CHAPTER IV

The Scope of the Federal Amending Power

ONE of the most recent problems which has arisen with respect to the process of amending the federal Constitution and, next to justiciability, the most important, is the scope of the power to amend.¹ The early case of Hollingsworth v. Virginia² simply went to the question of procedure. The Supreme Court never considered the matter in its opinions until the validity of the Eighteenth Amendment was assailed, among other grounds, for defects in substance.³ The briefs in the cases on the Eighteenth and Nineteenth Amendments contained extensive discussions on the subject, and the court rendered decisions disposing of the question. The contention of the opponents of the amendments was that there are certain implied limitations on the power to amend. Before analysis of this contention, it seems proper first to deal with the express limitations, if any, on the power.

A. EXPRESS LIMITATIONS

Article Five contains three express restrictions, two of which have now expired by their own terms. One states “that no Amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article.” The former clause provides: “The Migration or Importation of such Persons as any of the States now existing shall think

¹ In 1899 George T. Curtis wrote: “One of the most important subjects that can engage the attention of the statesmen and people of this country is the extent and scope of the power to amend the Constitution of the United States.” Curtis, Constitutional History (1896) 152.
² (1798) 3 Dall. (3 U. S.) 378.
proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person." The latter provides: "No Capitation, or other direct Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken." After 1808 these clauses of course became obsolete as limitations on the power to amend. During the two decades they were in force, however, it seems that there was no constitutional authority reposed in any body whatsoever to change the Constitution contrary to the purport of the clauses, since they are stated as unconditional prohibitions. Even though not only three-fourths of the states, but every one of them, and even though Congress and the then people unanimously desired such changes, it would seem that under the authority and control asserted by the judiciary today over the entire amending process, such changes could have been brought about only by revolution. However, if these limitations had been permanent, perhaps they might have been ignored as making the Constitution unworkable.

At present there is only one express limitation, "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." This restriction, it is to be noted, is not absolute, however, inasmuch as if a state consents it may lose its equal suffrage. Thus, this clause is a restriction on the method rather than the scope of amendment. The clause itself

4 The Supreme Court seems to have slipped into error in a dictum in Dodge v. Woolsey, (1855) 18 How. (59 U.S.) 331 at 348, when it refers to the slave trade exception as a "temporary disability to amend, and the other two permanent and unalterable exceptions to the power of amendment." The explanation of this ambiguity seems to be that the slave trade clause in the first clause of section 9 of Article I in itself limits its operation to the year 1808, while the direct tax clause does not. Otherwise the Sixteenth Amendment would be open to attack as void. Strictly speaking, the court is not correct in calling even the equality of the Senate clause unalterable inasmuch as all the states might repeal it. See infra, pp. 84 et seq.; 96 et seq.

5 ROTTSCHEFHER, CONSTITUTIONAL LAW (1939) 9-10.
could be repealed by an amendment ratified by all the states. Or if every state ratified the amendment, any given state or any number of states could be deprived of their equality. The same result would be reached if the state or states whose representation was reduced, together with enough others to make the necessary three-fourths, adopted such an amendment. On the other hand, if one or more states had their representation increased, all the others would have to consent since they no longer had equal suffrage. If the states were divided into three groups, the first of which got an increase of two senators, the second of one senator, and the third no increase at all, the second and third groups would have to consent to the increase of the first group. Consent by a state to one reduction in equality would not be consent to a still further reduction. Theoretically, states which got greater representation would not have to consent. It has been suggested that even this express limitation might be disregarded directly, or if not directly, indirectly by first repealing the clause and then depriving a state of its equal representation. Professor Rottschaefer states:

"There has been found no case in which the power to amend has been employed to directly or indirectly modify a constitutional provision expressly excepted from that power. The issues that such an attempt would raise could not be settled by any reasoning derived by logical processes from prevailing conceptions of sovereignty, and those based on considerations of convenience and expediency point to the solution that such attempts to limit the power of amendment should be held

The necessities of orderly government do not require that one generation should be permitted to permanently fetter all future generations."

The 1939 decisions of the Supreme Court may ultimately have serious effects on the application of the equality of suffrage in the Senate proviso. The Supreme Court may conclude that this is the type of procedural problem which should be treated as a political question. Or it may decide that this is an issue of substance and a fortiori involves a political question. In either event the proviso would not effectually limit the scope of the federal amending power.

Although there is thus at present only one explicit limitation, attempts have been made at various times to add other express limitations. Comprehensive limitations were proposed at the Constitutional Convention itself, but failed of adoption.\(^7\) Gerry moved to reconsider a proposed draft permitting Congress to call a convention to amend the Constitution on the application of the legislatures of two-thirds of the states. The effect of this provision, he asserted, would make the Constitution paramount to the state constitutions, since a majority of the convention could "bind the Union to innovations that may subvert the state constitutions altogether."\(^8\) Hamilton thought that the latter result was entirely proper. Sherman moved that Congress should be authorized to propose amendments to the states, but that the proposed amendment should not be valid until consented to by all the states. Mr. Wilson favored Sherman's proposal, except that he would allow ratification by two-thirds of the states to be sufficient. On the last day that Article Five was discussed by the convention, Sherman reiterated Gerry's view as to the dangers of an unrestricted power to amend. He favored restricting amending power so "that no state should be affected in its internal police,

\(^7\) Constitutional Law (1939) 9-10.

\(^8\) See 5 Elliot, Debates on the Adoption of the Federal Constitution, (1937 reprint of 1836 2d ed.) 530-532, 551-552.

\(^9\) Ibid. 531.
or deprived of its equality in the Senate.'"10 Thus a clear and comprehensive limitation would have been placed on the amending process as relating to interference of any kind with the powers of the states. He again moved to amend Article Five so as to require ratification by all the states. Gerry proposed to limit ratification to the legislature only. Sherman put his proposed limitation in the form of a motion, but Madison objected that if such special provisos were appended every state would demand them for their boundaries, exports, and other matters. After this motion failed, Sherman moved to strike out Article Five altogether. On the motion of Gouverneur Morris the "equal suffrage of the Senate" clause was adopted at the urging of the smaller states. It is significant that the restriction against affecting a state in its internal police proposed together with it by Sherman was not adopted. During the time just preceding the Civil War the Corwin amendment forbidding any amendment abolishing slavery was proposed by Congress, but failed of ratification.11 While there has since that time been an increasing number of proposals to change the amending process, these have related to the procedure rather than to the nature and substance of amendments.

B. ALLEGED IMPLIED LIMITATIONS

The major controversy as to the scope of the amending power has not been concerned with the meaning of the express limitations, but as to the existence and nature of so-called implied limitations on the power to amend. All sorts of surmises have been offered as to specific things which may not be done.12 Many of the discussions in legal periodicals have

10 Ibid. 551.
11 Ames, The Proposed Amendments to the Constitution (1897) 286.
12 Dissolving the federal Union, abolishing the state governments, or lodging all power in Congress, so that it would resemble the British Parliament—Machen, "Is the Fifteenth Amendment Void?" (1910) 23 Harv. L. Rev. 169 at 171; repealing the Bill of Rights—Jessup, The Bill of Rights and Its
taken the view that there are certain implied limitations, though there has been considerable disagreement as to their underlying bases. The remainder of this chapter will be devoted to an analysis of the *rationale* of these views and a statement and exposition of the arguments in favor of the contrary view that there are no such restrictions whatever on the amending power.

*Is there an implied guarantee of continued existence of the states?* Perhaps the basic argument advanced in favor of im-

