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ALONG THE MIDWAY: SOME THOUGHTS ON DEMOCRATIC CONSTITUTION-AMENDING

Clifton McCleskey*

IN the American political circus there is apt to be going on at any given time a number of sideshows pretty much unrelated to the action under the Big Top. Essentially harmless and perhaps even functional for the system, they include the activities of the anti-vivisectionists, campaigns to impeach the Chief Justice, and the fratricidal spasms of various Marxist-oriented splinter movements. Among these sideshows, however, one has been distinguished by its perennial character and by the attention given to it by otherwise sober and restrained persons. I refer to the attempt through state legislative petitions to get Congress to call a constitutional convention pursuant to article V.

In the post-World War II period alone, we have seen the development of three distinct movements directed toward that goal. The first of these (actually launched in 1941) was an assault on the federal income tax through a proposal to limit the maximum tax rate to twenty-five per cent. It scraped along for some years until its proponents abandoned it in the late 1950's, still claiming that they had enough petitions to demand the convention being sought.¹ The second assault was officially mounted in 1962 when the Sixteenth General Assembly of the States (a creature of the state-supported Council of State Governments) resolved in favor of three proposed constitutional amendments. One contemplated a "Court of the Union" to displace the United States Supreme Court in certain of its functions; a second was designed to reverse the Court's decision in *Baker v. Carr*² by limiting its jurisdiction; the third sought a revision in article V itself to allow a constitutional amendment to be initiated on the basis of identically-worded state petitions without the necessity of congressional or even convention action.³ That campaign was interrupted by the third move-

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1. See Fensterwald, *Constitutional Law: The States and the Amending Process—A Reply*, 46 A.B.A.J. 717 (1960); Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161 (1959); Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067 (1957).

2. 369 U.S. 186 (1962).

3. See Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963); Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659 (1964); Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175 (1963).

ment set in motion in 1964, again by the Assembly of the States. The goal in this most recent effort was a constitutional convention to frame an amendment designed to forestall implementation or continuation of the judiciary's policies regarding the apportionment of legislative bodies.⁴

In all three cases the sideshow has had a degree of success, as such things are measured. It is true that no convention has yet been called, and that substantive policy has seemingly been unaffected. But lawyers, political scientists, members of Congress, and other wise men have been drawn to the scene in seemingly disproportionate numbers, and a sizable body of them has been moved to make speeches, write law review articles, and otherwise expatiate on the subject of constitution-amending in general and the merits or demerits of particular proposals. This very symposium is further proof of our enduring fascination with this show.

The truth of the matter is that I find it hard to take these petitions seriously. Most state legislators appear to have the same difficulty, judging from the casualness and lack of careful scrutiny that have characterized their actions in voting up or down the petitions to Congress for a constitutional convention. And while the mood of Congress is always a many-splendored mystery to laymen, my guess is that a Congress engrossed with difficult problems of war and peace, taxation, social disorder, and voyages to outer space is not likely to get involved with the issue of a convention to consider the apportionment of legislative bodies.

This should not be taken as critical of the scholarly effort over the past twenty years or so to arrive at a better understanding of the constitutional provisions being invoked. Even though the disputants can hardly be said to have determined the outcome—it was never very likely that Congress would either order a convention or initiate the proposed amendments on its own—we are better off for their involvement. Indeed, much of the knowledge I have on the subject is derived from the dialogue prompted by the three movements just reviewed. However, it does seem that some broader perspective is needed if we are to benefit from further debate on article V. It is with this objective in mind that I propose to do some prospecting around the general topic of constitutional change, although it can be predicted that more questions will be raised than answered.

4. See the review of congressional opinion, newspaper commentary, and legal analysis prepared by the AMERICAN ENTERPRISE INSTITUTE, *A CONVENTION TO AMEND THE CONSTITUTION*, SPECIAL ANALYSIS No. 5 (1967)

I. THE INTERPRETATION OF ARTICLE V

The logical starting point in this endeavor is the text of article V, for its deceptively plain language conceals an array of ambiguities:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Applications of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress

