

# Michigan Law Review

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Volume 66 | Issue 5

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1968

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### Recommended Citation

Robert G. Dixon Jr., *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931 (1968).

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## ARTICLE V: THE COMATOSE ARTICLE OF OUR LIVING CONSTITUTION?\*

Robert G. Dixon, Jr.\*\*

CAPACITY for steady—even startling—development and relative incapacity for formal change, are twin features of American constitutionalism often noticed but seldom analyzed conjointly. Even the most stalwart supporters of the status quo do not want an unamendable Constitution, but disagreement as to *how* change should be effected, and the scope of it, runs deep. Indeed, this is the central problem of *Marbury v. Madison*.<sup>1</sup> That case was the effective innovator of judicial review, our “real” system for developmental constitutionalism. Interestingly, it also was one of the quite rare instances when a seemingly simple constitutional text was at issue (scope of Supreme Court original jurisdiction), one readily susceptible of formal amendment without raising larger issues of structure or policy for the rest of our public law system.

To be sure, there have been twenty-five formal constitutional amendments pursuant to article V, four of which date only from 1951. But laying aside the ten in the Bill of Rights, which were really a continuation of the original process of constitution-making, and the three Civil War amendments, which were part of the unique process of reformation of the Union, how many of the remaining twelve could not be put in the “so what” category?

The sixteenth, removing doubts concerning the constitutionality of income taxation, concerned a supposed limitation on congressional power which should never have been in the Constitution in the first place. For, if self-preservation is the “first law of government” as Lincoln said during the Civil War, then taxation is well-nigh the first power, limited only by current calculations of need. Even wielders of naked force expect to be paid. The prohibition and repeal amendments involved sumptuary matters which properly have no place in constitutional text. In practical effect the “noble experiment” did little more than contribute materially to the rise of organized crime in this country. The remaining amendments in-

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1. 5 U.S. (1 Cranch) 137 (1803). See also SUPREME COURT AND SUPREME LAW (E. Cahn ed. 1954).

volve only structural details, save the anti-poll tax amendment in 1964. But because poll taxes at that time had significant discriminatory effect on voter eligibility in only two states—Alabama and Mississippi—and the judicial process of developmental constitutionalism seemed about to correct that situation anyway,<sup>2</sup> the twenty-fourth amendment was more a symbolic (and politically inexpensive) gesture than a major blow for civil rights.

Even the structural changes brought about by some amendments, such as the limitation on the number of presidential terms and provision for presidential succession in the twenty-second and twenty-fifth amendments and the specification of presidential and congressional terms of office as beginning in January in the twentieth amendment, seem to reflect not so much great national policy decisions as general consensus on matters of detail, some of which are properly more allocable to statutory than constitutional control. The Founding Fathers can hardly be faulted for missing the mark in picking March 4 as the original inauguration date for the President, but a formal amendment to the commerce clause would be a far different matter.

What then of article V? Is it little more than a constitutional toy for occasional distraction and amusement while the large public policy and living constitution battles take place elsewhere? Must—or should—this be its role? Are there inherent limitations on article V which should be frankly admitted, or are improvements possible? Is judicial review a self-sufficient device controlling the direction and pace of constitutional development?

#### I. THE REAPPORTIONMENT AMENDMENT EXAMPLE

On two occasions in recent history, one being the school prayer decisions of 1962-1963<sup>3</sup> and the other being the reapportionment decisions of 1964,<sup>4</sup> rulings of the Supreme Court have evoked not only strong feeling but a drive to amend the Constitution to undo or modify the decisions. Laying aside questions as to the wisdom of

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2. See, e.g., *Cardona v. Power*, 384 U.S. 672 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); 1961 COMMISSION ON CIVIL RIGHTS, REPORT ON VOTING (1961).

3. *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

4. The cases decided with full opinions after oral argument were the Colorado case: *Lucas v. Forty-fourth Gen. Assembly*, 377 U.S. 713 (1964); the Delaware case: *Roman v. Sincock*, 377 U.S. 695 (1964); the Virginia case: *Davis v. Mann*, 377 U.S. 678 (1964); the Maryland case: *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); the New York case: *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); and the Alabama case: *Reynolds v. Sims*, 377 U.S. 533 (1964).

modifying these decisions, it was in each case far easier to criticize the Court's decision than to draft a satisfactory "repealing" amendment. The real lesson to be learned from the apparently dying reapportionment amendment campaign and the school prayer campaign may simply be this: It is easy to make a major constitutional modification by judicial decision but almost impossible thereafter to draft an amendment to undo the one unpopular decision without affecting anything else or creating new problems. For example, if the proposed prayer amendment used the phrase "nonsectarian," a round of fresh uncertainty for school boards and courts would follow; if the amendment itself tried to define the term, prospects for agreement would be dim.<sup>5</sup> The principal draft of Representative Becker, although avoiding that difficulty, did create at least one major uncertainty by authorizing school prayers in any "institution or place" on a "voluntary basis."<sup>6</sup> What is "voluntary" when attendance is compulsory as in public schools, penal institutions, or military service?