**Destruction by Alleged Due Process of Law** (1927); repealing the Ninth and Tenth Amendments—2 Curtis, Constitutional History (1896) 160; destroying alleged inalienable rights of personal liberty, or nationalizing women—Abbott, "Inalienable Rights and the Eighteenth Amendment;" (1920) 20 Col. L. Rev. 183 at 186; departing from the scheme and purpose of the original Constitution—Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," (1919) 18 Mich. L. Rev. 213 at 223; abolition of republican form of government, office of President, the Supreme Court, prohibition of intoxicating liquors, forming several new states within other states, or uniting two existing states, changing Article Five so as to allow ratification by a majority of the state legislatures, or a minority, or none at all—Appellant's Brief in National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588; abolition of the Senate or House of Representatives, setting up a hereditary monarchy, abolition of slavery—Representative Pendleton of Ohio, Cong. Globe, 38th Cong., 1st sess., pp. 2992–2993; negro suffrage in the states, allowing the Northern states to determine the question of suffrage and not allowing the Southern states to do so—Senator Dixon of Connecticut, Cong. Globe, 40th Cong., 3d sess., p. 707; woman suffrage in the states—Appellant's Brief in Leser v. Garnett, (1922) 258 U. S. 130, 42 S. Ct. 217; national income tax—Brown, "The Sixteenth Amendment to the United States Constitution," (1920) 54 Am. L. Rev. 843; deprivation of the power of the states to tax—Marbury, "The Limitations upon the Amending Power," (1919) 33 Harv. L. Rev. 223 at 226; election of President and the Supreme Court by the people, reenactment of laws by Congress after Supreme Court decision holding them void—Child, "Revolutionary Amendments to the Constitution," (1926) 10 Const. Rev. 27 at 34; national referendum on acts of Congress or on treaties, destruction of Senate's equal legislative power, transfer from the Senate to the House of the power to confirm appointments, make treaties, and try impeachments—Brown, "The Perpetual Covenant in the Constitution," (1924) 219 No. Am. Rev. 30 at 33; encroachment on states' police power, prescribing what people wear, eat, or drink—Holding, "Perils to be Apprehended from Amending the Constitution," (1923) 57 Am. L. Rev. 481 at 486; the Twelfth Amendment—Senator Tracy of Connecticut, Annals of Congress, 8th Cong., 1st sess. (1803) 163; hereditary monarch, Radin—"The Intermittent Sovereign," (1930) 39 Yale L. J. 514 at 525. For a rather full list, see Bacon, "How the Tenth Amendment Affected the Fifth Article of the Constitution," (1930) 16 Va. L. Rev. 771.
plied limitations is the contention that the Constitution guarantees the existence of the states, or, stated less emphatically, that under its aegis the states can not be destroyed, or even deprived of important powers. The inherent sovereignty of the states has been asserted with varying stress ever since the Constitution was adopted. It was the essential doctrine of the Secessionists. Even today it survives in a much mutilated form in the views of those who assert "states' rights." The Civil War seems to have settled by force of arms that secession is unconstitutional. The Supreme Court from earliest times has repeatedly said that the people of the United States are sovereign and that they adopted the Constitution. However much historical strength the view of state sovereignty may have had, the court decisions seem to have been in the opposite direction. It is true that the Court has spoken of an "indestructible Union, composed of indestructible States." But

38 Marbury's Brief in Myers v. Anderson, (1915) 238 U. S. 368, 35 S. Ct. 932; Brief of Elihu Root, Amicus Curiae, p. 53 ff., National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588; Appellant's Brief in Leser v. Garnett, (1922) 258 U. S. 130, 42 S. Ct. 217; Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," (1920) 18 Mich. L. Rev. 213 at 220; Marbury, "The Limitations upon the Amending Power," (1919) 33 Harv. L. Rev. 223 at 225; White, "Is there an Eighteenth Amendment?" (1920) 5 Corn. L. Q. 113 at 114. The objection was raised in the Senate and in several of the state legislatures when the Fifteenth Amendment was proposed. Cong. Globe, 40th Cong., 3d sess., p. 988 (Hendricks), 995 (Davis), 1639 (Buckalew), Appendix 151 (Doolittle), 158-165 (Saulsbury); Mathews, Legislative and Judicial History of the Fifteenth Amendment (1909) 57-75.

14 "... if it [an amendment] come fairly within the scope of the amending power, the State is bound to acquiesce, by the solemn obligation which it contracted, in ratifying the constitution. But if it transcends the limits of the amending power,—be inconsistent with the character of the constitution, and the ends for which it was established,—or with the nature of the system,—the result is different. In such case, the State is not bound to acquiesce. It may choose whether it will, or whether it will not secede from the Union." Calhoun, "A Discourse on the Constitution and Government of the United States," Works, Cralle ed. (1854) 300. Hayne seems to have taken the same view. 9 Dane, A General Abridgment and Digest of American Law (1829), Appendix 17. See also the arguments in State ex rel. McCready v. Hunt, (1834) 2 Hill L. (S. C.) 1. But see 1 Willoughby, Constitutional Law, 2d ed. (1929) 600.

15 Texas v. White, (1868) 7 Wall. (74 U. S.) 700 at 725; Lane County v. Oregon, (1868) 7 Wall. (74 U. S.) 71.
by this would seem to be meant that such destruction may not be brought about by the simple statutory action of either government, for the court did not mention the amending process.

It may be conceded that perhaps the most fundamental parts of the Constitution are those dividing the powers of sovereignty between the states and the nation. It is undoubtedly true that a substantial redistribution of powers is the most significant change which could be made in our constitutional organization. The Preamble speaks of the Constitution as being ordained and established, among other reasons, "in order to form a more perfect Union." Yet it is remarkable that there is no exception set out in Article Five against amendments which would abolish or greatly diminish the powers of the states. The sole exception is "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." This clause merely preserves equality of the states in the Senate, and not the existence of the states themselves. If the preservation of the states were so tremendous a desideratum, it would seem from a logical, if not historical, point of view, that a proviso would have been inserted expressly guaranteeing their continued existence. As a matter of fact, an exception intended effectually to preserve the existence of the states was offered and rejected at the Constitutional Convention. Sherman proposed that "no state shall without its consent, be affected in its internal police." This does not say in so many words that the states may not be abolished, but since the existence of a state is virtually identical with the existence of its police power, the effect was to preserve the states. In fact, Mr. Sherman in making his proposal expressed his fear "that three-fourths of the States might be brought to do things fatal to particular states, as abolishing them altogether. . . ." Since the amending power is placed

5 Elliot, Debates on the Adoption of the Federal Constitution (1937 reprint of 1836 2d ed.) 551. See also supra, p. 4 et seq.
in the hands of three-fourths of the states and since they can bind the other one-fourth, it is difficult to see why, if they so choose, they cannot abolish a single state, or a minority of states, or the entire number of states.\(^{17}\)

To assert that the amending power extends to the destruction of the states is scarcely necessary, however, to meet the arguments generally set forth in favor of implied limitations. Few serious persons propose to abolish the states at present, and there is no popular sentiment desiring such a change. The question is thus largely academic. The proponents of limitations have been prone to assert that every amendment which diminishes the power of the state constitutes an annihilation of the states. In the case of the Nineteenth Amendment, it was argued, for instance, that allowing women to vote in state elections so completely changed the composition of the state as virtually to result in the abolition of the old states and the setting up of new ones. The same criticism has been made of the Fifteenth Amendment. The courts have held, however, that a mere change in the composition of the electorate of the state is not a destruction of the state.\(^{18}\) A state is not composed simply of the existing electorate, but of the people, territory, and government.\(^{19}\) A real destruction of a state would seem to consist in abolishing its constitution and the branches of its

\(^{17}\) "There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority." Ware v. Hylton, (1796) 3 Dall. (3 U. S.) 198 at 236.

"The people of all the States, or the constitutional majorities can transfer power from one or more states to the General Government, even against the consent of a constitutional minority—as where a state opposes, or even six states oppose eighteen states, and constitutional majorities in Congress, and states can, on the 5th Article, transfer power from the one or six states to the Union, or take back power." 9 Dane, A General Abridgment and Digest of American Law (1829), Appendix 21–22.


\(^{19}\) Texas v. White, (1868) 7 Wall. (74 U. S.) 700 at 721.
AMENDING THE FEDERAL CONSTITUTION

government, seriously altering its boundaries, or adding it to another state. Not until these facts existed could the court properly be said to be in position to pass on the question whether a state may be destroyed by constitutional amendment.

The view that the states may be destroyed is not a mere corollary of the proposition that the nation is sovereign and indestructible. It would seem that the same three-fourths of the states which could destroy the states could also dissolve the Union. Should the time ever come when the existence of a united nation was thought undesirable, there seems to be no legal objection to the states proceeding by amendment to destroy the nation. It has sometimes been claimed that a nation may not destroy itself. Yet such things have occurred too often in the past to support such a belief. In contemplation of law almost anything is possible. Confederations and federations have existed in the past, and have dissolved. That they could not do so legally would seem to involve an unworkable conception of the law. It is submitted that if an amendment were adopted providing for the annexation of the United States to Great Britain or some other country, such amendment would be constitutional, though the effect

20 Attorney General Lee said in his argument in Hollingsworth v. Virginia, (1798) 3 Dall. (3 U. S.) 378 at 380: "The people limit and restrain the power of the legislature, acting under a delegated authority; but they impose no restraint on themselves. They could have said, by an amendment to the Constitution, that no judicial authority should be exercised, in any case, under the United States; and if they had said so, could a court be held, or a judge proceed on any judicial business, past or future, from the moment of adopting the amendment? On general grounds, then, it was in the power of the people, to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States?"

"The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will." Marshall, C. J., in Cohens v. Virginia, (1821) 6 Wheat. (19 U. S.) 264 at 389.