In the course of almost two centuries of use of the congressional-initiation, state-ratification amending procedure, we have been forced to grapple with a great many detailed questions of concern to the interested parties. May a governor exercise his veto power to block legislative ratification?⁵ Who decides how a ratifying convention is to be created and organized?⁶ May a popular vote be substituted for ratification by legislative or convention action?⁷ How many years may an unratified proposal be kept pending?⁸ May a state withdraw ratification, or reverse previous unfavorable action?⁹ Does "two thirds of both Houses" of Congress mean a two-thirds vote of all elected members, or of those present and voting (assuming a quorum)?¹⁰ Are there limits on the subjects that may properly be dealt with by amendment?¹¹ May Congress incorporate a time limit for consideration in a proposed amendment?¹² Does the President have any formal role in the process of initiating proposals?¹³

5. On this question, see L. ORFIELD, *AMENDING THE FEDERAL CONSTITUTION* 66 n.89 (1942).

6. See Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005 (1935).

7. *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920) (answering the question in the negative).

8. See *Coleman v. Miller*, 307 U.S. 433 (1939) (holding that it was up to Congress to decide whether a thirteen-year interval since initiation invalidated further ratification proceedings); *Dillon v. Gloss*, 256 U.S. 368 (1921) (upholding congressional specification of a seven-year limit on ratification).

9. See *Coleman v. Miller*, 307 U.S. 433 (1939) (holding previous rejection to be revocable, but upholding congressional precedents that ratification cannot be rescinded).

10. See *National Prohibition Cases*, 253 U.S. 350 (1920) (upholding congressional determination that two-thirds of those present and voting suffices).

11. See *Leser v. Garnett*, 258 U.S. 130 (1922) (finding nothing unconstitutional in the substance of the nineteenth amendment).

12. See *Dillon v. Gloss*, 256 U.S. 368 (1921).

13. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

In view of these and a great many other perplexities connected with congressional initiation and with the ratifying process,¹⁴ it is hardly surprising that numerous problems are anticipated should Congress move under the alternative mode to convene a convention on the request of state legislatures. Nor is it surprising to find that such questions have been pressed most insistently by those who are opposed to the substantive goals being sought by amendment—discouraging action by dwelling on real or exaggerated difficulties is a time-honored tradition in American political discourse. But whatever their motives, these critics have raised quite important points. What, for example, constitutes a valid petition which Congress must count in deciding whether it is obligated to call a convention under article V? Professor Black argues that, when amending the fundamental law, it is especially important to adhere very closely to form, and hence those petitions which are not identically worded need not be counted.¹⁵ Those petitions requesting a convention to promulgate an already drafted proposal may also be disregarded, according to Black, because article V contemplates a convention to “propose” amendments rather than to approve those already proposed by the drafters of the petitions. Another writer, addressing himself to the time span covered by petitions, concludes that earlier petitions may be disregarded when too long a time has elapsed or when there have been intervening socio-economic developments (war, depression, and so forth) which alter the situation.¹⁶ Others have argued that petitions may be disregarded when they come from malapportioned state legislatures.¹⁷

Another question that has been frequently raised pertains to the scope of a convention if one should happen to be called. Would it be limited to the subject matter indicated in the state petitions, or could Congress define its authority, or would the convention be free to consider any and all subjects? Some critics of the convention movement have taken the position that no limits can be set on the convention's activities, while others have argued that Congress could set limits.¹⁸ All seem to agree, however, that the convention would not necessarily be limited to the subject(s) dealt with in the state petitions.¹⁹

14. The single most comprehensive examination of the legal complexities is L. ORFIELD, *supra* note 5.

15. Black, *supra* note 3, at 863-64. *But cf.* Bonfield, *The Dirksen Amendment and the Article V Convention Process*, 66 MICH. L. REV. 949, 970 (1968).

16. Note, *supra* note 1, at 1072-73.

17. See the compilation of senatorial comments to this effect reported in AMERICAN ENTERPRISE INSTITUTE, *supra* note 4, at 29-31.

18. *Id.* at 33-39; Bonfield, *supra* note 3, at 677-78.

19. See, e.g., Bonfield, *supra* note 15, at 992.

A third example of the kind of question being raised will suffice. What would be the nature of congressional power to specify the composition and organization of a convention, and what role would the President have? Black's view is that Congress has rather complete discretion in getting the convention ready for business, and that voting in it could be on an individual rather than a state basis.²⁰ Traditionally, the President has been formally excluded from the constitution-amending process, but it is argued that this is of doubtful propriety, and in any case that the reasoning advanced would not support exclusion of the Chief Executive from the convention process.

