of the last two amendments, particularly the Eighteenth. It is argued with enough plausibility to convince a great many people that the Eighteenth Amendment was railroaded through the legislatures by means of powerful lobbies and a species of intimidation.<sup>54</sup> It is asserted

<sup>52</sup> See the argument of Senator Heflin of Alabama, 65 CONG. REC. 4931 (1924).

<sup>53</sup> The use of the popular referendum under the present terms of Article V was held unconstitutional in *Hawke v. Smith*, 253 U. S. 221, 40 Sup. Ct. 495, 64 L. ed. 871 (1920). See Taft, *Can Ratification of an Amendment to the Constitution Be Made to Depend on a Referendum*, (1920) 29 YALE L. J. 821.

<sup>54</sup> Senator Ashurst, 66th Cong., 1st Sess., CONG. REC. 5694, Sept. 22, 1919 says:

"I believe that the two amendments which were last proposed for ratification, viz., the one providing for woman suffrage and the other for prohibition—

that if the legislators had really voted as they felt that the amendment would never have been ratified. It is pointed out that a number of legislatures ignored previous popular referenda rejecting the amendment, and that in a number of cases subsequent popular votes under what the courts later found to be invalid or inapplicable provisions for referenda on federal amendments showed that the popular will was not in accord with that of the legislature. The Democratic party in 1924 adopted a plank advocating a popular referendum on federal amendments. Certainly the tendency of the past century has been towards more democracy in government. It is the frequently repeated doctrine of the supreme court that the people are sovereign, that they adopted the Constitution and may alter that document. If this doctrine is to be given anything but lip service, it would seem that the time has come when the people should be given the right to vote on whether an amendment should be adopted.

In the effort to secure a popular referendum, one must be careful to see that something else is not foisted upon one. The substitute may be so bad as to make the continuance of the present clause preferable. The provision for a referendum may be hedged about with clauses which so clog the amending process as to merit the defeat of the entire proposal.<sup>55</sup> Such was the situation with respect to the Wadsworth-Garrett amendment.<sup>56</sup> Under this proposal an amendment might possibly be subjected to a popular referendum. But then again it might not be since it is provided "that any state may require that ratification by its legislature be subject to confirmation by popular vote." If the state failed to make such provision, there could be no popular referendum. It was argued that the states would immediately make such provision. This was effectively answered by

and I am earnestly in favor of both those amendments—were not forced upon the people, but that they were submitted in response to a demand made by the people. At the same time I am not oblivious to the fact that there are millions of citizens of high character who believe that lobbies intimidated the legislatures of the various states and even intimidated Congress into submitting those amendments."

<sup>55</sup> Justin Miller, *Amendment of the Federal Constitution: Should it be Made More Difficult?* (1926) 10 MINN. L. REV. 185.

<sup>56</sup> Rep. Garrett, 67th Cong., 1st Sess., H. J. R. 69, April 21, 1921; Senator Wadsworth, 67th Cong., 1st Sess., S. J. R. 40, April 27, 1921; Senator Wadsworth, 67th Cong., 4th Sess., S. J. R. 271, Jan. 19, 1923; Rep. Garrett, 67th Cong., 4th Sess., H. J. R. 429, Jan. 31, 1923; Senator Wadsworth, 68th Cong., 1st Sess., S. J. R. 4, Dec. 6, 1923; Rep. Garrett, 70th Cong., 1st Sess., H. J. R. 143, Jan. 9, 1928. See speech by Senator Wadsworth, 68th Cong., 1st Sess., Cong. Rec., Vol. 65, 4491, 4495, March 19, 1924, and S. J. R. 21, 67th Cong., 1st Sess., April 13, 1921, making both legislative and popular vote mandatory.

pointing out that there was no good reason why the amendment should not directly provide for such ratification to make a popular referendum absolutely certain. The legislatures themselves would scarcely feel disposed to give up their present exclusive right of ratification, and it might take a great deal of time and effort to incorporate such a provision into the state constitution. Moreover there was only to be a referendum if the legislature ratified the amendment. If the legislature rejected, that ended the issue, and the people were left entirely without voice in the matter. Such a provision naturally made rejection very easy and acceptance even more difficult than it already is. Moreover the then existing legislature might reject, but could not accept.<sup>57</sup>

A number of senators of more liberal views perceived these objections to the Wadsworth-Garrett amendment and in fact the Senate Judiciary Committee reported out a revised proposal by Senator Walsh of Montana, popularly referred to as the Walsh substitute.<sup>58</sup> The principal feature of Walsh's proposal was that amendments should be referred directly to the people for ratification. The long delays and the increased difficulties of amendment under the Wadsworth-Garrett amendment were pointed out. Senator Jones of Washington then offered an amendment to the Walsh substitute taking a position intermediate between that of Senators Wadsworth and Walsh.<sup>59</sup> Unlike Wadsworth's proposal this plan contemplated the necessary use of the popular referendum in all cases. Also unlike Wadsworth's proposal it provided for a referendum when the legisla-

<sup>57</sup> These arguments were very clearly brought out by Mr. Huddleston of Alabama, 67 CONG. REC. 7203 (1926), who advocated ratification by popular vote. See also Rep. Griffin of New York, 66 CONG. REC. 4205 (1925).

<sup>58</sup> 65 CONG. REC. 4488 (1924), Senator Walsh said:

"The question may be asked, 'Why is it necessary to propose any change in the machinery for the consideration and ratification of amendments?' The answer is that experience through the years has demonstrated that there are certain elements of weakness in the machinery set up under Article V, and if it is true that there are certain elements of weakness in that machinery, it is important for us to give consideration to its perfection. Living as we are in a restless era, and having as we do many, many proposals for changing the fundamental law of this Republic, and remembering as we must that there are now pending in the Congress something like 100 joint resolutions proposing amendments to the Federal Constitution, it is incumbent upon us to give very, very serious consideration to the machinery by which this Constitution of ours is to be amended in the future."

For defenses of Walsh's substitute see *supra*, Adams, p. 4497, 4802, 4804, 4998. Brandagee, 4497, 4565, 4931. Borah, 4561, 4563, 4564. Robinson, 4800, Walsh, 4931, Gerry, 4935, Norris, 4941.