"He [Senator Rowan in Foote’s Debates] says the States have power of right, that is constitutional power, to control and limit the General Government, in all its branches, by amending the Federal Constitution, as provided for in the 5th Article in it. To this I entirely assent." 9 DANE, A GENERAL ABRIDGMENT OF AMERICAN LAW (1829), Appendix 16.
of the amendment would mean the destruction of our national existence.\textsuperscript{21} Thus it seems that the amending power is no more favorable to the continued existence of the nation than it is to that of the states.\textsuperscript{22} But perhaps the best answer to those who fear the destruction of the states is the fact that the whole power of ratification is left to the states as such. The whole power vested in Congress is to propose, and if the states are to be destroyed, it will be because they acting as states desire their own destruction. It would seem that they may be trusted to perpetuate their own existence.

\textit{Is there an implied guarantee of police power of the states?} One of the most frequently voiced arguments for implied limitations is the view that the police power and the rights of local self government of the states may not be impaired.\textsuperscript{23} This contention may be disposed of at the outset by the reply that since the states themselves may be destroyed, it logically follows that their police power may be taken from them. Moreover, since the Constitution itself was a scheme to shift

\textsuperscript{21} Bliss attacks the view that sovereignty may not be ceded, pointing out that it contradicts the facts of history,—the fact that states have voluntarily united with, have become merged or subordinate to other states. \textit{Bliss, Of Sovereignty} (1885) 110.

\textsuperscript{22} "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes." Madison, in \textit{The Federalist}, No. 46.

Article Five "equally enables the general and the state governments to originate the amendment of errors, as they may be pointed out by the experience on the one side, or the other." Madison in \textit{The Federalist}, No. 43.

\textsuperscript{23} Root's Brief, p. 53 ff., in National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588; Stevenson, States' Rights and National Prohibition (1927) 79-96; Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," (1920) 18 Mich. L. Rev. 213 at 220. It is sometimes broadly asserted that only the states have police power and that such power is unlimited. But the federal government itself exercises a considerable degree of it indirectly through the taxing, commerce, and postal powers. A list of such powers is set out in Shawnee Milling Company v. Temple, (C. C. Iowa, 1910) 179 F. 517 at 524. Even apart from amendments to that end, the police power of the states is limited by the Constitution itself in the view of Holmes, J., in Noble State Bank v. Haskell, (1910) 219 U. S. 104, 31 S. Ct. 186.
some of the powers formerly held by the states to the federal government, there seems no convincing reason why subsequent transfers of power may not occur. An express proviso safeguarding the police power of the states was rejected by the Constitutional Convention. The equal suffrage in the Senate proviso indicated that the framers of the Constitution contemplated other deprivations of states' powers as valid. The police power when broadly defined means all the powers of the state. To say that this power may not be infringed is thus equivalent to asserting that no change affecting the powers of a state may be made by amendment. Such a view would confine amendments to changes in the federal government, changes moreover which would take away powers from that government. This is true because all powers not prohibited to the states are reserved to the states and to the people. Hence all powers conferred on the federal government are conferred at the expense of the states, except in the case of those reserved to the people, whose consent is implicit in the amending process.

The critics of the Eighteenth Amendment asserted, rightly it appears, that it impaired the police power of the states. From this they concluded that it was invalid. They pointed

24 "The extent of the encroachment upon the police powers of the states is a political matter, to be determined by the people. That the exercise of the amending power granted by article V may encroach upon some of the state rights is true; but that is inevitable, and was necessarily contemplated when the power to amend was granted," Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 192.

25 "Nor however difficult it may be supposed to unite two thirds, or three fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority." Hamilton, in The Federalist, No. 85.

26 Supra, p. 4 et seq. That such provision was thought unnecessary, just as was the Bill of Rights, see Bacon, "How the Tenth Amendment Affected the Fifth Article of the Constitution," (1930) 16 Va. L. Rev. 771 at 773.

27 In Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 191, the court concedes that "the police power in a very large sense is the state itself."
out that the previous amendments had not encroached on the police power, or if reminded of the Civil War Amendments, asserted either that they do not affect the police power or that the question of their validity is a political question on the ground that they were adopted as war measures. The first ten amendments, it is true, are limitations on the powers of the federal government only. The Eleventh Amendment protects the states from suit by individuals in the federal courts. The Twelfth Amendment merely changed the mode of electing the President and Vice-President of the United States. Thus until 1865, when the Thirteenth Amendment was ratified, no amendment had been adopted interfering with the powers of the states. This is perhaps the explanation of the belief that the states' police power was exempt from constitutional diminution. The three Civil War Amendments, however, clearly infringed upon the powers of the states. Slavery had formerly been a purely domestic institution which only the state itself could regulate. The effect of the Fourteenth Amendment was to bring into the federal courts a tremendous number of cases arising out of the due process clause, and to vest the Supreme Court with a wide

27 But it is a significant fact, noted in the early case of Jackson ex dem. Wood v. Wood, (1824) 2 Cow. (N. Y.) 819 at 820, that the House of Representatives at the first session of Congress adopted an amendment providing "that no state should infringe the right of trial by jury, in criminal cases, nor the right of conscience, nor the freedom of speech or of the press." Cf. Annals of Cong., 1st Cong. 1st sess. (1789) 435.

28 In a dissenting opinion in the Slaughter House Cases, (1872) 16 Wall. (83 U. S.) 125, Swayne, J., said: "These [reconstruction] amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven." In referring to the Thirteenth and Fourteenth Amendments, Strong, J., said in Ex parte Virginia, (1880) 100 U. S. 339 at 345, that "They were intended to be, what they really are, limitations of the powers of the States and enlargements of the powers of Congress." The Fifteenth Amendment was held to be such a limitation in Guinn v. United States, (1915) 238 U. S. 347, 35 S. Ct. 926. See also the Solicitor General's argument in the National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588; United States v. Sprague, (1931) 282 U. S. 716, 51 S. Ct. 220.
supervisory power over state legislation. The Fifteenth Amendment forbade the states to deny the right to vote on account of race or color. Inasmuch as the power to determine their electorate is fundamental, this clearly was a limitation on the states. Since these amendments have never been held invalid, it would seem to follow that the Eighteenth Amendment is valid though the states' police power is impaired. The briefs against the Eighteenth Amendment fully set out the argument as to police power, and the Supreme Court, nevertheless, held it valid. In view of the nature of the Civil War Amendments, and of the holding of the Supreme Court as to the Eighteenth Amendment, it would seem conclusive that the amending power may alter the police power of the states at will. A final query for the proponents of implied limitation is: if the powers of the nation may be limited as they were by the earlier amendments, why cannot the powers of the states be similarly cut down? Unless the powers of both may be altered, the utility of the amending process is greatly weakened.

Does the proviso for equality of suffrage in the Senate imply other restrictions? Resort is sometimes had to the clause guaranteeing equality of suffrage in the Senate as an express limitation, or as a basis for deducing implied limitations. The true character of the clause as simply a limitation on the procedure of amendment has already been pointed out. This

---

31 Machen, “Is the Fifteenth Amendment Void?” (1910) 23 HARV. L. REV. 169 at 172-176, contends that the Senate cannot be abolished, or made an advisory body; nor may the states be abolished, nor altered in their composition as by adding negroes to the electorate, or by changing their boundaries. He also asserts that by “state” is meant the people of the state, not the physical territory thereof. See also Appellant’s Brief in Leser v. Garner, (1922) 258 U. S. 130, 42 S. Ct. 217; Appellant’s Brief in Myers v. Anderson, (1915) 238 U. S. 368, 35 S. Ct. 932; Marbury, “The Limitations Upon the Amending Power,” (1919) 33 HARV. L. REV. 223 at 228; White, “Is There an Eighteenth Amendment?” (1920) 5 CORN. L. Q. 113 at 116.
32 See supra, p. 84 et seq.
SCOPE OF FEDERAL AMENDING POWER

clause provides simply for the equal representation of each state in the Senate. It should be limited to its proper scope. It says nothing about the continued existence of the state itself, nor of the freedom of the state from a whole or partial loss of its powers through amendment. That it was not intended to cover more than the single matter of equality in the Senate is evident from the history of its adoption by the Constitutional Convention. Sherman there expressed his fear that the amending power might do two things: destroy the states and deprive them of their equality in the Senate. He therefore moved the adoption of a proviso that no state without its consent should "be affected in its internal police, or deprived of its equal suffrage in the Senate." Thus the first part of the proviso would protect the existence of the states, and the latter their equality in the Senate. His motion failed, but immediately thereafter Gouverneur Morris' proposal of the present equality clause was adopted. It would therefore seem reasonable that historically at least the clause is confined to protecting the equality of the states in the Senate.