The difficulties with the various reapportionment amendment drafts in Congress in 1965 and 1966 were considerably more intricate and will be a principal focus of this paper as a case study in the problems of implementing article V. Although seldom accurately reported in the press, the aim of the only amendments to receive serious consideration was *not* to repeal the "one man-one vote" principle but only to undo one of the "big six" reapportionment decisions of 1964, *Lucas v. Forty-fourth General Assembly*.<sup>7</sup> The other decisions—the principal opinion being attached to the Alabama case, *Reynolds v. Sims*<sup>8</sup>—laid down the basic proposition that

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5. See colloquy between Congressman Byron G. Rogers and Professor Paul A. Freund in *Hearings on School Prayers Before the House Comm. on the Judiciary*, 88th Cong., 2d Sess. 1657 (1964).

6. See H.J. Res. 693, 88th Cong., 1st Sess. (1963), commonly referred to as the "Becker amendment," § 1 of which read: "Nothing in this Constitution shall be deemed to prohibit the offering, reading from, or listening to prayers or biblical scriptures, if participation therein is on a voluntary basis, in any governmental or public school, institution, or place."

7. 377 U.S. 713 (1964). See generally Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation*, 63 MICH. L. REV. 209 (1964), where it is suggested that either the due process or republican government guarantee clauses would have been a better basis than the equal protection clause for the reapportionment rulings. With equal protection the grounding, it is logically difficult to distinguish the apportionment bases for the Senate and House of Representatives. Moreover, if equal protection is the measure it would logically also render invalid many unequalizing internal legislative practices which enhance the influence of some citizens, e.g., the constituents of the committee chairman who get their posts by seniority rule.

8. 377 U.S. 533 (1964).

state legislators should be elected from districts of equal population (or proportional population in the case of multimember districts). In *Lucas*, which was a "majorities in conflict" case, the Court added the rule that both legislative houses must be on this basis even if the people of a state had rejected this idea by statewide referendum and had chosen to place one house on a modified population basis. The common purpose of one of the drafts of Senator Church, of the modified version of Senate Minority Leader Dirksen, and of the draft of Senator Javits was to keep both state houses on an equal population basis as an initial premise, but to allow the people by popular referendum to place one house on some other basis.<sup>9</sup>

#### A. Drafting Difficulties

As the debate and re-drafting went on, refinement followed refinement so that some drafts came to resemble an election code. But constitutional amendments, with a few exceptions, are noted for their brevity, if not their clarity. Lack of clarity is less consequential when only *in futuro* effect is intended, as with the creative process of elaborating the meaning of the fourteenth amendment due process and equal protection clauses. In regard to a possible reapportionment amendment, however, the purpose was to modify only the Supreme Court's decision in *Lucas* and leave untouched the other decisions. *The Washington Post* editorially characterized the issue as follows: "Such a carefully limited plan would not amount to going back to the 'rotten-borough system' which [Justice] Douglas so vigorously deplored. Rather, it would merely allow the states some of the discretion that they always exercised in shaping their own governments."<sup>10</sup> And yet, consider the following examples of the practical problems which arose as draft followed draft in an attempt to devise such a limited amendment.

First, should there be express provision for continuing judicial review of apportionment or should there be silence, with reliance on the general tradition of judicial review as it is expanded or contracted by changing judicial concepts of activism and restraint? The opening sentence of the initial Dirksen draft of S.J. Res. 2,<sup>11</sup> until deleted in

9. S.J. Res. 38, 89th Cong., 1st Sess. (Senator Church, Feb. 2, 1965); S.J. Res. 44, 89th Cong., 1st Sess. (Senator Javits, Feb. 8, 1965); S.J. Res. 66, 89th Cong., 1st Sess. as amended, July 22, 1965, to substitute the "Dirksen amendment" (S.J. Res. 2 as amended) for its original terms.