<sup>59</sup> 65 CONG. REC. 4802 (1924).

ture rejected an amendment as well as when it ratified. It did agree with Wadsworth's proposal, however, in the fact that the legislature still remained a part of the amending procedure. But it became a purely advisory body. That is to say no matter how the legislature voted a popular referendum automatically followed and the result of the legislative vote whether for or against the amendment was immaterial. The proponents of the Jones amendment argued that the people would receive the benefits of the legislative discussions. If a popular vote alone were taken, such a vote might come so soon after proposal by Congress that there would be no time for deliberation. On the other hand it was argued that this plan turned the legislature into a mere debating society, and that since its action was mere *brutum fulmen* it would not take its function seriously enough to make its discussions of any value to the people. In fact it would strip the legislature of its dignity to make it a mere advisory body. Moreover there would be unnecessary delay involved since the people could act only after the legislature had acted, and moreover only a subsequently elected legislature itself could act. As to the possibility of undue haste and lack of knowledge on the part of the voters, it was pointed out that it is virtually impossible to secure the proposal by Congress by the necessary two-thirds vote without their having been a long preliminary popular agitation and discussion. Senator Walsh and a number of other senators who favored a popular referendum, objected vigorously to the Jones amendment, and declared they preferred the existing system to it. It is true that the Jones amendment did present a rather evenly balanced proposal on the one hand making a considerable delay necessary and yet on the other hand providing for a popular referendum in all cases, such referendum to be absolutely decisive irrespective of the action of the legislature. It was subject to the further objection that in case the legislature took no action at all then no referendum could occur. The Senate at first accepted the amendment,<sup>60</sup> only shortly later to reject it.<sup>61</sup> The Walsh substitute finally died on the Calendar. The House Judiciary Committee twice reported favorably on the Wadsworth-Garrett Amendment, but no vote was ever taken on it.<sup>62</sup> Senator Brandegee twice proposed that Congress should have the option of submitting

<sup>60</sup> 65 CONG. REC. 4940 (1924), by a vote of 34 to 29.

<sup>61</sup> *Ibid.*, p. 5003, by a vote of 39 to 35.



amendments to be ratified according to either of the present modes or by a popular referendum.<sup>62</sup>

Assuming that there is to be a popular referendum, there is still the question of when it should be held. The most usual provision is that it shall be held at the next general federal election, in other words at the next election of members of the House of Representatives.<sup>63</sup> This means that the amendment will be voted on by the people at some time less than two years after it was submitted by Congress. It also means that all of the states would be passing on the amendment on one uniform date, excepting of course Maine which votes earlier. If the amendment were rejected that would seem to cut off another referendum without a new submission by Congress. Hence we would dispose of the problem of whether or not a given amendment is still pending. Other proposals have been that it shall be voted on at the next general state election held within the state.<sup>64</sup> General state elections are held usually every two years and in some states annually so that amendments would be voted on at approximately the same time. A third conceivable plan would be to allow each state to hold its election when it chose.<sup>65</sup> This, however, would do away with uniformity of time of ratification and still leave unsolved the problem of whether or not a given amendment is still pending. Perhaps the most satisfactory stipulation is that first mentioned, providing for a vote at the same time that the lower house of Congress is being elected.

It has been suggested that to permit a popular vote at so early a date may result in action on the amendment before there has been an opportunity for public discussion and deliberation on the amendment. Congress might submit an amendment only a few months before the election. Doubtless there is some force in this objection. Possibly it might be well to prescribe a minimum period such as one year or six months between the date of submission and that of the popular ref-

<sup>62</sup> 65th Cong., 1st Sess., CONG. REC. 5556-5558, and 66th Cong., 1st Sess., S. J. R. 41, CONG. REC. 5694-5700, twice reported favorably by the Senate Judiciary Committee. See also Smith, *op. cit. supra* note 17, at 657.

<sup>63</sup> Senator Pomerene of Ohio, 66th Cong., 1st Sess., S. J. R. 22, May 23, 1919; Rep. Emerson of Ohio, 66th Cong., 1st Sess., H. J. R. 60, May 24, 1919; Rep. Emerson, 66th Cong., 1st Sess., H. J. R. 123, June 18, 1919; Rep. Lea of California, 71st Cong., 2nd Sess., H. J. R. 168, Dec. 16, 1929. In Australia an amendment is submitted to popular vote within not less than two or more than six months after it has been proposed.

<sup>64</sup> Senator Norris, in a letter of June 10, 1931, to the author of this article.

<sup>65</sup> Speech by Senator Wadsworth, 65 CONG. REC., 4495 (1924).

erendum. The present amendments have been ratified in most cases by the then existing legislatures, in some cases on receipt of telegraphic information of the approval by Congress. No amendment has taken as much as three years to ratify, and the tremendous pressure brought to bear on the legislatures has been such as to induce prompt action, in some cases through special sessions. Moreover as Senator Walsh has pointed out the bare fact of approval by Congress in itself indicates that a measure has received long prior discussion, so that the populace does not need a long period of time in which to make up its mind.<sup>66</sup>

If Article V be amended to provide for ratification of amendments by a popular referendum, questions may arise as to by what majority an amendment must be carried and as to who is to be the judge of whether or not an amendment has been adopted by the requisite majority. By a majority do we mean a majority of the qualified electors of the state, or a majority of the electors voting on the amendment? The same doubt has arisen as to similarly phrased clauses in state constitutions. Perhaps the sounder legal view is that simply a majority of the electors voting on the amendment is sufficient, yet the adjudicated cases are split about evenly on the matter. To prevent any controversy it seems best to provide expressly that ratification be by a majority of the qualified electors voting on the proposed amendment.<sup>67</sup> The Wadsworth-Garrett amendment is doubly ambiguous in providing simply for "confirmation by popular vote." Usage, however, would seem to indicate that by this is meant a simple majority rather than a two-thirds or a three-fourths or some other majority.

In the recent congressional debates argument arose over which was to control the matter of whether or not an amendment has been adopted,—the federal government or the states. Under the present legislative mode, the courts will not look behind the legislative rolls to decide whether an amendment has been adopted after it has been certified to the Secretary of State by the state officials. But ratifica-

<sup>66</sup> 65 CONG. REC. 4558 (1924) ; Borah, 4564, Norris 5002.