Historical considerations aside, it seems that a logical analysis of the words of the clause leads to a similar result. The clause purports to deal with the equal suffrage of a state. It makes no provision for the perpetual existence of the states, or of the police power of the states, or of the Senate. Seemingly all three of these could be abolished. Theoretically,

---

22 Supra, pp. 4 et seq.; 86 et seq.
23 "The exception in favour of the equality of suffrage in the senate, was probably meant as a palladium to the residuary sovereignty of the states, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted upon by the states particularly attached to that equality." Madison, in The Federalist, No. 43. Iredell, however, asserts that it was adopted "in order that no consolidation should take place." 4 Elliot, Debates on the Adoption of the Federal Constitution (1937 reprint of 1836 2d ed.) 177.
even though the states or the Senate or both were abolished, a state would not be deprived of its equality as to suffrage in the Senate. If all the states were abolished, the relation of equality would be undisturbed, although the states themselves no longer existed. If simply a part of the states were abolished, it would scarcely be appropriate to speak of them as losing their equality in the Senate for they would lose their very existence. The possibility of equality of a state would seem to flow from the existence of the state, and not the existence of the state from the characteristic of equality in the Senate. In other words, the existence of the state seems to be the primary matter, and equality only a secondary possibility. Similarly, if the Senate were abolished, the equality of suffrage would not be disturbed, as each state would have no senators at all. If the next step were to abolish the states themselves, it would seem absurd that reliance could be placed on the equality clause to prevent their abolition. Inasmuch as the equality clause had lost any subject-matter on which to operate with respect to its chief purpose, namely, the preservation of equality in the Senate, it would appear far-fetched to maintain that it continued to operate in such a way as to preserve the states themselves.

The chief objection to a broad interpretation of the clause is that so much is made to hinge on so little. Not only are the states to continue to be equally represented in the Senate, but they themselves are to continue in perpetuity, and, on the same logic, the Senate is also to go on forever. It seems only reasonable that had the framers intended to guarantee the existence of the states and to impose similar implied limitations deduced from the clause, they would not have left such weighty matters to implication. The conclusion seems inevitable that the implied limits deduced from the equality

---

clause are hung on too small a peg. The stretching of this seemingly innocent and insignificant exception offends the intuitive sense of the limits of legal casuistry.

Do the Bill of Rights and the Fourteenth Amendment limit other amendments? To the layman, the Bill of Rights and the Fourteenth Amendment may be thought so fundamental in their nature as to be limitations on the amending power. But however significant they may be, they were not parts of the original Constitution. They may be repealed just as any other amendment and are no more sacred from a legal standpoint than any other part of the Constitution. As one authority has said:

"Even these constitutional limitations, however, do not deny the group's right to revise the scale of values handed down to it from the past; they merely restrict the legal methods of their revision. The argument sometimes advanced that there are implied limits on the power to amend the federal Constitution is clearly untenable. There is, perhaps, no politically organized society whose legal system does not assume a right of such revision vested in some one or more of its organs. The only method which it would be at all logical for the law to deny is that by revolution."

It is sometimes argued that the Bill of Rights was in reality a part of the original Constitution and was intended to constitute a limitation on Article Five. But the states adopted the Constitution unconditionally, and the obligation to incorporate the Bill of Rights was entirely moral, not legal. Even if it had been a part of the original Constitution, it would not necessarily limit the amending power. It contains

---


Rottschaefer, "Legal Theory and the Practice of Law," (1926) 10 Minn. L. Rev. 382 at 393.

no express, nor even any reasonably implied, reference to Article Five. No other clauses of the original Constitution have ever been construed to limit the power. In the state decisions no attempts have been made to construe a state bill of rights as a limit on the state’s power to amend its constitution, except in a single Arkansas case, and this case simply holds that the legislature, which was vested with the amending power, could not so amend. In dictum it declared that the people in Convention might do so. An Oregon decision expressly held that the bill of rights might be altered. In a recent decision of a federal circuit court it was argued that the effect of the Fourteenth Amendment was to require the submission of all future amendments to the people, but the court rejected the contention.

Does the Tenth Amendment limit other amendments?
In the opinion of many, a conclusive argument in favor of implied limitations is the Tenth Amendment: "The powers not..."
delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

First of all, it should be noted that the provision is not a part of the original Constitution. It is one out of several amendments and is itself subject to repeal. It is not a part of Article Five and makes no reference to that article. It did not reserve the amending power; it reserved only the non-delegated powers, whereas the amending power had been previously delegated. The first ten amendments have invariably been interpreted as limitations on the federal government. The federal government is to be distinguished from the amending body, which is made up not only of Congress but of the state legislatures or state conventions. The distinct-
tion is fundamental. The federal government is limited, while the amending body, which is the highest agent of the people and exercises sovereignty, is unlimited except by the equality in the Senate clause. If the Tenth Amendment were to be construed as affecting the amending body, it would be a limitation on the states, which perform the most important part of the amending process, namely, ratification.

A very practical argument against construing the amendment as a limitation on the amending body is the fact that such a construction would operate to nullify the grant of the amending capacity or to seriously impair its usefulness. No change could be made in the national government except such as left it with its previous powers, or with less powers than it had before. That is, no new powers could ever be conferred on the national government, since any such powers would have to come from the residuum reserved to the states. New powers could be conferred on the states alone, and no powers could be taken from them. In view of the apparently natural growth of the activities of the national government not only in recent years but from the very beginning, a serious crisis might be developed if no new powers could be given it. The fact that since the Civil War the amendments have limited the states and given new powers to the national government clearly indicates the trend of the growth of the living Constitution. Even if the Tenth Amendment were interpreted as an "invisible radiation" limiting the amending power, it should be noted that the powers not delegated or prohibited by the Constitution are reserved to the states, "or to the peo-

44 See infra, chap. VI.

45 "A fundamental error running through all these provoking essays is the confounding of government with sovereignty, a failure to distinguish between a political society or state and the active agencies or governmental organs which that society creates and endows with power." McGovney, "Is the Eighteenth Amendment Void Because of its Contents?" (1920) 20 Col. L. Rev. 499 at 500.
Is there a restriction that an amendment may not be legislative in character? The amending process is not the regular legislative process of the federal government. Ordinarily it is the business of Congress to legislate for the nation, and of the state legislatures for the respective states. The Constitution confers all legislative powers on Congress. From this it has sometimes been deduced that an amendment may not be legislative in character. In political science a distinction is made between constitutional content of an organic character and that of a legislative character. The distinction, however, is one of policy, not of law. It would indeed be peculiar if the...
authority which can delegate to Congress the authority to legislate, could not itself legislate. The framers of the Constitution seem to have contemplated amendments of a legislative nature when they wrote in the twenty-year limitations as to the slave trade and the imposition of direct taxes without apportionment. It may be impolitic to write clauses which are legislative in their nature into the Constitution, but the legality of so doing apparently is not open to question. The wisdom of the Fifteenth and the Eighteenth Amendments may well be open to serious criticism, but their legality seems unassailable.

Moreover, if the Eighteenth Amendment be invalid as being legislative in nature, it would seem that a number of earlier amendments must fall on the same ground. The Thirteenth Amendment legislated slavery out of existence, the Fourteenth Amendment legislated on several subjects, such as citizenship, the exclusion of rebels from office, and the repudiation of debts of rebelling states. Yet it has not been seriously pretended that these amendments are void because of their legislative content.

A practical argument against differentiating between legislative and non-legislative amendments is the fact that there is no satisfactory and clean-cut distinction between the two. Until the Supreme Court had put the stamp of approval on each proposed amendment, there would be no way of ascertaining its legislative character. Power of a despotic nature would be vested in the Supreme Court, and the court might that, as between Congress and the people, in whom the ultimate right of sovereignty resides, only Congress could legislate.

"The limitations upon the people's power to change their Constitution are no more than they have chosen to make them. In so far as article I of the Constitution is concerned, there is no limitation upon the sovereign right of the people to legislate a rule, act, or principle into their organic law." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 191. See also Appellant's Brief in State ex rel. Halliburton v. Roach, (1910) 230 Mo. 408, 130 S. W. 689. But see Jameson, Constitutional Conventions, 4th ed. (1887) 429.
be drawn into partisan controversy. It may perhaps be alleged that by a true amendment is meant a change in the structure of the government, or a change of extraordinary importance in the life of the nation. Perhaps the former test would not be impossible of application. Under it the first twelve amendments, the Fifteenth, the Sixteenth, which permits Congress to impose taxes on incomes without apportionment, the Seventeenth, providing for the popular election of Senators, and the Nineteenth, providing for woman suffrage, would all be valid. But the Thirteenth, parts of the Fourteenth, and Eighteenth Amendments would all be invalid. Moreover, the difficulties of applying this test are greater than at first appears. Almost every change in the structure of government involves some redistribution of power and is partially legislative in nature. On the other hand, almost every change of a legislative character directly or indirectly involves a change in the structure of the government.