Although these and other such questions are troublesome, it seems to me that on the whole, rather too much has been made of the problems associated with any effort at implementation of the "convention by petition" provisions of article V. It is very doubtful that they are any greater in number or magnitude than those associated with the other provisions of article V, to which somehow we have always been able to provide viable solutions. And, with all due respect to the reasoning offered in support of the interpretations just reviewed, diametrically opposed conclusions have their own plausibility. For example, with respect to the validity of state petitions, it is equally possible to argue that it is only necessary to have the requisite number of states make clear their desire for a convention—more is not indicated by the provisions of article V. And if favorable action by malapportioned legislatures on the twenty-second through the twenty-fifth amendments sufficed to win their ratification, why should not convention petitions from them be valid? As to the scope of a convention's deliberations, would it not be illogical to allow the states to bring about a convention while giving Congress power to thwart the whole undertaking by assigning responsibilities other than those originally contemplated by the states?

II. THE TRADITION OF CONSTITUTIONAL EXEGESIS

My purpose in touching on some of the specific problems that have been raised and the interpretations offered is not to try to dissect them nor to reach final conclusions about the merits of the competing viewpoints. It is rather to demonstrate the inconclusive nature of that debate—an inconclusiveness inherent in the tradition of constitutional exegesis that has long dominated the treatment of issues of this sort. When policy issues having constitutional

20. Black, *supra* note 3, at 964-65.

implications arise, one chooses one's ground on whatever basis, one consults the Founding Fathers, one cites appropriate precedent and authority, and one conjures up problems which must be solved or solutions to problems thought up by someone else. Having done all this, one has conformed to the tradition of discourse and has thereby missed (or dodged?) a great many of the real issues and questions.

Somehow a way must be found to escape entrapment in that tradition and to develop instead a basis for a modern reading of the Constitution, including article V. To do that we must first dispose of "the intent of the Founding Fathers." Although the great gaps in what can be known of their thinking should give anyone pause,²¹ my objection is not based primarily on the difficulty of knowing what they intended. Neither is it rooted in any desire to denigrate. That they were great men I freely admit, and that they sometimes had hold of enduring principles may be further acknowledged. We should, therefore, consult their wisdom in the same way that we might turn to John Locke or to Thomas Jefferson.

But the search for "the intent of the Founding Fathers," so familiar in American constitutional interpretation,²² goes well beyond that sort of undertaking. It assumes instead that we are somehow obligated to conform in present-day usage to the thinking of the delegates at Philadelphia. There are two compelling objections that can be raised against this viewpoint. First, it may simply be denied that our subordination to the Constitution derives from the action of any assemblage of people in the late eighteenth century. I would be as hard-pressed as most to provide a rigorous explication of the source of political obligation, but that it is of a contemporary nature seems beyond question. What the leaders of 1787 intended by a given provision is thus of no particular relevance to us in 1968.

But even if this view is rejected, even if one is willing to be bound by eighteenth century viewpoints, there remains the crucial question: Whose viewpoint is relevant and binding? If the Constitution derives its legitimacy from the Founding Fathers, then no doubt their views would be controlling. But when we confront the issue squarely, even the most dedicated worshipper of the Founding Fathers must admit that the ultimate legitimizing action was that taken in the state ratifying conventions. Thus it is

21. Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340 (1955).

22. For examples of this approach to the analysis of article V, see L. ORFIELD, *supra* note 5, at 116-18; Black, *supra* note 3, at 963; Note, *supra* note 1.

the "intent" there that must be heeded, not that of the Founding Fathers.²³ So far no one has shown much stomach for taking up that investigation.

This argument that we should dismiss the ruminations of the Founding Fathers, except as we can find in them some still-valid principles, can be extended to cover all that has taken place subsequently. It is all very interesting but basically irrelevant that the Supreme Court in *Hawke v. Smith, No. 1*²⁴ in 1920 interpreted article V to be exclusive, thus barring the use of other methods of constitutional initiation and ratification, or that Congress has generally acted through the years to keep the President from playing any role in the formal amending process. We need not feel bound by those precedents; what really matters is *our* views and *our* needs and *our* values. To argue so is not to deny the importance of the concept of constitutionalism and all that it entails, but it is to assert that this Constitution must be kept responsive to the needs and aspirations of the people who are being governed under it at any given time.