10. Editorial, *The Washington Post*, March 8, 1965, at A 14, col. 2.

11. S.J. Res. 2, 89th Cong., 1st Sess., introduced Jan. 6, 1965, by Senator Dirksen for himself and thirty-seven other senators, began as follows: "The right and power

subcommittee, seemed to point away from actually impeding judicial review. Some Senators, however, favored specified review powers. Might not such a provision deprive the Court of its traditional capacity to control its work and to avoid untimely handling of awkward questions by manipulating such flexible concepts as "standing to sue" and "justiciability"?

Second, should the draft amendment seek to regulate the manner in which the people of a state give their assent to placing one legislative house on a basis other than strict equal population districts? Specifically, should the people simply vote on the general idea of having a "federal plan" or a "modified federal plan" (that is, one house based on population, the other on political subdivisions or some mixed formula), with details left to the legislature or a state constitutional convention? Or should the people vote on a specific plan? If the latter, should there be provision for a choice among plans, or for successive presentation of different plans?

Third, should there be provision for periodic popular consultation—say, a decennial referendum—on such a reapportionment formula regardless of the outcome of the initial vote? Here again, the question would recur whether the voters should have a choice among competing plans or be allowed simply to cast a yes-no vote on one measure. In lieu of such detailed specification of the number and character of referenda required to adopt and continue a federal plan, would it be preferable and simpler to require a popular initiative process for each state for this topic? Under existing law only a minority of states authorize an initiative process whereby the people can effect governmental change without resort to the legislature.

Fourth, to what extent should a federal amendment seek to define the number and character of nonpopulation factors which could be incorporated in a modified federal plan or mixed apportionment formula? Some of the Dirksen and Javits drafts spoke simply of "reasonable weight to factors other than population."<sup>12</sup> The American Bar Association proposal spoke of apportionment "in part by reference to geography, county and city lines, economic conditions, history, and other factors."<sup>13</sup> Apart from the difficulty of

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to determine the composition of the legislature of a State and the apportionment of the membership thereof shall remain in the people of that State."

12. S.J. Res. 2, 89th Cong., 1st Sess. (1965) (with minor changes made before the vote); S.J. Res. 44, 89th Cong., 1st Sess. (1965).

13. Text as approved by House of Delegates, Feb. 8, 1965.

getting agreement on a list of limiting standards, the incorporation of such provisions in an amendment raises several policy questions. Would the list hinder the process of tailoring an apportionment system to the needs of a particular state? Would the list impede the traditional processes of judicial review, which otherwise could be relied upon to negate either specifically impermissible standards, such as race, or generally "unreasonable" standards?

Fifth, as a corollary to the "other factors" question, should the amendment seek to limit in arithmetical terms the extent of permissible deviation from an equal population district premise? Such a provision might be phrased as follows:

Nothing in this Constitution or judicial interpretations thereof shall limit the right and power of the people of a state, expressed through statewide referendum, to apportion one house of the state legislature by population and the second house by a mixture of population and nonpopulation considerations provided the resultant deviations from mean population in the districts for the second house do not exceed an average deviation of  $X$  percent and a maximum deviation of  $Y$  percent . . . .

Taking this route might obviate the need for any finite list of non-population factors which could be utilized. Average deviation, it should be noted, is the most meaningful arithmetical measure of "malapportionment," notwithstanding the typical practice of focusing on the extremes. Although a rule of reason could and should be judicially maintained, there would be more room for traditional and realistic political negotiation and no need to prove that each district line was "rational" in the sense of being a logically consistent derivation from a specified list of factors.

This summary of the kinds of questions which arise in attempting to devise a text for a narrow reapportionment amendment is not exhaustive. It does serve to document the proposition that even with more congressional support than the amendment proponents were able to muster, the task of devising a satisfactory text would not have been easy. Incorporating any significant number of the suggestions listed above could have produced not a constitutional amendment but an election code.

## B. Ratification by Unreapportioned Legislatures

### 1. Justiciability

No constitutional amendment has yet been declared "unconstitutional" although for a time the Supreme Court seemed to treat the

amendment process as subject to judicial review.<sup>14</sup> This view was apparently repudiated in *Coleman v. Miller*,<sup>15</sup> which is the latest Supreme Court treatment of the amending power. That case, heard before eight Justices, involved the initiated but unratified child labor amendment. The Court ruled that both the issue of undue time lapse for ratification following congressional initiation and the power of the Kansas legislature to give approval after having initially rejected the amendment were "political questions" for Congress, not the Court, to decide. Four concurring justices, including Justices Black and Douglas who are still sitting, went further, stating their view in strong terms that the amending process was "'political' in its entirety from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."<sup>16</sup>

If the Supreme Court were to ignore the *Coleman* dictum and be willing to review a reapportionment amendment, would ratification by some malapportioned state legislatures be deemed such a "bootstrap" operation as to jeopardize the amendment's constitutionality? The essence of the argument would be that the amendment was a minority imposition on the American people and hence not a ratification as contemplated by article V. At least two preliminary counterarguments could be made: first, the amendment would not have been proposed unless supported by a two-thirds vote in both houses of Congress; second, even after ratification by three-fourths of the states, a reapportionment amendment of the Javits or Dirksen type would contemplate deviation from the equal population district standard only if the deviation were approved by a statewide popular referendum.