The difficulties of the second test are even more manifest. When the inertia of the amending process has been overcome, it is scarcely possible to say that the proposed amendment is not of constituent importance.\(^{49}\) When the Prohibition Amendment was adopted, despite some contrary beliefs, there seems to have been a tremendous public sentiment which had long favored it. The same may be said of the Civil War Amendments. In the United States, where the dogma of popular sovereignty is so firmly rooted, there would seem to be no valid legal objection to the people's writing their convictions into the Constitution on any subject they choose

\(^{49}\) "There being no express inhibition in the Constitution of the United States against ordaining a final permanent law, what authority is there for implying one? . . . I fail to perceive anything in any part of the organic law that would justify a judicial interpretation forbidding the people to do so when they are convinced that on a given subject the time has come to prevent perennial changes in respect thereto." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 193.
in the absence of express constitutional prohibition. Many of the state constitutions are a standing witness of this fact, and the decisions seem to uphold amendments of every nature.

Is there a restriction that an amendment must be germane? It has sometimes been suggested that an amendment must be germane. That is, a proposed amendment must relate immediately to some specific clause in the Constitution, or must be in harmony with the "spirit" of the Constitution. Article Five gives no hint of such a limitation. The first twelve amendments and the Sixteenth and Seventeenth doubtless meet the test. But the Civil War Amendments and the Eighteenth and Nineteenth Amendments are not necessarily germane as respects any previous articles in the Constitution. As long as they are permitted to remain on the books it seems that little attention can be paid to any such objection.

But assuming for the sake of argument that germaneness is a test of validity, it is difficult to see what would not be germane to the Constitution. The Constitution assumes to deal with all political power whatsoever, giving specific powers to the federal government, providing for changes by an amending power, and reserving all other power to the states or to the people. The general spirit and purpose of the Constitution, whatever they may be, cannot be isolated with scientific accuracy. Perhaps the best statement of the purpose, though having no legal force, is that to be found in the Preamble:

"We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our

Posterity, do ordain and establish this Constitution for the United States of America."

The statement of purposes is thus very broad. Among them is the promotion of the general welfare. If an amendment is conducive to the general welfare, it is then germane. 51 It would seem that a court could not set up its own notion of what the general welfare was, and would have to assume that what Congress and three-fourths of the states have approved promotes the general welfare whether or not in reality it actually does. With such a broad test it would seem that no amendment can be annulled for not being germane. 52 That its makers entertained broad views of the purposes of the Constitution there can seem little doubt. 53 Realizing the imperfections of their work, it is not reasonable to surmise that they intended that future generations should not make such alterations as they thought best. Today, at a time when absolutes are discredited, it must not be too readily assumed that there are fundamental purposes in the Constitution which shackle the amending power and which take precedence over the general welfare and needs of the people of today and of the future.

52 "When the people place limitations upon their power to modify the Constitution, these limitations cannot be extended by what others may think or believe to be a purpose. Purpose or no purpose, the way to amend is pointed out; that way must be followed, and, when followed is sufficient. Whatever may be the result, or however confusing or perplexing, or even useless may be the consequences, the Constitution becomes the will of the people when it is adopted by their vote in the method provided." Crane, J., concurring in Browne v. City of New York, (1925) 241 N. Y. 96 at 126, 149 N. E. 211. See also, Miller, "Amendment of the Federal Constitution: Should It Be Made More Difficult?" (1926) 10 MINN. L. REV. 185 at 199.
53 "... the public good, the real welfare of the great body of the people, is the supreme object to be pursued ... no form of government whatever has any other value, than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan. Were the union itself inconsistent with the public happiness, it would be, Abolish the union. In like manner, as far as the sovereignty of the state cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." Madison, in THE FEDERALIST, No. 45.
Is there a restriction that an amendment cannot add but only alter? An argument very much like the foregoing is that an amendment may alter, but may not add. This contention is largely a quibble on the definition of the word “amendment.” It is asserted that by amending the Constitution is meant the changing of something that is already in the Constitution, and not the addition of something new and unrelated. Cases prescribing the very limited meaning of amendment in the law of pleading are cited as authoritative. It would seem improper, however, to accept such a definition, as amendments to constitutions have always been construed more liberally and on altogether different principles from those applied to amendments of pleadings. A mere glance at the Civil War and the Eighteenth and Nineteenth Amendments, as well as at many amendments made to state constitutions, is enough to show that by an amendment is meant an addition as well as an alteration. The United States Senate...

54 For example, Machen, “Is the Fifteenth Amendment Void?” (1910) 23 HARV. L. REV. 169 at 170, note, cites the following cases holding that an amendment to a pleading cannot substitute a new case: Shields v. Barrow, (1854) 17 How. (58 U. S.) 130 at 144; Goodyear v. Bourn, (D. C. N. Y. 1855) 3 Blatchf. 266, F. Cas. No. 5561; Givens v. Wheeler, (1882) 6 Colo. 149. He also cites 2 Morawetz, PRIVATE CORPORATIONS, 2d ed. (1886) § 1096, which merely states that a reserved power to amend a charter of incorporation does not extend to the substitution of a new charter. In Livermore v. Waite, (1894) 102 Cal. 113, 36 P. 424, the court says that an amendment must not fundamentally alter the Constitution, and must improve, or better carry out its purpose. See also Morris, “The Fifteenth Amendment to the Federal Constitution,” (1909) 189 No. AM. REV. 82; Appellant’s Brief in National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588.

55 McKenna, J., dissenting on other issues in the National Prohibition Cases, supra, 253 U. S. at 401, states that the references in Article Five and in Article Six, sec. 2, to “this Constitution” do not forbid an amendment inconsistent with a clause in the Constitution before amended, and are not a limitation on the amending power. “What other purpose could an amendment have?”

“The Constitution is the organic and fundamental law, but that law may be changed, added to, or repealed, if that is done by the states and the people themselves in the way provided. Their power to better it, as they think, is not to be hamstrung by mere rigidity of definition of words. Adding something new to the organic law is an amendment of the organic law, in the judgment of this court.” State of Ohio ex rel. Erchenbrecher v. Cox, (D. C. Ohio, 1919) 257 F. 334 at 343.
under its power to amend revenue bills may substitute entirely new bills. In fact, the amending process would be largely futile if no additions could be incorporated. The fathers of the Constitution neither expressly nor by reasonable implication gave ground for any such understanding of the process. Perhaps the best evidence of contemporary construction is to be found in the heading of the joint resolution of Congress submitting the first ten amendments commencing, "Articles in addition to and Amendment of the Constitution." 56

Is there a law above amending power and the Constitution? In surveying the arguments as to implied limitations, it seems necessary to consider a doctrine which has proved peculiarly attractive to some, namely, that there is a law higher than the written Constitution which is inviolable and constitutes a limitation on the power to amend. Strange bedfellows are to be found adhering to this view. It is likely to be urged by the most naive man in the street and also by learned lawyers and philosophers. Large masses of the people of the United

"The Constitution is a mere grant of power to the federal government by the several states and any amendment which adds to or in any manner changes the powers thus granted comes within the legal and even within the technical definition of that term." Ex parte Dillon, (D. C. Cal. 1920) 262 F. 563 at 567 aff'd Dillon v. Gloss, (1921) 256 U. S. 368, 41 S. Ct. 510.

"Words in the Constitution of the United States do not ordinarily receive a narrow and contracted meaning, but are presumed to have been used in a broad sense with a view to covering all emergencies." . . . The definitions of the word 'amendment' include additions to, as well as correction of, matters already treated; and there is nothing in its immediate context (article V) which suggests that it was used in a restricted sense." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 190, quoting from In re Strauss, (1905) 197 U. S. 324 at 330, 25 S. Ct. 535.

"A Constitution has an organic life in such a sense, and to such a degree that changes here and there do not sever its identity." Cardozo, J., in Browne v. City of New York, (1925) 241 N. Y. 96 at 111, 149 N. E. 211.

56 "An amendment to the Constitution, which is made by the addition of a provision on a new and independent subject, is a complete thing in itself, and may be wholly disconnected with other provisions of the Constitution; such amendments for instance as the first ten amendments to the Constitution of the United States. These were therein referred to as articles in addition to and amendment of the Constitution." State ex rel. Greenlund v. Fulton, (1919) 99 Ohio St. 168, 124 N. E. 172.
States view the Constitution as something sacrosanct and protected from serious alteration. The language of the Declaration of Independence as to inherent and inalienable rights is unhesitatingly accepted by many as having a legal as well as a political and ethical significance. Seward, Secretary of State under Lincoln, once said that “there is a higher law than the Constitution which regulates our authority,” but he was careful to add that he would “adopt none but lawful, constitutional and peaceful means to secure even that end.”