<sup>67</sup> Mr. Porter of Virginia, on Jan. 13, 1873, 42nd Cong., 3rd Sess., Globe 538; Senator Owen of Oklahoma, on Sept. 22, 1921, 66th Cong., 1st Sess., 5700; see speech by Senator Robinson of Ark., 65 CONG. REC. 3676 (1924); speeches by Senators Harrison and George, p. 4999, *supra*; proposal by Senator Reed of Missouri, supported by Norris, p. 5003, 5006, *supra*; letter of June 10, 1931, by Senator Norris to author of this article. Professor Edward S. Corwin, in a letter of May 27, 1931, to the author of this article suggests ratification by an absolute majority of the number voting in the most recent presidential election.

tion by popular vote does not involve a precisely analogous situation, and so question might arise as to whether or not the federal government might attempt to regulate the conduct of the election, the qualifications of voters, and the counting of the ballots, etc. It was after some acrimonious debate on this as well as other controversial issues that the Walsh substitute was recommitted to committee for clarification.<sup>68</sup>

Another point which has frequently been raised is that of how long an amendment remains open for ratification after it has been submitted by Congress. As a matter of common sense an amendment proposed a generation or more previously should not remain open to ratification.<sup>69</sup> A time limit set out in amendment on a specific subject would govern the ratification of that amendment. But the Supreme Court has gone even further and said that Congress has the implied power to prescribe a reasonable time limit for ratification. However, where Congress fails to do this or the amendment itself is silent, the question still remains an open one. Even when Congress does prescribe a limit the question may arise whether such limit is a reasonable one. A number of proposals have therefore been made for specific time limits such as five,<sup>70</sup> six,<sup>71</sup> seven<sup>72</sup> or eight<sup>73</sup> years. Where action by both the legislatures and the voters is contemplated, naturally a longer period should be provided, and such changes were offered when the Wadsworth-Garrett Amendment was discussed in Congress. If ratification were to be exclusively by a popular referendum, especially if the vote was taken at a uniform date there would seem to be no need for providing a limitation, unless the referendum provision be construed to permit another referendum without another submission by Congress. In connection with time limitations, perhaps it might be well to limit the time during which an application by a legislature for a national constitutional convention is effectual.

<sup>68</sup> Senator Swanson of Virginia, 65 CONG. REC. 5007-5009 (1924).

<sup>69</sup> Senator Ashurst, 65th Cong., 1st Sess., CONG. REC. 5556, July 30, 1917; Senator Norris, letter of June 10, 1931, to the author of this article; BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* (1922) 36; AMES, *supra* note 32.

<sup>70</sup> Senator Chilton of W. Va., 63rd Cong., 2nd Sess., S. J. R. 126, March 12, 1914; Mr. Igoe of Missouri, 65th Cong., 1st Sess., H. J. R. 137, Aug. 4, 1917.

<sup>71</sup> Senator Wadsworth, 64th Cong., 2nd Sess., S. J. R. 207, Feb. 5, 1917; Senator Wadsworth, 65th Cong., 1st Sess., S. J. R. 88, Aug. 2, 1917; Senator Brandegee, 65th Cong., 1st Sess., S. J. R. 90, CONG. REC. 5556-5558; Senator Fletcher, 65th Cong., 2nd Sess., S. J. R. 182, Nov. 1, 1918; Senator Brandegee, 66th Cong., 1st Sess., S. J. R. 41, Jan. 2, 1919.

<sup>72</sup> Mr. Cullen of New York, 67th Cong., 1st Sess., H. J. R. 162, June 24, 1921. See article by Senator Ashurst, *supra* note 44.

<sup>73</sup> Senator Wadsworth, 68th Cong., 1st Sess., S. J. R. 109, March 28, 1924.

Virtually all the changes which have been suggested in the amending process have been as to procedure. Although in the last decade numerous assertions have been made that there are certain implied limitations on the content of amendments, few suggestions have been made that express limitations be inserted in the amending clause.<sup>74</sup> It is of course true that the Constitutional Convention inserted three such limitations and that a fourth limitation was suggested but rejected. Two of these limitations, couched in absolute terms, so that apparently a unanimous vote of all the states could not destroy them, expired in 1808. The first forbade Congress from prohibiting the importation of slaves until 1808. Apparently, however, an amendment forbidding such importation without mention of Congress, in other words an amendment of a legislative nature such as the Eighteenth Amendment would have been valid. The second limitation expiring in 1808 was that no capitation or other direct tax shall be laid except in proportion to population. Although more doubtful, this too was only a limitation on Congress, so that an amendment legislating on the subject might have been adopted. Thus these limitations were such only on the powers that could be given to Congress. Nevertheless the principle remains clear that there were certain things that could not be done directly by the amending power, although very much the same result might be accomplished indirectly. The third limitation and the only one now in existence is that no state shall be deprived of its equal suffrage in the Senate without its consent. Hence even though an amendment is adopted according to the regular procedure it is invalid if it deprives a state of its equal suffrage unless the state affected consents. An amendment adopted by all the states, however, would wipe out the clause.

Although some of the proponents of limitations on the amending power have drawn a great deal of comfort from the equal suffrage clause, it would seem that the limitation is more nominal than real in its practical effect. In recent years the following are some of the limitations which have been alleged to exist on the scope of the amending power: dissolving the federal Union, abolishing the states,

<sup>74</sup> Butler, *The Constitution One Hundred and Forty Years After* (1928) 12 CONST. REV. 121, 126; Westervelt, *Amend Article V* (1931) 24 L. AND B. AND CENT. L. J., 166, 169, would amend Article V so as to provide "that amendments dealing strictly with the organization of government might be submitted to the legislatures of the several states for ratification and adoption, and that those dealing in any way with the mass of governmental powers must be submitted to conventions of the people."