## 2. Powers of Malapportioned Legislatures

The starting premise is that a malapportioned legislature is competent to discharge its customary tasks as the legislative organ of the state including, as the Supreme Court indicated in the *Maryland* case,<sup>17</sup> enactment of reapportionment measures. Indeed, this premise follows inexorably from the proposition frequently announced both before and after the reapportionment cases of 1964 that reapportion-

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14. See, e.g., *United States v. Sprague*, 282 U.S. 716 (1930); *Dillon v. Gloss*, 256 U.S. 368 (1921); *Leser v. Garnett*, 258 U.S. 130 (1922); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hawke v. Smith* No. 1, 253 U.S. 221 (1920).

15. 307 U.S. 433 (1939).

16. *Id.* at 456.

17. *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 675-76 (1964).

ment is a legislative function and that the problem is to galvanize the legislature into action. Because reapportionment is necessary only when the legislature has become malapportioned, the current malapportioned body must be empowered to reapportion—unless the function be removed from the legislature entirely. Accordingly, following the Court's lead, virtually every court which has dealt with reapportionment has accorded primacy to legislative action, stepping in only when the malapportioned legislature fails to act in appropriate fashion on reapportionment.

A special question might arise, however, concerning the power of a malapportioned legislature to *initiate* an apportionment amendment to the *state* constitution—and perhaps, by analogy, to *ratify* a proposed *federal* apportionment amendment, which is the present question. The legislative initiative in amending state constitutions may take either of two forms: the legislature may call a convention to consider an amendment or submit a proposed amendment directly to the people. The general tendency in the post-*Reynolds* era has been to make no distinction between the power of a malapportioned legislature to reapportion itself by statute or by instituting a state constitutional convention. Malapportioned legislatures have instituted constitutional conventions either to sanction a plan already put in force by the malapportioned legislature, as in Connecticut, or to make a fresh start, as in New Jersey, Hawaii, and Maryland. In a preliminary phase of Tennessee reapportionment, a challenge to a legislative call of a constitutional convention for reapportionment was dismissed on the ground that even though the convention, like the legislature, would be malapportioned, it would only have power to propose and not to take final action.<sup>18</sup>

The more precise analogy, however, to the yet undecided question of the power of a malapportioned state legislature to ratify a federal amendment, is the question of the power of such a legislature directly to propose a state constitutional amendment on apportionment. In one recent case, a federal district court in Nebraska refused either to enjoin submission of a constitutional amendment proposed by the malapportioned legislature or to rule on the amendment's validity prior to expression of popular feeling.<sup>19</sup> By contrast, in *Toombs v. Fortson*,<sup>20</sup> a Georgia federal district court ruled that

18. *West v. Carr*, 212 Tenn. 367, 370 S.W.2d 469 (1963).

19. *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189, 194-95 (D. Neb. 1962).

20. *Toombs v. Fortson*, Civ. Action No. 7883 (N.D. Ga., June 30, 1964). The order was entered despite the innocuous nature of the proposed new constitutional clause

a malapportioned legislature was incompetent to submit a state constitutional reapportionment amendment to the people. This latter case reached the Supreme Court, but the question was mooted by an intervening election before appeal. The Court partially vacated the ruling and remanded with a short per curiam opinion which seemingly had the effect of placing the matter in limbo and robbing the lower court order of any precedential effect. Justice Goldberg, in a dissenting opinion, found the Court's remand order "mystifying" and wanted to make it crystal clear that the Court was leaving open the question of the power of a malapportioned legislature to initiate constitutional change.<sup>21</sup>

Another recent case presenting, in part, the same question also failed to result in a clear holding by the Supreme Court. In a complicated series of events in Hawaii, a federal district court disallowed both interim use of a legislature-passed reapportionment plan and its contemplated submission to the voters as a constitutional amendment.<sup>22</sup> The ruling, however, was based on an alleged federal constitutional defect in the plan itself—denial of equality of voter representation by using multimember districts to create "monoliths"<sup>23</sup>—rather than an intrinsic lack of power in a malapportioned legislature to propose constitutional amendments. The district court's ruling concerning multimember districts was reversed by the Supreme Court for lack of appropriate proof of invidious effect, but the machinery for a constitutional convention set in motion by the legislature under district court pressure was allowed to stand.<sup>24</sup> Thus, except for the ambiguous per curiam opinion in *Toombs*, the Supreme Court has not indicated its views on the power of malapportioned legislatures to submit a reapportionment amendment to the people directly. Perhaps there is little difference in effect