The view of unlimited internal sovereignty of the state has undergone serious criticism during the last century at the hands of the political pluralists, who deny the absolute and indivisible sovereignty of the state, as viewed internally and apart from international law. Since the state is not supreme, neither is the amending body, for the amending body is virtually the state, or at least its most powerful agent. The theories of pluralism of the last century were mainly developed by Gierke in Germany, and by Maitland, Figgis, and Laski in England, by Duguit in France, and by Krabbe in the Netherlands. Krabbe, like many of the other pluralists, views the state as the creature of law, and law alone is sovereign. Perhaps their whole position is best summed up in the words of Duguit:

“The more I advance in age and seek to penetrate the problem of law, the more I am convinced that law is not a creation of the state, that it exists without the state, that the notion of law is altogether independent of the state, and that the rule

Abbott, “Inalienable Rights and the Eighteenth Amendment,” (1920) 20 Col. L. Rev. 183 at 184, says that “the question is not whether we can take a drink now and again, but whether in this federal Union of ours there resides any power which is literally absolute, that is, without even those ultimate limitations which we are accustomed to speak of as the constitutional guarantees of our liberties.... For the first time in the history of the American Union an amendment to the Constitution has been adopted, or claimed to have been adopted, which attempts to limit the personal liberties of the people.... There are a number of constitutive principles of private rights which have been so wrought into the fabric of our institutions that they cannot be abrogated.”
of law imposes itself on the state as it does upon individuals."

The theories of pluralism have found little support in the United States among the political scientists and scarcely any among the lawyers. Professor McIlwain states that pluralism is "equivalent to a repudiation of all control over the individual citizen except that which he voluntarily imposes upon himself." Many pluralists concede the legal sovereignty of the state. Our legal views are of course traceable to those of the English common law. The analytical view of the law as a body of rules laid down by the sovereign or recognized and enforced by the courts runs back to Hobbes, Blackstone, Bentham, and Austin. Their views and those of Holland and Salmond, and of John Chipman Gray in the United States, are representative of the prevalent view of the law held by lawyers in this country. It is true that in the United States the strictly analytical view is considerably modified by the large proportion of the law to be found in the cases rather than in statutes, and also by the doctrine of judicial review. The Supreme Court of the United States has the last word in the construction not only of treaties and statutes, but of the Constitution itself, and if it laid down implied limitations on the amending power, such limitations would doubtless be accepted as constitutional. Theoretically, however, the Constitution is supreme over all, including the Supreme Court, whose members take an oath to support it. In looking for limitations on the power to amend, it is therefore the duty

58. DUGUIT, TRAITÉ DE DROIT CONSTITUTIONNEL, 2d ed. (1921) 33.
60. "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts." Yick Wo v. Hopkins, (1886) 118 U. S. 356 at 370, 6 S. Ct. 1064.
of the Court to look to the Constitution itself. The Constitution does not recognize any such type of law as Natural Law, or the Law of God, or the Law of Reason. The medieval sovereigns were regarded as being subject to Natural Law and the Law of God. The Law of God has since been relegated to theology. The growth of the modern independent nations of Europe meant the emergence of a national law governing each nation, and the disappearance of natural law. In England some isolated cases decided or intimated that an act of Parliament “contrary to common right and reason” was void. Blackstone at times suggests that all laws are subject to natural law and at other times maintains that there is nothing superior to an act of Parliament. Since his time Austin and Bentham quite definitely gave the bent to Anglo-American legal theory, so that today natural law is regarded as non-

61 “The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. . . . no law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare.” Bertholf v. O'Reilly, (1878) 74 N.Y. 509 at 514–516.

In Buckner v. Street, (C. C. Ark. 1871) 1 Dill. 248 at 251, F. Cas. No. 2098, it is said, however, that there are no limitations on the sovereign people of the United States, “if we except those imposed by the Deity.” To the same effect, see 9 Dane, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW (1829), Appendix 64. In Booth v. Town of Woodbury, (1864) 32 Conn. 118 at 127, it is asserted that the people are “under no restraint except that imposed by the principles of natural justice.”

62 “Is the right of the people of the United States to do this thing questioned? It could be questioned only on the grounds advanced by Lord Coke, in Bonham’s case, that the common law controlled acts of parliament, and adjudged them void when against common right and reason. But all the judges since his time have said that it was for parliament and the king to judge what common right and reason was, and Lord Campbell styles what was said by Lord Coke in this case, ‘nonsense still quoted by silly people. . . .’ A stronger epithet than that applied by the Lord Chancellor to those who quote Lord Coke’s dictum in Bonham’s case as authority, might justly be applied to those who question the power and authority of the people of the United States, by amendment of their constitution of government, to abolish slavery. . . .” Buckner v. Street, (C. C. Ark. 1871) 1 Dill. 248 at 255, F. Cas. No. 2098. But cf. Plucknett, “Bonham’s Case and Judicial Review,” (1926) 40 HARV. L. REV. 30.
existent or as ideal law and is relegated to ethics and political philosophy. While there are ever-recurring revivals of a belief in natural law, and while sound philosophic reasons may perhaps be offered in its behalf, it seems that such a view of the law has little chance in the interpretation of American constitutional law. In the words of one, both judge and philosopher:

“If there is any law which is back of the sovereignty of the state, and superior thereto, it is not law in such a sense as to concern the judge or the lawyer, however much it concerns the statesman or the moralist. The courts are creatures of the state and of its power, and while their life as courts continues, they must obey the law of their creator.”

Is there an implied limitation that amendments taking away individual liberties must be ratified by state conventions? In the decade of the thirties there were some interesting developments with respect to the scope of the amending power. The first of these was in 1931 in the case of United States v. Sprague. There the assailants of the Eighteenth Amendment, instead of asserting that such amendment was beyond the scope of the amending power, took the narrower ground that there were limitations on the scope of amendments which could be ratified by state legislatures. That is to say, while

63 Cardozo, The Growth of the Law (1924) 49. McGovney says: “Against a sovereign organized political society an individual member of it has no legal rights. That, at least, is the situation under the present state of organization or unorganization of the human race into separate, independent, sovereign societies. There is no law superior to their wills governing their relations with their own members. On the other hand, as against government, in the United States, our political society has secured to the individual many privileges and immunities. What society has thus created, cannot society take away or alter? Legally certainly society may do so.” McGovney “Is the Eighteenth Amendment Void Because of its Contents?” (1920) 20 Col. L. Rev. 499 at 501.

“Certainly no successful attempt has been made to indicate why a constitution might not originally command or prohibit anything physically possible.” Radin, “The Intermittent Sovereign,” (1930) 39 Yale L. J. 514 at 521.

there were no limitations as to what might be ratified by state conventions, there were such limitations as to state legislatures. The legislative ratifying power could not deal with an amendment conferring upon the federal government new direct powers over individuals. It could deal only with such proposals as involved a change in the machinery of the federal government. It was argued that the original Constitution had been ratified by state conventions because the legislatures were deemed incompetent to surrender the liberties of the people to the new government to be established by the Constitution. The Tenth Amendment, reserving to the states or to the people the powers not delegated to the federal government, was alleged to have removed whatever doubt there formerly existed under the original Constitution. The trial court rejected these theories, yet on the basis of a strange mixture of "political science" and "a scientific approach to the problem of government," it held the amendment void because not ratified by conventions. But the Supreme Court gave no weight to either of these theories and held unequivocally that the choice of the method of ratification rested "in the sole discretion of Congress." Thus the scope of the amending process seems to be the same no matter what the method of ratification. And though there are no cases on it, probably the scope is the same no matter what the method of proposal, whether by national convention or by Congress. In fact, reasoning backwards, since as seen in Chapter III, on the procedure of amendment, a national convention has very broad powers of proposal, it follows that Congress also has.


67 282 U. S. at 730.

68 See chap. III, p. 44 et seq. To carry out the reasoning still further, since the Sprague case holds that a state legislature has the same power as a state convention in ratifying amendments, Congress has the same powers as a national convention in proposing amendments.
C. GENERAL ARGUMENTS AGAINST IMPLIED LIMITATIONS

In addition to the arguments against specific alleged limitations, there are a number of general arguments refuting the existence of implied limitations altogether.