depriving the states of their police power, making Congress as supreme as the British Parliament, the Bill of Rights, the Fourteenth Amendment, the other parts of the Constitution and the spirit of the Constitution, inalienable rights of personal liberty, the nationalization of women, and other restrictions too numerous to mention.<sup>75</sup> A proposal which would have resulted in a substantial restriction on the amending power was that offered by Sherman at the Convention "that no state should be affected in its internal police." Madison objected that this would pave the way for special provisos in behalf of the individual states, and Sherman's motion was lost. The last serious attempt to limit the content of amendments was made just prior to the Civil War when numerous proposals were made forbidding Congress to adopt any amendment abolishing slavery.<sup>76</sup> Congress actually submitted an amendment to this effect, known as the Corwin amendment, which was ratified by two states and by an Illinois constitutional convention which happened to be in session. It should be observed, in passing, that this amendment would restrict only Congress and not the amending power itself, so that an amendment directly abolishing slavery would have been valid. The state courts have with two or three exceptions rejected the doctrine of implied limitations. Only two state constitutions contain express limitations on the content of amendments. It would seem that the present federal amending power is practically unlimited in its scope. No question could arise over the validity of changes in the amending procedure itself, and none as to changes in content, provided that the equal suffrage clause is observed. Amendments limiting the substance of future amendments would doubtless be valid under the American conception of the powers of the sovereign, though in England it has been asserted that one Parliament is not bound by the acts of another. Yet it would seem extremely unfortunate to impose any limitations on content both because one generation cannot foresee the needs of another and because such restrictions make a revolution necessary to accomplish the change which is forbidden. Fortunately the proponents of a more difficult amending process have concentrated on changes in procedure, so that there is little prospect at the present time that any limitations on content will be added to Article V.

<sup>75</sup> A full list is set out in Orfield, *op. cit. supra* note 4, at 553.

<sup>76</sup> Fourteen such proposals were made between Dec. 12, 1860, and April 8, 1864. See the list in AMES, *op. cit. supra* note 6, at 356-368.

In concluding this study of the reform of the federal amending power, it seems not only proper but essential to summarize the underlying factors which are to be considered when amendment or revision of the Constitution is sought. One must beware of making an absolute of any one element, since here as in most other situations it is unlikely that there is any one fundamental principle entitled to exclusive emphasis.<sup>77</sup>

Before considering these various factors one must carefully distinguish between the policy and the legality of changes in the amending process. As has been seen it is unquestionably legal to make any change that is desired in the amending procedure providing of course that the existing rules are followed in making that change. But it by no means follows that merely because a change can legally be made and is made that such a change is a desirable one. By the policy of a change, on the other hand, is meant the practical operation of the machinery in its effect on the life of the nation. In considering the reform of the federal amending power it is the policy we are interested in rather than the legality since there can be no question of the legality when the proper procedure for securing the amendment is followed and proper weight is given to the equal suffrage proviso.

First to be considered in examining the policy of a change suggested in the amending procedure is its effect on the maintenance of the federal system. Will the change so operate as to bring about the destruction of the states, or substantially to weaken them? It should

<sup>77</sup> JAMESON, *CONSTITUTIONAL CONVENTIONS* at 549:

"Provisions regulating the time and mode of effecting organic changes are in the nature of safety valves, they must not be so adjusted as to discharge their peculiar function with too great facility, lest they become the ordinary escape pipes of party passion; nor, on the other hand, must they discharge it with such difficulty that the force needed to induce action is sufficient to explode the machine. Hence the problem of the constitution maker is, in this particular, one of the most difficult in our whole system, to reconcile the requisites for progress with the requisites for safety."

Mr. Huddleston of Alabama, 67 CONG. REC. 7203 (1926), says that "the clause which lies nearest to its heart is the clause which permits a change in the Constitution. It is more vital and more fundamental than any other provision of the Constitution. For, by dealing with that clause, we may fix it so that the Constitution is absolutely rigid and may never be amended, or we may fix it so that it may be amended lightly and without sufficient thought. In other words, through that clause we reach toward every other clause in the whole Constitution; and that cannot be said about any other clause of the Constitution."

"I cannot go into that in detail. I merely want to bring the thought that unnecessary meddling with the Constitution becomes a more serious offense when we deal with an amendment to the particular clause, than if we were undertaking to deal with any other section."

be clear, however, that there is nothing sacrosanct in the maintenance of the federal system *per se*. The federal system is defensible only when it conduces to the greatest good of the nation and the states.<sup>78</sup> As soon as it becomes evident that the nation would be better off as a unitary state, such as France or Italy, then let it become such, and let the principle of the general welfare supersede that of states' rights. Similarly if a division of the nation into its component elements would operate for the general welfare of those concerned, let the union be dissolved. That either one of these situations now exists in the United States can scarcely be seriously asserted. We are still strongly committed to the notion of an "indestructible Union, composed of indestructible States."<sup>79</sup> There is little question that the trend in recent years has been toward centralization. The increasingly industrial character of the nation, the improvement of the means of communication, the disappearance of the frontier, and the past feeling of confidence which the federal government has inspired in the people have all combined with an irresistible force to strengthen the feeling of unity.<sup>80</sup> Yet one cannot deny the need of local self government, based on a real popular interest and popular knowledge of the local situation. The Eighteenth Amendment has demonstrated that there are limitations on what can be accomplished by the federal government. The import of this is clear: since the federal principle is a valuable one, care must be taken that the states are consulted as such in the ratification of amendments and perhaps in their proposal as well. When the states ratify as such, it is obvious that under the natural law of self-preservation they will safe-guard their own interests. In view of the seemingly inevitable trend towards centralization, however, they must not be given an absolute

<sup>78</sup> Cf., however, the statement as to the intent of the framers of the Constitution, in Goodnow, *Judicial Interpretation of Constitutional Provisions* (1912) 3 ACADEMY OF POL. SCI. PROC. 49, 52:

"Finally, the confidence of the fathers in the existence of eternal political verities and the possibility that fallible humanity might ascertain and formulate them is seen in the difficulty if not impossibility of amending the constitution which resulted from the processes of amendment involved."

<sup>79</sup> Senator Reed of Pennsylvania, 65 CONG. REC., 4496 (1924); Freis, *Amending the Constitution of the United States* (1920) 33 HARV. L. REV. 659; Dodd (1921) 30 YALE L. J. 321, 348, 354; AMES, *op. cit. supra* note 32; HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925), 220; Moschzisker, *Dangers in Disregarding Fundamental Conceptions When Amending the Federal Constitution* (1925) 11 CORN. L. Q. 1; Garrett, *Amending the Federal Constitution* (1929) 7 TENN. L. REV. 286, 288.

<sup>80</sup> BRYCE, *AMERICAN COMMONWEALTH* (4th ed. 1910) 403; THOMPSON, *FEDERAL CENTRALIZATION* (1923) 305-327.

veto, and the requirement of adoption by an excessive majority of states might well be somewhat relaxed. That is to say the federal principle must be harmonized with the general welfare, since in the last analysis it is defensible only as conducing to the general welfare.