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on reapportionment. It did no more than fix the size of the two houses, repeal all other provisions, and empower the legislature to reapportion as it wished—under the overall restraint, of course, of the federal equal population principle. If we assume that a malapportioned legislature is incompetent to initiate a constitutional amendment, as the Georgia federal district court ruled, then what of provisions in some states where eight per cent of the people may initiate constitutional change by petition? Does equal opportunity to utilize the petition process make the difference?

21. *Fortson v. Toombs*, 379 U.S. 621, 631-34 (1965). Justice Harlan in a separate opinion could find "nothing . . . in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself." *Id.* at 626.

22. *Holt v. Richardson*, 238 F. Supp. 468 (D. Hawaii 1965); *Holt v. Richardson*, 240 F. Supp. 724 (D. Hawaii 1965).

23. *Holt v. Richardson*, 240 F. Supp. 724, 730 (D. Hawaii 1965).

24. *Burns v. Richardson*, 384 U.S. 73 (1966).

between this question and that of the power to call a convention, especially where the convention is to consider a plan already in force.<sup>25</sup>

## II. ARTICLE V AND THE "ONE MAN-ONE VOTE" PRINCIPLE

### A. *Ratification by Malapportioned Legislature of Federal Amendment*

Analogies from the state constitution cases aside, the question of the power of a malapportioned state legislature to ratify a reapportionment amendment to the *federal* constitution would never be aired if the Supreme Court adhered to the view of the four concurring justices in *Coleman* that constitutional amendment disputes are "political questions" not judicially reviewable. The easing of the political question disability in *Baker v. Carr*,<sup>26</sup> however, might presage a willingness to review the merits of the question. If so, the basic question would be the power of a malapportioned legislature to ratify *any* constitutional amendment. A recent essay seeking to maintain the thesis that a malapportioned legislature could not ratify a reapportionment amendment conceded that the argument was equally applicable to ratification of any amendment.<sup>27</sup> The central premise was that the Constitution, including its judicial gloss, is higher law and invalidates all governmental actions inconsistent with its announced commands and proscriptions.

In realistic terms, therefore, the question would be whether a state legislature, even one properly reconstructed after *Reynolds*, could ratify any constitutional amendment without having reapportioned itself under the most recent decennial census.<sup>28</sup> A flat rule that such a legislature could not ratify any amendment would demonstrate by *reductio ad absurdum* the fallibility of the premise. Since many legislatures would be regularly affected, this rule would

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25. Of special significance may be the more recent ruling of the Supreme Court in the famous disputed Georgia governorship election. *Fortson v. Morris*, 385 U.S. 231 (1966). There the Court upheld, five-to-four, the power of the malapportioned Georgia legislature (partially reapportioned but under court mandate to reach full compliance) to elect Lester G. Maddox governor of Georgia in 1966 when neither he nor his Republican opponent, Howard H. "Bo" Calloway, received the necessary majority of the popular vote.

26. 369 U.S. 186 (1962).

27. Wolf, *An Antireapportionment Amendment: Can It Be Legally Ratified?*, 52 A.B.A.J. 326 (1966).

28. It seems unlikely, although not impossible, that the fourteenth amendment will be construed to require reapportionment more often than the regular decennial census, or a five-year census if that becomes the regular practice of the Census Bureau.

force periodic suspension of article V in regard to legislative ratification and force use of the alternative route of state ratifying conventions, which, incidentally, might also be suspect if the same districts were used. Further, there would be little basis for distinguishing, and continuing to observe, the rule that a malapportioned legislature is empowered to pass general legislation or even elect a governor, as in Georgia.<sup>29</sup> Consistency of principle under such a Caesar's-wife rule would seem to require as well the nullification of all enactments of lame-duck legislatures, even if properly apportioned.