*Expressio unius est exclusio alterius.* Perhaps the most obvious and at the same time the most powerful argument against the existence of any implied limitations is the presence within the amending clause itself of the explicit limitations which have previously been described. The existence of these limitations shows that the makers of the Constitution evidently gave some thought and consideration to limitations on the power to amend. The slave trade, direct taxes, and equality of representation in the Senate were all matters of great controversy in the Constitutional Convention, and each was settled by compromise. Three limitations were plainly set forth in the same clause of the Constitution that granted the amending power. Several proposed limitations offered at the Constitutional Convention, one of them of vital importance, in that it proposed to exempt the police power of the states from interference, were rejected. The makers of the Constitution seemingly intended to provide for a broad power of amendment. As Madison suggested, if limitations of one kind were adopted, limitations of another kind would also be demanded. Certainly no power conferred in the Constitution is ultimately of more importance than the amending power. If the fathers were careful in the drafting of any clause

\footnotesize{\textsuperscript{69} Supra, p. 4 et seq.}
\footnotesize{\textsuperscript{70} "The rejection of most of the proposed limitations on this power and the inclusion of but one permanent disability or restriction is strong evidence that, save as to the included exception, it was intended that the legislative departments of the governments of both the United States and the several states, acting in a special capacity for such purpose, should be practically unlimited in their power to propose and adopt amendments." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 195. See also, Pillsbury, "The Fifteenth Amendment," (1909) 16 Me. St. B. A. Proc. 17.}
\footnotesize{\textsuperscript{71} S Elliot, Debates on the Adoption of the Federal Constitution (1937 reprint of 1836 2d ed.) 552. See supra, p. 4 et seq.
of the Constitution, it would seem that certainly nothing would be left to implication concerning the bounds of the amending power. The issue would seem to be a proper case for the application of the maxim, *Expressio unius est exclusio alterius.* This maxim admittedly is not of universal application. Instances may well be cited where it would be improper to apply it. As Chief Justice Taft said in a recent case: "This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment." The application varies with the circumstances. The maxim is not limited to the law of property, or to contracts, or to statutory law. It may be and has been applied in the construction of a constitution. The setting out of the express limitations in Article Five with no suggestion or implication of any other limitations, and the grant of the power to amend in broad and general terms would fairly seem to be a case where the maxim may appropriately be applied.

*View of framers of Constitution as to its imperfect nature.*

Additional support for the broad view of the power to amend

---

72 In Gibbons v. Ogden, (1824) 9 Wheat. (22 U. S.) 1 at 191, Marshall, C. J., said: "It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted. . . ."

73 Ford v. United States, (1927) 273 U. S. 593 at 611, 47 S. Ct. 531.

is found in the fact that the framers of the Constitution regarded their work as far from perfect and consequently anticipated a wide use of the power to amend. The Constitution is the product of several great compromises. A considerable group in the Constitutional Convention and a large minority of the people were opposed to the adoption of the Constitution as submitted. Even those members of the Convention who favored it were lukewarm in their support, and defended it solely on the ground of expediency. Such members as Benjamin Franklin expressed their unenthusiastic opinion

Mason said at the Convention: "The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence."

Iredell, later a Supreme Court justice, declared before the North Carolina ratifying convention: "Mr. Chairman, this is a very important clause. . . . The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diligence of their capacities, and undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. This, indeed, is one of the greatest beauties of the system, and should strongly recommend it to every candid mind."

"In regard to the Constitution of the United States, it is confessedly a new experiment in the history of the nations. Its framers were not bold or rash enough to believe, or to pronounce it to be perfect. . . . They believed, that the power of amendment was, if one may so say, the safety-valve to let off all temporary effervescences and excitements; and the real effective instrument to control and adjust the movements of the machinery, when out of order, or in danger of self-destruction."

"As to individual states and the United States, the Constitution marks the boundary of powers. . . . If the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment." Cushing, J., in Chisholm v. Georgia, (1793) 2 Dall. (2 U. S.) 419 at 468.

"The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution, by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated." Brewer, J., in Kansas v. Colorado, (1907) 206 U. S. 46 at 90, 27 S. Ct. 655.
of it. One of the arguments asserted in its favor was that it was capable of alteration. In fact, many state conventions adopted it on the tacit understanding that a Bill of Rights would be immediately incorporated. Altogether it seems unreasonable that its framers regarded the Constitution as exempt from alteration except when expressly so provided. As Mr. Justice Holmes has said, the Constitution "is an experiment." It is only in the generations since the Constitution was adopted that a sort of halo of sanctity has been attached to it. People have sought certainty in political affairs only in a somewhat lesser degree than they have in religion. The Constitution has come to have a significance to the people of the United States such as has never become attached to the written constitution of any other state. Gladstone's dictum that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man" is a shibboleth of American politics. Many appear to have forgotten "that the Constitution is not an end in itself, but rather a means, or an instrument, if you please, adopted for the specific purpose of regulating the public affairs and preserving the individual rights of the nation. . . . But it would be asking the impossible to expect one generation to plan a government that should endure through all time and through revolutionary changes in every aspect of life." 77

Article Five as sui generis. A third important consideration in favor of the view that the power to amend is unlimited except as to the equal suffrage in the Senate clause is the peculiar status of Article Five. The article seems to be sui generis. 78

78 Abrams v. United States, (1919) 250 U. S. 616 at 630, 40 S. Ct. 17, dissenting opinion.
76 The view of Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," (1920) 18 Mich. L. Rev. 213 at 221, that Article Five is limited by the provisions of the original Constitution, including in this the Bill of Rights, seems to have found little support.
No other articles of the Constitution are to be looked to when the legal status of an amendment is in question. This seems to be true in the procedure of amendment. Congress when proposing and the states when ratifying are not bound by the rules of legislative action. A simple compliance with Article Five is enough and no limitations are read in from other clauses of the federal Constitution. The proponents of implied limitations forget that Article Five is as much a part of the Constitution as any other part of it. Admittedly, limitations on the scope of an amendment are more fundamental than those on the procedure. Since limitations gathered from other clauses and from the general character and “spirit” of the Constitution have not been generally implied as to procedure, it would seem illogical and a serious matter to imply limitations as to substance. Article Five, the sole fountain head of the power to amend, is silent and appears to confer the power in broad and sweeping terms. Suggested limitations must be critically viewed, and compared with its provisions, and not the provisions of the remainder of the Constitution.

**Danger of limiting the scope.** An argument of tremendous practical importance is the fact that it would be exceedingly dangerous to lay down any limitations beyond those expressed. The critics of an unlimited power to amend have too often neglected to give due consideration to the fact that

79 Supra, pp. 48, 62–63. But Congress may derive additional power from the power under Article One to pass all necessary and proper laws. ROTTSCHEIFER, CONSTITUTIONAL LAw (1939) 387.

80 "The Constitution of any government which cannot be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by civil war." Iredell before the North Carolina Ratifying Convention, 4 ELLiot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1937 reprint of 1836 2d ed.) 176–177.

"If the plaintiff is right in its contention of lack of power to insert the Eighteenth Amendment into the United States Constitution because of its subject-matter, it follows that there is no way to incorporate it and others of like character into the national organic law, except through revolution. This, the plaintiff concedes, is the inevitable conclusion of its contention. This is so startling a proposition that the judicial mind may be pardoned for not readily acceding
alteration of the federal Constitution is not by a simple majority or by a somewhat preponderate majority, but by a three-fourths majority of all the states. \(^{81}\) Undoubtedly, where a simple majority is required, it is not an especially serious matter for the courts to supervise closely the amending process both as to procedure and as to substance. But when so large a majority as three-fourths has finally expressed its will in the highest possible form outside of revolution, it becomes perilous for the judiciary to intervene. This may account for the resort to the doctrine of political questions in the child labor amendment cases of 1939. \(^{82}\) In fact, the amending process in the past has been so difficult that it may perhaps be said that amendment in effect has been brought about by judicial interpretation. \(^{83}\) It is of course the business of the judiciary to enforce the law. But it is, and probably always has been, an unformulated ground of action in the judicial mind never so to act as to come squarely in conflict with the executive and legislature and a large group of the people. In the last analysis, self-preservation is perhaps as basic a motive in judicial action as in any other type of human activity.

It would seem, however, that there is no necessity to resort to the ground of self-preservation as a reason for the

to it, and for insisting that only the most convincing reasons will justify its acceptance.” Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 189–190.

When passing on the validity of amendments, “The court may, and should, and must, on such great occasions, look to effects and consequences.” Marshall, J., in State ex rel. Postel v. Marcus, (1915) 160 Wis. 354 at 357, 152 N. W. 419. In the National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 588, Hughes points out in his brief that judicial construction has always been open to change through amendment, but if the court itself limits the amending power, the subject is taken beyond the reach of popular control.