A second factor of importance is that of the wisdom and efficiency of the amendments secured through the change in the amending process. Will the change be of such kind as to result in the adoption of amendments which will prove harmful to the country? Can a lesser majority than is now required be trusted to adopt amendments which may injure not only themselves, but the dissenting minority? Will the constitution not become unduly prolix and cluttered up with legislative provisions?<sup>81</sup> The mere fact that a simple majority or even an extraordinary majority desire a change by no means demonstrates that the change will prove beneficial.<sup>82</sup> King Mob may be just as much a despot as a single dictator. The discussions at the Constitutional Convention show that the framers of the Constitution were frankly aristocratic in their views and deliberately set up a framework of government and a charter to protect

<sup>81</sup> Freund, *Legislative Problems and Solutions* (1921) 7 A. B. A. J. 656, 658, says that "when the people desire to accomplish through the constitution a direct result independent of legislative assistance, they overlook the fact, that there are few propositions of law that can be made sufficiently brief for constitutional formulation, and at the same time self executing." See also BURGESS, *op. cit. supra* note 11; BURDICK, *op. cit. supra* note 69 at 49.

<sup>82</sup> Miller, *op. cit. supra* note 55 at 188: "Generally the votes which have been cast in state elections, and particularly in referendums upon proposed constitutional amendments, have indicated an unwillingness upon the part of the people to concern themselves with such questions. The slogan, 'When in doubt, vote no!' has been applied with particular emphasis, and from the evidence available it appears that usually the number and percentage of votes cast upon proposals for amendments have been the lowest cast for any propositions or candidates on the ballot. The reason is that the voters are unable or unwilling to give proper consideration to such questions. They elect lawmakers for that purpose and have a right to expect that their representatives will take testimony, consider all the evidence and, after due and proper deliberation, render a reasoned decision. Many voters are not properly trained to understand questions of the import involved in proposed constitutional amendments."

Walter F. Dodd says in (1921) 30 YALE L. J. 321, 354: "A serious question presents itself as to whether the federal amending process should be so easy as to permit the introduction into the Constitution of provisions which involve directly sectional or political issues. Clearly the federal Constitution performs a function different from that of the state constitution, and should be less flexible than the state constitutions may properly be." See also, Jameson, *op. cit. supra* note 43, par. 532, 487; Long, *Tinkering With the Constitution*, (1915) 24 YALE L. J. 573, 586; Brown, *Irresponsible Government by Constitutional Amendment*, (1922) 8 VA. L. REV. 157; Butler, *op. cit. supra* note 74 at 121, 123. Cf., however, the view of Smith, *op. cit. supra* note 17, at 657, 669, that the dominating political party should be able to introduce amendments.



the rights of minorities.<sup>83</sup> This is quite clearly shown in Article V which permits amendment not by a majority of the states or a majority of the people, but only by three-fourths of the states without any direct popular participation in any stage of the amending process. This made it certain that the rights given to minorities under the Constitution would be taken away from them only after the majority had made itself overwhelmingly strong. In other words, the theory is that a constitutional amendment is of much greater significance than a statute, and that it is much more likely to be a wise amendment when a large majority concur in it. The Eighteenth Amendment is frequently cited to show that even a large majority can make a mistake.

There is, however, another side of the picture. The amending process may be made so difficult as to prevent the adoption of amendments which are unquestionably sound. One must balance against the undesirable amendments checked by a difficult amending process the desirable ones not adopted because of such process. It has been asserted that a more flexible amending process might have averted the Civil War. The enemies of the Eighteenth Amendment also appear to forget that a difficult amending process makes it almost impossible to repeal an unsatisfactory amendment. Making it easier to amend might result in the adoption of a number of undesirable proposals, yet such amendments might be repealed with the same ease. There is much to be said for the view that the really practical program of those who would bring back the use of intoxicating liquors is to seek to amend Article V to permit an easier mode of changing the Constitution, rather than peevishly to seek to increase the difficulties of amendment.

A third factor, and one closely related to that just discussed, is that of proper deliberation. The amending process should not be so changed that amendments can be adopted without an opportunity to discuss the arguments pro and con.<sup>84</sup> An amendment should receive

<sup>83</sup> Senator Bruce of Maryland (1924), 65 CONG. REC. 4557 says that "they kept their eyes no more on the possibility of oppression in high places than they did upon what they conceived to be the caprices, the passions, the sudden gusts of impulse in one form or another to which men en masse are subject. They believed in representative government rather than in pure democracy."

<sup>84</sup> "The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation and caution; and to follow experience, rather than to open a way for experiments, suggested by speculation or theory." II STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3rd ed. 1858), par. 1827, p. 634. Senator Wadsworth, 65 CONG. REC. 4495 (1924).

at least as much consideration as a statute. Under the present system due deliberation is more than amply secured. The two-thirds majority required in Congress and the three-fourths required among the states insure adequate deliberation. A measure which must pass the scrutiny of thirty-seven legislative bodies, each in turn divided into an upper and a lower house, can scarcely be said to have been rushed through. In fact the agitation for the most recent amendments began seventy-five and fifty years ago, so that the process if anything must be said to be too slow. For this last reason it would seem that the recent proposals for ratification only by subsequently elected legislatures, and permitting of a confirmation by popular vote of the legislative ratification, and allowing a state to withdraw its acceptance of an amendment should all be defeated.<sup>85</sup> The present provisions for securing deliberation are entirely adequate. In fact the more recent proposals call for a lessening of the majorities required both for proposal and ratification. The proposal for a popular referendum also looks in the direction of less deliberation since the amendment would be voted on conclusively by the people within one or two years after submission. The framers of the Constitution anticipated a frequent use of the amending power.<sup>86</sup> Practically all the critics of the present amend-process at least until the last decade have agreed that the process should be made easier. No amendments were adopted between 1804 and 1865, and between 1870 and 1913. The Progressive Party in 1912 adopted a plank favoring easier amendment. The adoption of the last four amendments has resulted in a reversal of opinion on the part of many, so that such proposals as the Wadsworth-Garrett Amendment are designed to make it more difficult.<sup>87</sup> The weight of opinion, however, probably is that the

<sup>85</sup> In 1826 Rep. Herrick of Maine introduced a resolution to regulate the time for introducing amendments, proposal to be allowed only every tenth year. 19th Cong., 1st Sess., Debates, 1554. Chief Justice Von Moschzisker of the Supreme Court of Pennsylvania, suggests that if a popular referendum is to be provided for only a limited number of amendments should be voted on at the same election, *op. cit. supra* note 79, at 5. Senator Owen, 66th Cong., 1st Sess., CONG. REC., 5700, proposed that there be mailed to each voter a copy of the proposals and a copy of the arguments, for and against, prepared by two committees composed of leading representatives of the opposing sides.