We must, therefore, divorce ourselves from the traditional approach, with its extrapolation from the intent of the Founding Fathers and precedent, and seek instead the development of general principles which will allow us to deal with what appear to be some of the more fundamental issues and questions: What is the relationship of the formal amending process to other methods of constitutional change, and when is one preferable to the other? Which of the alternative methods for initiating and for ratifying formal amendments is superior, and why? What is the proper role of such governmental institutions as Congress, the President, state legislatures, and the courts in the amending process? Above all, what can be done to make the provisions of article V more useful and more meaningful to us? When we can answer questions of this sort, we will be well on our way to disposing of article V as a constitutional issue.

III. COMPARATIVE CONSTITUTION-AMENDING

I suggest that we begin our approach to these questions with an examination of formal amending procedures employed in other nations. It seems reasonable to limit this review to those political systems that have some claim to classification as democracies, and to those that are more or less federal in nature as well. Even with these

23. The point is Anderson's, although he does not press it. Anderson, *supra* note 20, at 341.

24. 253 U.S. 221 (1920).

limitations there are more cases than can be conveniently examined here, and so the discussion will center on seven nations with relatively stable systems constituting a cross section of sorts of federal democracies: Australia, India, Canada, Mexico, Venezuela, Switzerland, and West Germany.²⁵ I shall also touch on the amending provisions contained in the American state constitutions.

The first three nations mentioned achieved their present status through the British Empire and Commonwealth, and may logically be considered together. In Australia, constitutional amendments are initiated by an absolute majority in each House of Parliament, typically as a government measure.²⁶ If one house refuses to concur in the proposal of the other, there are provisions for an alternative procedure to initiate the proposal of the one house. Ratification (by popular vote) requires a majority of those voting on the proposition *and* a majority of the states. The state legislatures may not initiate proposals or force conventions, nor are they involved in the process of ratification.

In India, the national legislature is normally both the initiator and the ratifier of constitutional amendments.²⁷ The process requires a two-thirds majority of those present and voting in each house, provided that the vote for the proposal is equal to or greater than an absolute majority of elected members in each chamber. Measures so passed are effective upon the assent of the President, with one notable exception: amendments which touch upon the division of authority between the states and the national government must also be ratified by the legislatures in at least half the states.

In Canada, the process of formal constitutional change is clouded considerably by the lack of any provision in the fundamental law for future amendments, a situation made understandable by the fact that the fundamental law is itself statutory in form.²⁸ Amendments to those fundamental laws affecting the Dominion government

25. Except as otherwise noted, I have relied here on the analysis and the constitutional texts presented in W. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* (1956). However, I have not in all instances accepted the implications of that authoritative treatment. English language versions of the constitutions of the world are conveniently assembled in A. PEASLEE, *CONSTITUTIONS OF NATIONS* (1950) (3 volumes).

Since amending procedures in Brazil and Argentina do not fit the pattern found for most of the other nations considered, the skeptical reader may wonder about their exclusion here. The decision not to include them, made before I had any knowledge of their provisions, was based on the political instability of those countries in recent years. Mexico and Venezuela seemed more deserving of the label "federal democracies."

26. CONSTITUTION ch. VIII, § 128 (Austl.).

27. CONSTITUTION pt. XX, art. 368 (India).

28. The Constitution of Canada consists, in the main, of the British North American Act of 1867 "and subsequent amendments" to that Act. Since no statute stands on a higher level than any other, "amendment" may be by implication from the subsequent enactment of an inconsistent statute. See W. LIVINGSTONE, *supra* note 24, at 22-23.

alone may be made by the Dominion Parliament acting in normal fashion. Those provisions touching the federal system may be amended only by the Imperial (British) Parliament, which in turn acts only upon the request of the Dominion Parliament. Whether the Dominion Parliament should consult the provinces and if so, who in the provinces, is still a disputed issue among Canadian constitutional theorists, but there is not much doubt that the Dominion Parliament can as a matter of right request imperial legislation without obtaining provincial approval. It is worth noting that the Dominion Parliament was eventually successful in establishing that it alone can petition the imperial body for legislation—the Dominion government no longer claims such a right.