\(^{81}\) Such critics assume “that the ultimately sovereign people have inferentially deprived themselves of that portion of their sovereign power, once possessed by them, of determining the content of their own fundamental law.” ROTT-SCHAEFFER, CONSTITUTIONAL LAW (1939) 9. See also ibid. 398.


courts refraining from limiting the power to amend. As has been iterated and reiterated, the court is bound by no express limitations except the equal suffrage clause, which limits only the method of amendment. If the judiciary in the absence of such limitations go ahead and deliberately lay them down, it would seem that they are positively courting disaster. In refusing to lay down restrictions, the court is not affirmatively violating any express clause of the Constitution. It is not violating any broad general provision, nor the “spirit” of the Constitution. In the absence of any other express limitations and in view of the reasonable conclusion that there are no other limitations, it seems that the court is merely doing its plain duty in refusing to discover any new restrictions. Considering the danger of implying such restrictions, and the unreasonableness of any such implications, it would seem that the onus is on the protagonists of the view of limited power to demonstrate clearly the legal basis of their view.

Rejection of implied limitation by the courts. It is a fact of no little importance that the Supreme Court of the United States and the inferior federal courts have given no encouragement to the view that there are implied limitations. To be sure, the Supreme Court has not categorically declared that

84 “Impressive words of counsel remind us of our duty to maintain the integrity of constitutional government by adhering to the limitations laid by the sovereign people upon the expression of its will. . . . Not less imperative, however, is our duty to refuse to magnify their scope by resort to subtle implication. . . . Repeated decisions have informed us that only when conflict with the Constitution is clear and indisputable will a statute be condemned as void. Still more obvious is the duty of caution and moderation when the act to be reviewed is not an act of ordinary legislation, but an act of the great constituent power which has made Constitutions and hereafter may unmake them. Narrow at such times are the bounds of legitimate implications.” Cardozo, J., in Browne v. City of New York, (1925) 241 N. Y. 96 at 112, 149 N. E. 211.

“Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning or for the exercise of philosophical acuteness or judicial research. . . . The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.” 1 Story, Commentaries on the Constitution of the United States, 3d ed. (1858) § 451.
there are no such limits. But it has either expressly or tacitly rejected every limitation urged upon it. The court did not pass on the question of restrictions in an opinion until the validity of the Eighteenth Amendment was adjudicated. The Fifteenth Amendment seems to have been the first that was ever attacked on that ground as exceeding the scope of the amending power. Even that attack was made only in comparatively recent years. But though the briefs of the appellant asserted the existence of limitations, the court completely ignored the contention in its decision. When the legality of the Eighteenth Amendment was tested, the opinion was a mere syllabus statement that the amendment was "within the power to amend." Chief Justice White criticized the absence of any reasoning, and Justice McReynolds expressed himself as unable to come to any conclusion. The scope of the power of amendment was first discussed by the court at any length in Leser v. Garnett when the Nineteenth Amendment was attacked. In that case, too, the court upheld the amendment as against any implied restrictions. Manifestly the doctrine of implied limitations will have to rear its structure on something else than court decisions.

"Abuse" of the amending power an anomalous term. The proponents of implied limitations resort to the method of

---

85 The Supreme Court "has not . . . ever decided or stated that there are no implied limits on the amending power. It is a practical certainty, that, if it ever passes on that question, it will hold that there are no such implied limits upon that power." Rottschaefer, Constitutional Law (1939) 398.


88 (1922) 258 U. S. 130, 42 S. Ct. 217.
reductio ad absurdum in pointing out the abuses which might occur if there were no limitations on the power to amend. The Supreme Court might be abolished. A monarchy might be set up. The women of the nation might be nationalized. In reply it should be pointed out in the first place that the fact that a power may be abused does not necessarily militate against the existence of the power. The Supreme Court has declared over and over again that the possibility of abuse is not to be used as a test of the existence or extent of a power. Thus the postal and taxing powers of the federal government may be abused, but that does not affect their existence or their scope. The possibility of abuse of intergovernmental taxation has not prevented the Supreme Court from recently permitting it. Moreover, there seems to be no consensus as to what is and what is not an abuse of the amending power.

In the second place the amending power is a power of an altogether different kind from the ordinary governmental powers. If abuse occurs, it occurs at the hands of a special organization of the nation and of the states representing an extraordinary majority of the people, so that for all practical

80 "The fear that sustaining the right of the people to extinguish the traffic in intoxicating liquors opens the door to a like prohibition of other business, therefore, is not well founded. But, if it were, it would be of little force in dealing with the question of power. The right to exercise power inevitably carries with it the possibility of abuse, but abuse in the exercise of power is no argument against its existence. The line between a proper use and abuse of power cannot be settled in advance; but it may be said, and that is as far as the present inquiry warrants, that whenever any other business produces like evils it may be disposed of in the same way." Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 192.


purposes it may be said to be the people, or at least the highest agent of the people, and one exercising sovereign powers. Thus the people merely take the consequences of their own acts, whereas where the abuse of a governmental authority occurs, there is abuse by a mere governmental agent of the people, and the people suffer the consequences of the arbitrary acts of individuals. It seems natural that somewhere there resides within the nation the power to do anything, and logically this authority resides in the amending body. It seems anomalous to speak of “abuse” by such a body. Unless the view be adopted that the people of the United States are not sovereign and that they are not to be trusted to alter their fundamental institutions but are to be carefully safeguarded by a small group of men who know or think they know what is best for the people, it seems necessary to conclude that they have a full capacity to amend, free from any implicit limits, no matter what abuses may result.

The consequences of the view just stated are not as ominous as they may appear at first blush. No abusive assaults on our constitutional system have as yet been made by amendment.

92 “In this connection it should not be overlooked that the ultimate power to amend the United States Constitution is not given to the federal government, but to the people of the several states. The power of Congress in that respect ends with its proposing the amendment to the states. The ultimate and controlling act is by the people themselves, acting through their chosen representatives.” Feigenspan v. Bodine, (D. C. N. J. 1920) 264 F. 186 at 195.

“Has it ever been pretended that the limitations of the power of the states were also limitations on the whole people of the United States, when acting in their aggregate, sovereign capacity in amending or altering their constitution or government?” Buckner v. Street, (C. C. Ark. 1871) 1 Dill. 248 at 249, Fed. Cas. No. 2098.

“An amendment, which has the deliberate judgment of two thirds of Congress, and of three fourths of the states, can scarcely be deemed unsuited to the prosperity or security of the republic. It must combine as much wisdom and experience in its favor, as ordinarily can belong to the management of any human concerns.” 2 Story, Commentaries on the Constitution of the United States, 3d ed. (1858) § 1830.

“I grant that if three-fourths should make the chief magistrate hereditary, it would be a gross abuse of power. Against this, and other abuses, we have provided, by requiring so large a majority as three-fourths, and this is the only guard we have thought necessary. The right in the one-fourth to correct the abuse, is revolutionary, not sovereign.” Argument of Blanding in State ex rel. McCready v. Hunt, (1834) 2 Hill L. (S. C.) 1 at 172.
The language used in attacking the Fifteenth, Eighteenth, and Nineteenth Amendments has been much stronger and more suggestive of violence than the occasion warranted. However inexpedient negro suffrage and prohibition may be, it cannot be seriously pretended that they have weakened or seriously altered the general tenor of the Constitution. It may be that serious abuses may occur in the future; it can scarcely be said that they have occurred up to this time. It may be objected that the possibility of abuses in the future should be provided for. In reply, it may be said that the nation has not been threatened by the absence of such implied limitations thus far, and that there have been no wanton abuses. The generation of today cannot know the needs of the generation of tomorrow. Any restrictions which might be laid down now might easily turn out to be futile, while such as might prove beneficial may not be known or suggested by the leaders of the present era. It seems best in this matter to permit each generation to take care of itself. In the last analysis, political machinery and artificial limitations will not protect the American people from themselves. "The perpetuity of American institutions will depend not upon special mechanisms or devices, nor even upon any particular legislation, but rather upon the good conscience and intelligence and the attitude of the American people themselves."

Political questions. A recent development, though not directly dealing with the scope of the amending power, is the doctrine of "political questions" developed in the cases deal-

---

93 "The framers of the Constitution could not foresee the form or character of amendments which might become necessary in the future and wisely left all such questions in the hands of those who might be charged with official duty when the necessity for the change and the character of the change to be made became apparent." Ex parte Dillon, (D. C. Cal. 1920) 262 F. 563 at 567-568.

94 Bates, "How Shall We Preserve the Constitution?" (1926) 44 Kan. S. B. A. Proc. 128 at 147: "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done." See also Holmes, J., in Blinn v. Nelson, (1911) 222 U. S. 1 at 7, 32 S. Ct. 1.
ing with the child labor amendment. If the time limit for ratification and the effect of prior rejections by states and possibly the right of the lieutenant governor of a state to cast a deciding vote when the state senate was equally divided, were political questions, why would not the scope of the amending power be a political question? The practical dangers of limiting the scope and the difficulties in laying down implied limitations might well justify the Supreme Court in disposing of the problem by calling it a political question. In the opinion of the writer, however, it would be more straightforward and courageous and less confusing to rule that there are no implied limitations.