<sup>86</sup> Hamilton's remarks at the Convention, 5 ELLIOTT, DEBATES 530, and THE FEDERALIST, No. 43.

<sup>87</sup> Marshall, C. J., in *Barron v. Baltimore*, 7 Pet. (U. S.) 242, 249, 8 L. ed. 672 (1833); Brown, J., in *Holden v. Hardy*, 169 U. S. 336, 387, 18 Sup. Ct. 383, 42 L. ed. 780 (1898); WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1884), 242; (1890) 13 REPORT OF THE NEW YORK BAR ASS'N., 141; 1 BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW (1896) 150; Potter,

present process is difficult enough, perhaps exactly to the proper degree.<sup>88</sup> Many are indifferent toward the question.<sup>89</sup> The writer predicts that with the defeat of the Child Labor Amendment, the virtually insuperable difficulties in repealing the Eighteenth Amendment, and an interval during which no amendments are adopted, there will be a return to the old view that the process is too difficult. Strange as it may seem the first definite proposal to make the amending process easier did not come until the Civil War Period. Up to 1911 approximately twenty-five amendments to the amending process

*op. cit. supra* note 18, at 589, 592 (1909); BRYCE, *op. cit. supra* note 80, at 359 (1910); Munroe Smith, *op. cit. supra* note 17, at 657 (1911); Johnstone, *op. cit. supra* note 17, at 265; Thompson, *op. cit. supra* note 80, at 65, 69 (1912); BEARD, AMERICAN GOVERNMENT AND POLITICS (1914) 62; DICEY, LAW OF THE CONSTITUTION (1915) 145; Tanger, *op. cit. supra* note 13, 689, 698 (1916); John W. Davis (1923) 48 REP. OF AMER. BAR ASS'N., 201; Senator Brookhart, of Iowa, 65 CONG. REC., 4564, 4566 (1924); Rep. Huddleston, of Alabama, 66 CONG. REC. 4572 (1925); Ben A. Arneson, *Is It Easy to Amend the Constitution?* (1926) 60 AM. L. REV. 600; Justin Miller, *op. cit. supra* note 55, at 185.

Ames seems at first to have thought the amending process too difficult. *Op. cit. supra* note 6, at 300. But more recently he has changed his opinion. "Although the speaker some years ago held the view that the amending process was too difficult he has been led, in common with others, to a modification of that opinion. He believes that a radical change in the method of amendment is neither necessary nor desirable." *Loc. cit. supra* note 32.

Dodd, in his *Revision and Amendment of State Constitutions* (1910), 141, note, states that "it seems to be the general view that our federal constitution cannot be amended except in times of national crises." In (1921) 30 YALE L. J. 321, 348, 353, he concludes that the present process is substantially satisfactory. In a letter of May 28, 1931, to the author of this article he seems to return to his original viewpoint when he says that "the Eighteenth Amendment serves to illustrate the substantial impossibility of getting a thing out of the Constitution if a change of policy is desired by a great majority of the people of the country. I am inclined to think that under our present procedure there is no possibility of repealing the Eighteenth Amendment however insistent the demand for its repeal may grow to be."

<sup>88</sup> Brown, *The New Bill of Rights' Amendment* (1922) 9 VA. L. REV. 14; Alexander Sidney Lanier, *Amending the Federal Constitution* (1923) 9 VA. L. REV. (N. S.) 81; Mussman, *Is the Amendment Process Too Difficult?* (1923) 57 AM. L. REV. 694, and *The Difficulty of Amending Our Federal Constitution: Defect or Asset* (1929) 15 A. B. A. J. 505; Senator Edge, 65 CONG. REC. 4497 (1924), and also 4938; Margaret C. Klinglesmith, *Amending the Constitution of the United States* (1925) 73 U. OF PA. L. REV. 355, 368; Thomas F. Cadwalader, *Amendment of the Federal Constitution* (1926) 60 AM. L. REV. 389; Butler, *op. cit. supra* note 74 at 121 (1928); Garrett, *Amending the Federal Constitution* (1929) 7 TENN. L. REV. 286.

<sup>89</sup> Senator Bursum of New Mexico, 65 CONG. REC. 4420 (1924) says:

"It seems to me that consideration of amendments to the Constitution ought not to be considered the first business to take up. We have gotten along pretty well during the last 150 years without those amendments and we might get along perhaps a few days longer."

Senator Walsh, in attaching the Wadsworth Garrett Amendment, p. 4561, *supra*, says:

"I do not think there is any occasion for any amendment to the Constitution

were offered while since that time about seventy-five proposals have been made, making a total of about one hundred amendments offered in Congress to Article V. The fact that the last seventy-five proposals have been made in the last two decades possibly foreshadows a change.

The need for an easier amending process can easily be overstated, however. The Constitution is of so elastic a nature that on many subjects the desired ends can be achieved without altering the Constitution.<sup>90</sup> The language of the Constitution is brief and couched in general terms. Moreover the liberal construction school of interpretation has triumphed over the strict constructionists, so that by a process of interpretation the terms of the Constitution may be made to cover most problems that arise. There are limits, however, on what can be accomplished by interpretation. The commerce clause, the war power, and the Fourteenth Amendment all admit of interpretation. But such provisions as those for the electoral college and the time of meeting of Congress and Article V itself do not. The amendment process should not be so difficult that strained interpre-

on this subject; but, if there is, I think that the obvious tendency of the times and the wisdom of our age suggests that the matter be submitted to the people of the state."

*Cf.* the view of Senator Pepper of Pennsylvania, p. 4569, *supra*:

"I am unable to share the view of the Senator from Montana [Mr. Walsh] that this subject is one unworthy of consideration at the present time. It seems to me that while the experiences incident to the adoption of recent amendments are fresh in our minds, and at a time when we are not disturbed by the pending of any great amendment involving a question of policy upon which the country is divided, is the ideal time to propose for consideration a measure designed to prevent in the future the evils which have been incident to the process of amendment in the past."