It might be instructive next to consider the amending process in two federal systems whose origins reflect some influence from the United States. In Mexico, amendments are initiated by a vote of two-thirds of the members present in Congress, with ratification requiring favorable action in a majority of the state legislatures.²⁹ In Venezuela the initiation of amendments requires approval by a simple majority in each house of Congress of proposals submitted by one-fourth of the members of one house or by the legislatures in one-fourth of the states.³⁰ Two-thirds of the state legislatures must then ratify the proposed amendment. More stringent procedures are required where general constitutional reform is proposed: one-third of the members of the entire Congress or a majority of state legislatures must submit the proposal; admittance of such proposals by the Congress (in joint session) requires a two-thirds vote. Once admitted, the proposals may be initiated by Congress by a simple majority vote. Ratification of a general constitutional reform requires a referendum in which approval is expressed by "a majority of the voters of the entire Republic." The constitution explicitly bars the President from the vetoing of amendments or general reforms, and gives him only a ministerial role in the promulgation of changes.

Finally, we might note the pattern in two other federal systems: Switzerland and West Germany. The Swiss constitution contemplates both total revision and partial or specific change.³¹ Total revision may be initiated by the two houses of the Federal Assembly in the same fashion as ordinary law, with introduction by any member of either chamber or by executive message. If the advisability of total revision or the form of a new constitution cannot be agreed upon by

29. CONSTITUTION tit. VIII, art. 135 (Mex.).

30. This summary is drawn from the text presented in PAN AMERICAN UNION, CONSTITUTION OF THE REPUBLIC OF VENEZUELA, 1961 (1963).

31. CONSTITUTION ch. III, arts. 118-23 (Switz.).

both houses, then a preliminary referendum is held to decide whether there should be such a revision. Total revision also may be initiated through a petition signed by 50,000 voters and, again, approved by a popular referendum. Under either mode, actual revision is then undertaken by a newly elected Federal Assembly. Regardless of the method of initiation, ratification requires a popular referendum in which there is approval by a double majority: a majority of those voting on the proposal, and a majority of the voters in a majority of the cantons.

Partial revision in Switzerland may be accomplished through amendments initiated by the Federal Assembly and ratified by referendum, with again the necessity of a double majority. Amendments may also be initiated by the petition method, either as a statement of principle which must be drafted into formal constitutional terms by the assembly, or as a formally stated amendment. If the former, the assembly may require a favorable referendum before proceeding with the drafting. If the latter, the assembly may offer an alternative to be voted on at the same time or may recommend disapproval of the original proposal. In either case, the voters eventually are assured of an opportunity to pass judgment on the proposed amendment, a double majority being needed.

The 1949 Bonn constitution for West Germany provides for constitutional amendments to be initiated and adopted by a two-thirds vote of the membership of the *Bundestag* and by two-thirds of those voting in the *Bundesrat*.³² Neither popular ratification nor *Länder* (states) approval is necessary, although it must be noted that the *Länder* are represented as such in the *Bundesrat* by members of each *Land* government who must vote by states. The amending process may not be used to change certain provisions regarding the federal system.

Also relevant to an examination of democratic processes in constitution-amending are the procedures found in the fifty American states.³³ All of the states now allow the legislative branch to initiate constitutional amendments. In nineteen states a two-thirds vote is necessary to initiate proposals, and in another eight states a three-fifths majority is required. Of the seventeen states which permit only a simple majority vote to initiate amendments, about half require such vote in two successive legislative sessions before deeming the

32. CONSTITUTION art. 79 (Fed. Rep. of Ger.).

33. The following account draws on W. GRAVES, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION (1960); Shull, *Legislature and the Process of Constitutional Amendment*, 53 KY. L.J. 531 (1965); COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES, 1966-67 (1966).

proposal initiated. The remaining six states have a miscellany of initiation provisions that cannot be conveniently categorized. It should be stressed that in most states the required vote—two-thirds, three-fifths, or simple majority—is a vote of all elected members, not just those present and voting.