Attempts have been made to make the argument more plausible by suggesting two limitations.<sup>30</sup> First, it is said that only reapportionment amendments would be affected because citizens would lack the requisite degree of personal interest for standing to challenge other kinds of amendments. This reasoning assumes, of course, that conceded voter standing for direct attack on state legislature apportionment could be extended to cover the somewhat different question of the ratification process for a federal reapportionment amendment. It also assumes that courts would take a narrow view of citizen standing to challenge non-reapportionment amendments. However, prior to the notion expressed by the four concurring justices in *Coleman v. Miller* that judicial review of constitutional amendment issues was foreclosed on political question grounds, the Court in a series of suits had litigated a number of questions concerning the validity of the prohibition and women suffrage amendments without being troubled by standing considerations.<sup>31</sup> Recent cases, moreover, suggest a trend to ease requirements of standing so that citizens may more easily litigate public law issues, such as, church-state relationships<sup>32</sup> and reapportionment itself.

The second limitation would confine the asserted legislative disability to those bodies judicially declared malapportioned at the time. Absent such a ruling an unreconstructed or malapportioned legislature could still validly ratify a federal reapportionment amendment. This limitation is based on the sound principle that constitutional amendments must at some point be final, so as to avoid the confusion and uncertainty of retroactive invalidation. This limitation, however, brings with it new problems of arbitrariness. It introduces the random factor of variant plaintiff and judicial vigor

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29. See note 25 *supra*.

30. Wolf, *supra* note 27, at 328-30.

31. See cases cited in note 14 *supra*.

32. *E.g.*, *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). *But cf.* *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967).

in timing and pressing reapportionment suits. It also would operate differently in different states because of divergences of judicial opinion on what constitutes "malapportionment." A ten or fifteen per cent deviation from average size district (and substantially higher in the "first round" lower court cases after *Reynolds v. Sims*) has been acceptable in some states but not in others. Not to put too fine a point on it, the argument against ratification of any federal amendment by malapportioned legislatures has an instinctive appeal but concededly sweeps in too much if not limited; and, limitations of the principle have their own shortcomings.

Hence, in an attempt to avoid all doubts, it can be expected that any future reapportionment amendment, like Senator Dirksen's ill-fated 1966 proposal, will provide for ratification by state conventions rather than state legislatures. It should be noted, however, that similar objections may be made to the convention if it is not properly apportioned.

A ratifying convention, after all, is not the same thing as a statewide popular referendum which intrinsically follows one man-one vote. If delegates may be elected from legislative districts,<sup>33</sup> the convention could be in outward form a carbon copy of the state legislature. Although its members are delegates rather than legislators and would be chosen only on the basis of their commitment to vote yes or no on the amendment in question, the factor of distortion of popular will caused by unequally sized districts would still be present in important degree. Not eliminated at all would be the vice common to all district voting systems: the distortion of the result caused by ignoring the surplus plurality in any given district—these are, in effect, "wasted votes." The statewide popular majority actually may lose if its strength is heavily concentrated in a minority of districts.

#### B. *Should We Amend Article V To Conform to One Man-One Vote?*

In short, under article V we are forced to hard choices of how properly to implement ratification with legislatures which will be recurrently malapportioned because of the combination of tight equality requirements and differential population growth. It may not be satisfactory to use *reductio ad absurdum* as an all-encompassing

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33. See E. BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 515-19 (1938).

exoneration for the ills of our present practice. Perhaps it is time to take a fresh look at article V itself. Some of the problems raised above would be mooted by terminating entirely the practice of state legislative ratification and using only state ratifying conventions. Other problems would be obviated if the entire ratification section of article V were rewritten to authorize statewide popular referenda as the sole method for ratification of federal amendments.

All problems would vanish, and "one man-one vote" theory would be fully honored, only by going further and authorizing *nation-wide* popular referenda as the sole ratification device for federal constitutional amendments. Only thus can we avoid the distorting feature of surplus pluralities stemming from the state units which would still be present in the half-way house device of intrastate referenda. In ratification of federal amendments by state legislatures or conventions there are as many districts—and consequent distortions—as there are state legislative districts, approximately 5,000. In ratification by statewide popular referenda there are still fifty districts, the states themselves. Only in ratification by nationwide popular referenda is there an undistorted national popular response to the national issue of changing the Constitution which rules us all.

Such a shift, of course, may be too great a change from our "federal" or "states rights" heritage to accept all at once. But, if one man-one vote be taken seriously, the choice should be between such a truly national ratification process and use of statewide referenda. In the former the "federal" interest still would be preserved by the role of the United States Senate in the initiation process; in the latter the "federal" principle would be preserved again by the Senate role and by the unit participation of the states in ratification. Neither ratification procedure now authorized in article V—by state legislatures or conventions commonly elected from the very same districts—is conceptually consistent with the "one man-one vote" revolution.