<sup>90</sup> AMES, *op. cit. supra* note 6, at 302; BRYCE, *op. cit. supra* note 80, at 371; GOODNOW, *op. cit. supra* note 78; Hall, *An Eighteenth Century Constitution—A Comment* (1912) 7 ILL. L. REV. 285.

Senator Walsh of Montana, 65 CONG. REC. 4494 (1924), says:

"Of course, many features of this Constitution of ours are of doubtful wisdom theoretically. We can easily conceive that a whole flood of evils might possibly come by reason of extraordinary powers granted here, but some way or other, they never do."

James Bradley Thayer, *Our New Possessions* (1899) 12 HARV. L. REV. 464, 468, says:

"That instrument, astonishingly well adapted for the purposes of a great, developing nation, shows its wisdom mainly in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations. As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them."

tations causing loss of confidence in the judiciary must be resorted to.<sup>91</sup> Nor should it be so difficult that the federal judicial veto of legislation cannot be overcome.<sup>92</sup>

A fourth factor is that of popular democracy.<sup>93</sup> The nation has been a republic since it broke away from England. Beginning with the Jacksonian era the electorate has grown by leaps and bounds, so that there is almost universal manhood suffrage except in the South. The Fifteenth Amendment nominally at least increased the votes of the nation. Within our own times suffrage has been conferred on women. The Seventeenth Amendment provided for popular election of Senators, and very largely paved the way for agitation in behalf of popular participation in the amending process.<sup>94</sup> The average of popular education is surely higher than it ever was, and should become even higher with the gradual assimilation of our immigrants. The Supreme Court and the commenators on the Constitution and our political orators make frequent reference to the sovereignty of the people. Yet the people do not participate in a single stage of the amending process. The Constitution was not directly adopted by the people, nor is it amendable directly by them.<sup>95</sup> The optional convention plan provided for in Article V is never resorted to, and if it were it would not so accurately reflect the wishes of the people as a popular vote. It is indeed an anomalous situation where the people are given no participation in the most important of political matters—that of altering the Constitution. Even the indirect participation presented through the use of the legislatures can scarcely be called representative because of the excessive majorities required both for proposal and for adoption. Ordinarily one conceives of democracy as

<sup>91</sup> Potter, *op. cit. supra* note 18, at 589, 595.

<sup>92</sup> Munroe Smith, *op. cit. supra* note 17, at 657, 662.

<sup>93</sup> BORGEAUD, ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA (1895) 337; SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1911) 40; MACY AND GANNAWAY, COMPARATIVE FREE GOVERNMENT (1915) 291; Seba Eldridge, *Need for a More Democratic Procedure of Amending the Constitution* (1916) 10 AM. POL. SCI. REV. 683; and Ames, *op. cit. supra* note 32, at 62, 70.

<sup>94</sup> Senator Borah says that the movement for the Seventeenth Amendment was born on "a tide of the earnest effort of the American people to make what free government is destined to be in the last analysis—popular government."

<sup>95</sup> BORGEAUD, *op. cit. supra* note 93, at 332, in contrasting governmental with popular ratification says: "The former springs historically from a semi-medieval conception of the state, by which sovereignty is divided between the prince and the representatives of the nation, and under the influence of which the constitutions have taken on the character of compacts between two parties. The latter is the one whose foundations were laid by the revolutions, and which has been developed in the democratic spirit of our time."

acting through simple majorities. Under the present system the representatives of thirteen states can check the wishes of both the people and the representatives of the other thirty-five. Before we can correctly speak of the people as being sovereign in the United States, we must amend the Constitution so as to permit a majority of the electorate of the entire country to amend the Constitution. There would, however, be but a slight departure from this principle if we permitted ratification by a majority of voters in each of a majority of states thus making the state still the unit of ratification, or if the provision were for ratification by a majority of the voters in each state plus a majority of the electorate of the entire nation. The advocates of the democratic principle must bear in mind the other factors which have been previously discussed. Obviously the maintenance of the federal principle will necessitate the preservation of the states as units in the amending process. Moreover to permit amendment by a simple majority may result in the adoption of undesirable and excessive constitutional changes, without adequate deliberation. An amendment reflecting only the wishes of a majority may also encounter difficulties in enforcement.

It is of course easy to make a fetish of democracy. To a great many people Wilson's epigram about "making the world safe for democracy" has taken on a sardonic meaning. It is sun clear that political democracy is not a panacea for the ills of the nation. The dictatorships in Europe and elsewhere indicate a lapse back to more aristocratic forms of government and, according to some, a failure of democracy. On the other hand, the experience of the United States, the new republican governments in Germany and Spain and Turkey all indicate that democracy and representative government are by no means on their death-bed. Perhaps the use of the referendum will now and then result in the adoption of unwise changes. The experience of the states of this country has perhaps on the whole been favorable.<sup>96</sup> The electorate is on the whole as conservative or more conservative than the legislatures, so that possibly there would be fewer changes than previously if the popular referendum were adopted. At least many of the proponents of a more difficult amending process will often be found also recommending ratification by popular vote. If mistakes are made the people will recognize that the mistakes are their own. They will naturally take more interest

<sup>96</sup> DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* (1910) 270-292.

in a document which is their own.<sup>97</sup> Perhaps they will also be more willing to comply with laws laid down by themselves. The demand for popular democracy should be heeded to the extent of allowing participation in the ratification of amendments and perhaps even in initiation.<sup>98</sup>

A fifth and last factor to be considered is that of enforcement. This factor has been almost entirely overlooked until recently not only in connection with amendments but also as to statutes in general. The Fifteenth Amendment and more recently the Nineteenth have very forcibly brought this question to the front. It is an unfortunate situation to have a law passed which is not enforced. It is a great deal more unfortunate to adopt an amendment to the national constitution which in large part remains a dead letter on the books.<sup>99</sup>

<sup>97</sup> Senator Borah, 65 CONG. REC. 4562 (1924) says:

"The Constitution ought to be regarded as the people's law, the people's charter. I think just so nearly as is practicable and possible the judgment of the people, direct and immediate, should be taken as to what shall be found in their Constitution. Certainly, if we were making a constitution or rewriting the Constitution and submitting it, we would feel under obligation to submit it as directly to the people as practicable, and I feel that in incorporating amendments we should observe the same rule.

"There are a number of reasons for this, but one of the reasons is largely what you might call a sentimental or psychological reason, that is, I feel that people ought to be permitted to feel that when the Constitution is completed from time to time, and as it stands, it is their expression, an instrument which they have made; that it is their charter, that upon them it depends largely for its existence, and I should therefore want to bring home to them as nearly as possible the changing of it or the amending of it or the modifying of it in any respect.

"I was at one time very much disturbed over the question of the initiative and referendum, but as I have observed its working in Switzerland and elsewhere, I find, instead of its being a radical proposition, it is an extremely safe and conservative proposition." *Ibid.*, 4563.

<sup>98</sup> Charles Borgeaud says that "it appears possible, after the comparative study we have just made, to determine precisely the principle which governs contemporary democracy in the exercise of its constituent powers. This principle is proclaimed in the immense number of constitutional texts we have had occasion to examine, and the entire development of the public law of those nations whose constitutional history has been the chief object of our investigation. It may be formulated as follows: The constituent power is wielded directly by the people for purposes of sanction; directly or indirectly through its representatives for purposes of initiation. In other words—considering sanction alone, which shows the essential character—the imperative act which gives being to the fundamental law proceeds directly from the body of qualified voters, sole possessors of the sovereign rights of the nation." *Op. cit. supra* note 93, at 337.

<sup>99</sup> Moschzisker, *op. cit. supra* note 79; Brown, *The People Should Be Consulted as to Constitutional Changes* (1930) 16 A. B. A. J. 404.

Senator Underwood of Alabama pointed out in the Senate debate on the adoption of the Eighteenth Amendment, 65th Cong., 1st Sess., CONG. REC. 5554, July 30, 1917:

"The sound and underlying theory of democracy 'that a just form of gov-

In considering changes of the amending process one is therefore by no means raising an academic question when one asks whether it will make likely the adoption of amendments which will not be enforced. Because of the difficulties of enforcement it may therefore be desirable to require that something more than a simple majority of the legislatures or of the people must favor a change. While a simple majority may be adequate for a statutory change, a constitutional change should have something more substantial behind it. A simple majority may by changes in popular sentiment become a minority. Sumptuary legislation even when favored by considerably more than a majority may encounter such opposition as to breed a feeling of disrespect for law in general. The violation of the federal principle may also result in a falling down of enforcement because of the jealousy of the states. Altering the amending process in such a way as to permit of unwise or hasty changes also contributes to a failure of the law. The passage of amendments without consulting the people by a popular referendum may result in charges that the amendment was railroaded through the legislatures and is not representative of the real wishes of the people. It is evident then that the factor of enforcement is subject to the interaction of the other factors.

Great caution must be exercised, however, with respect to the conclusions one draws concerning the element of enforcement. It has been pointed out that it is undesirable to alter the amending process in such a way that unenforceable or unenforced amendments will be adopted. On the other hand an even worse situation develops when an amendment is adopted which it is practically impossible to repeal chiefly because of difficulties in the amending

ernment requires the consent of the governed' is often subject to perversion. President Hadley of Yale University in his *Standards of Public Morality* says:

"Not content with saying that all just government is based on the consent of the governed, the enthusiastic advocates of democracy hold that if you could only find what a majority of the governed wanted you could easily incorporate it into law. Never was there a greater practical error. Public law, to be effective, requires much more than the majority to support it. It requires general acquiescence. To leave the minority at the mercy of the whims of the majority does not conduce to law or good government or justice between man and man. Even Rousseau, the leading apostle of modern democracy, saw this most clearly. He said in substance: 'A majority of the people is not the people and never can be. We take a majority vote simply as the best available means of ascertaining the real wishes of the people in cases when it becomes necessary to do so.'"

"It does not forgive the error of government to be able to command majorities in legislative bodies when a vast number of people stand in opposition to statutes which they feel and believe tread on their personal rights and endanger their personal liberty."



process. It seems that evils are bound to arise under either a facile or a difficult amending process. The reformer is seemingly between Scylla and Charybdis. Balancing the evils involved, is it not perhaps saner in the long run to make the amending process sufficiently easy so that an occasional mistake is made which may be corrected in the same easy fashion, rather than to make it so difficult that when a mistake is made such mistakes cannot be corrected except by revolution?<sup>100</sup> After all the people or some large part of them must be permitted to make their mistakes and to do so within the limits of the Constitution. It would therefore seem undesirable to write into the Constitution limitations on the content of amendments, or to alter the procedure in such a way as to make amendment almost impossible. There is no scientific method of ascertaining beforehand whether or not an amendment can or will be enforced, and even after its adoption statements alleging nonenforcement may be hard to prove. As Thomas Jefferson has said each generation must be permitted to make its own laws. It may be well to guard the people against themselves as to ordinary matters, but it is possible to go too far when it is sought to do this with respect to altering the Constitution. Society cannot go on without taking some chances. The interests of progress as well as order must be consulted, otherwise order itself will perish. As Professor Munroe Smith says: "Sooner or later, however, it will be generally realized that the first article in any sincerely intended progressive program must be the amendment of the amending clause of the Federal Constitution."<sup>101</sup>

<sup>100</sup> Arneson, *A More Flexible Constitution* (1927) 61 AM. L. REV. 99. D. C. Lunt, *Amending the Constitution* (1930) 23 LAWYER AND BANKER AND CENTRAL L. JOURN. 252, 254, says: "The problem is far from simple. It is doubtful if any workable system could be devised, based directly or indirectly upon popular acclaim, which would prevent the perpetration of such sumptuary errors as the Eighteenth Amendment and yet permit of the correction of the defects discovered in the functioning of the organic law and the inevitable adjustment to wholly unforeseen conditions."

See also the speeches of Mr. Huddleston of Alabama, 66 CONG. REC. 4573 (1925), and 67 CONG. REC. 7203 (1926). In the former speech he said:

"But assuming that some one of the amendments which have been adopted is objectionable and should be repealed, those who advocate making it harder to amend the Constitution take an illogical position. They advocate making it harder to repeal an objectionable amendment than it was to secure its adoption."

<sup>101</sup> *Op. cit. supra* note 17 at 657, 673.