### III. THE UNUSED FEDERAL CONVENTION PROCESS

One of the best-known "dead letter" clauses in the federal Constitution is that part of article V which authorizes constitutional amendment by the process of a constitutional convention. A convention "shall" be called by Congress on "application" of two-thirds of the states, with subsequent ratification accomplished by the usual

alternatives of approval by three-fourths of the states acting either through their legislatures or state conventions. It is understandable that the Founding Fathers, sitting in a constitutional convention, should have wished to authorize further conventions as an alternative to constitutional change by congressional initiation. It is, however, also understandable that the convention device has never been used; piecemeal constitutional revision, which is all the people have ever desired, is more expeditiously handled by congressional initiation. The state initiation procedure of article V has become, therefore, only a "protest clause"—a device for venting popular protest against congressional refusal to initiate a given amendment.

Because other participants in this symposium are giving detailed attention to the many questions raised by this alternative method (now part of the Dirksen campaign), this Article shall touch on only one or two aspects of interest. The first assumes that a sufficient number of states petition Congress, which then refuses to call a convention notwithstanding the seemingly mandatory language of article V. Would this congressional refusal to call a convention be a "political question" beyond the reach of judicial power, or could Congress by court order be forced to act? In 1965 at an early stage in the reapportionment amendment struggle, Senator Douglas predicted that Congress would not—and implied that he would not—honor a "call" for convention "even if two-thirds of the State legislatures pass the applications." He doubted that Congress could "be forced to do so."<sup>34</sup>

It is true that despite both *Baker v. Carr*,<sup>35</sup> involving state legislative reapportionment, and *Wesberry v. Sanders*,<sup>36</sup> concerning congressional redistricting, there is no precedent for orders by a federal court directed to the President or Congress. Both *Baker* and *Wesberry* could be enforced by federal court orders against state legislatures. Considerations both of power to enforce the order, and of separation of powers at the national level of government, might induce a court to avoid a clash with Congress on the call of a constitutional convention. Such considerations led the Supreme Court in the past to refuse to enjoin President Andrew Johnson from enforcing reconstruction legislation.<sup>37</sup> To be sure, in 1952 the Court

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34. *Hearings on Reapportionment of State Legislatures Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 35, 40 (1965) (statement of Senator Paul Douglas).

35. 369 U.S. 186 (1962).

36. 376 U.S. 1 (1964).

37. *Mississippi v. Johnson*, 71 U.S. (Wall.) 475 (1866).

did invalidate President Truman's seizure of steel mills during a strike, but the injunction was directed to the Secretary of Commerce and in any event was a negative order rather than a command to act.<sup>38</sup> If this be the case, then what remedy exists?

Another question is the composition of the convention. Article V seems to vest plenary power in Congress to provide for the size, composition, and method of choosing delegates of the convention. In exercising this power, Congress might simply provide for election of a convention parallel to Congress itself, that is, with delegates elected by congressional districts and at large in the states. This would mean obviously that the delegation elected from states at large—corresponding to the Senate—would be grossly malapportioned by population. Although article V may expressly authorize Senate malapportionment by exempting it from constitutional amendment, it does not authorize parallel convention malapportionment. It would be an anomaly to establish a national convention to deal with state legislative apportionment which was itself malapportioned. The problem would be minimized by modeling a national convention on the House of Representatives and basing it solely on congressional districts, but this would still overrepresent the smallest states, because each state is guaranteed at least one Representative and some states have less population than the national norm for a congressional district. In a properly apportioned national convention—following the emerging rule-of-thumb of some courts that a district deviation of more than ten per cent (or even less) is suspect—some smaller states could have no delegates of their own unless the convention were made quite large.

For example, if Alaska, the smallest state by population, were to be given one vote in a national convention and if all other states were to be given voting strength in direct proportion to that of Alaska, there would be 804.7 votes cast at the convention.<sup>39</sup> Although New York's present congressional delegation is 41, at the convention New York would cast 74.2 votes. The other states now having only one representative in the House—Delaware, Nevada, Vermont, and Wyoming—would cast 2.0, 1.3, 1.7, and 1.5 votes, respectively. Only Alaska's vote would be the same as its House vote. Alternatively, if the size of the convention were limited to 435 with no state guaranteed at least one vote, and if votes were apportioned according to a strict system of population ratios, Alaska, Nevada, Vermont,

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

39. That is, dividing each state's 1960 population by that of Alaska—226,167.

and Wyoming would not have a whole vote of their own. Vermont might have a full vote, however, if a ten per cent deviation were deemed permissible, because its population is within ten per cent of the ratio.

Many of the questions raised in the past several years would be dealt with in Senator Ervin's bill to establish procedures for calling and holding a national constitutional convention. Again, detailed discussion of that subject is left to the Senator and other participants, except to raise one question which the bill does not clearly answer. The bill provides that Congress is to determine the number of resolutions received and to ascertain whether or not they are on the "same subject." Congress then has a "duty" to call a federal constitutional convention. Could Congress also check the "federal validity" of the state applications under now-hidden meanings of article V? Senator Ervin's bill ignores this point. State legislatures are to be the exclusive judge of the "validity of adoption" of the resolution in each state, but this is a different question from the question of "federal validity."

Even without exhausting here all of the possible complexities, the state petition and federal convention route to constitutional amendment emerges as a veritable can of worms and seems unlikely to be used successfully. For this reason many find it difficult to take seriously this portion of article V, despite the intent of the Founding Fathers to keep open an amendment route not subject to congressional control. Although perhaps few persons now share the deep sense of nation-state tensions and fears which underlay adding the state petition clause to article V, situations can be imagined even in this age where the disposition of congressional forces, including a Senate filibuster, could block initiation of an amendment which, if submitted, would receive adequate popular support for ratification.

Perhaps by analogy to the practice in some states—and under the impelling force of the "one man-one vote" principle—we should explore the advisability of proposing federal amendments by some process of national popular initiative. Alternatively, and again by state analogy, initiation could be effected by two successive Congresses by an absolute majority (or even simple majority), in lieu of the present requirement of a two-thirds vote. This would lessen the power of an obdurate Congress to block desired change, yet retain a procedure which recognizes the serious nature of constitution amending.

## IV. IS ARTICLE V SIMPLY IRRELEVANT?

The drive for congressional initiation of a reapportionment amendment and the ensuing campaign to accomplish the same goal by constitutional convention seem to have failed for the time being. Some of the particular proposals had little merit; others, focussing on a very limited modification of the "one man-one vote" principle and on recurring population referenda, were more appealing in principle but difficult to incorporate in appropriate constitutional text. As the reapportionment amendment controversy fades, it leaves us with these far broader issues: Is the formal amendment article irrelevant to the larger public law controversies of our day? Is it totally irrelevant where modification of a Supreme Court decision is involved? With regard to the latter issue, it is certainly too late in the day to deny that courts do dramatically and effectively change the Constitution. Supreme Court justices on occasion admit to "amending" the Constitution, or at least accuse their brethren of it, which amounts to the same thing.<sup>40</sup>

Is there cause for concern when a proposal for a constitutional amendment leads more to a national diatribe than to a national dialogue? The present-day champions of the Court and viewers-with-alarm of the amending process may be classed as political "liberals." But liberals have not always been on the side of the Court, nor have "conservatives" always opposed it. Indeed the Court was frequently so pro-property from the Civil War to the New Deal that attacking the Court, in the name of democracy, was a standard liberal pastime. Hence, the present degree of anti-article V feeling, in the cause of keeping Court decisions inviolate, is historically anomalous. Court decisions have changed, yes. But has democratic theory regarding the proper repository of ultimate control changed that much? Control made too "ultimate" is not "control" at all.

So, although we begin with the question of a reapportionment amendment we end with a much larger question: Is article V irrelevant to the grander issues of constitutional form and policy which we call constitutional law? The unique American process of judicial review, so foreign to our English or continental forebears, is for us a traditional and valued process. Few now fail to perceive and admit that it is a major form of American policy-making. But is it not a condition of the exercise of such great power that it be

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40. *See, e.g.,* Justice Black in *Bell v. Maryland*, 378 U.S. 226, 342 (1964); Justice Harlan in *Reynolds v. Sims*, 377 U.S. 533, 591 (1964).

deemed to be honorably subject to the process of constitutional amendment?

Postulate, for example, the conditions of 1936, with *no* prospect for change of heart by the Supreme Court majority in the near future. The country wants to go forward, but the Court stands in the way of congressional legislation. A Senate filibuster blocks constitutional amendment by congressional initiation. Two-thirds of the state legislatures are persuaded to call a constitutional convention to overturn the Agricultural Adjustment Act (AAA) decision, the National Industry Recovery Act (NIRA) decision and others. Unfortunately, the texts of the state petitions differ. Some focus on the AAA decision and the relation of the tax-spend power to the reserved powers doctrine. Others focus on the NIRA decision and the separation of powers doctrine. Still others focus on the commerce clause aspect of the NIRA decision. To complicate the issue further, all of the problems of a possible runaway convention are cogently raised by the conservatives who do not want the Court's decisions upset. In the context of 1936 would we have—or should we have—backed off from the convention process for constitutional change?