The overwhelming majority of state legislatures have as well the authority to call constitutional conventions, either as a matter of explicit grant or by construction and settled practice; in only four states is this still an unsettled matter.³⁴ In a little over half of the states, the call for a convention requires a two-thirds vote; in most of the remaining states a simple majority suffices.

A third method of proposing amendments is available in the fourteen states allowing the popular initiative. When supported by petitions signed by a specified number of voters (usually a figure equal to eight to ten per cent of the voters in a recent general election), proposed amendments are presented to the electorate for approval or disapproval.

In the vast majority of states the process of popular ratification requires only a majority of those voting on the amendment but a few states require a majority of those voting in the election. Others have various provisions, such as New Hampshire's requirement of a two-thirds vote or Nebraska's that the majority in favor must equal thirty-five per cent of the election vote. Delaware is distinguished by the fact that the voters never have the opportunity to pass on proposed amendments; legislative action in two consecutive sessions is final. Only a very few states provide for ratification on some sub-state level, such as counties or municipal corporations. In New Mexico, certain constitutional provisions relating to suffrage and education can be amended only if the proposal is approved by a three-fourths vote in the legislature and by a three-fourths majority of the voters representing a two-thirds vote in each county. In Georgia amendments of a local nature need only to be approved in the subdivision affected by the proposal.

In concluding this review of state practices, it should also be noted that the states have followed the example of the national constitution in denying a formal role for the chief executive in the amendment process. They have also neglected to make any provision for the resolution of conflict or deadlock between the two legislative chambers when considering proposals for amendments.

Comparative data on constitution-amending drawn from other nations and from the fifty states are helpful in evaluating the role of

34. Indiana, New Jersey, North Dakota, and Vermont.

article V, but for our purposes they must be tempered with reasoning based generally on democratic political theory. I do not think it necessary to embark here on an extended discussion of that most slippery concept. Suffice it to say that my thinking is in line with such contemporary writers on the subject as Henry Mayo, Austin Ranney, and the late Wilmoore Kendall.³⁵ Their basic emphasis is procedural, and hence "democracy" is defined in terms of political equality, popular sovereignty, majority rule, and representative institutions. In any event, it is doubtful that my comments below would be much affected by the use of some alternative formulation, so long as the concept of democracy is used with enough precision to distinguish it from such related concepts as "liberalism" or "constitutionalism."

IV. TOWARD THE MODERNIZATION OF ARTICLE V

It might be wise to begin with a reminder that the formal amending process does not, and should not be expected to, carry the major burden of constitutional change. Every schoolboy knows that our Constitution is subject to change through informal processes as well as through formal amendment. The Supreme Court and lesser courts, Congress, the President, the bureaucracy, political parties, interest groups, and in an ultimate sense even individual citizens are all involved in a ceaseless effort to reshape the American Constitution. Some of this effort is wasted, and a part of the tugging and hauling cancels out, but some of it eventually succeeds in giving birth to new constitutional principles without benefit of baptismal rites, so to speak. This sort of process is not peculiar to the United States, although it is doubtless the subject of somewhat greater notice here and in other countries where there is a written constitution and a specified amending process.

The relative importance of these agencies of informal change is as unsettled in theory as it is varied in practice. After an historical review of American political thinking on the broad question of the responsibility for constitutional interpretation, Donald Morgan was able to identify three principal theories.³⁶ One, which he calls the Jeffersonian or "political" solution, intends for each of the three branches of government to share in the resolution of constitutional issues, with that branch entitled to prevail which has the ultimate responsibility for action. The Marshallian or "juristic" position concedes some responsibility for constitutional decision to the other

35. H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* (1960); A. RANNEY & W. KENDALL, *DEMOCRACY AND THE AMERICAN PARTY SYSTEM* (1956).

36. D. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 71-98, 331-62 (1966).

branches, but, by emphasizing the rule of law and the paramount position of the national government vis-à-vis the states, manages to give a degree of primacy to the judiciary. The third viewpoint, which Morgan refers to as that of "judicial monopoly," postulates a sharp division between policy and constitutional issues. Policy questions are properly the province of the political agencies of government; constitutional issues arising in connection with policy should be deferred to the courts as possessors of the necessary independence, specialized skills, and acuteness of judgment. There is no need to repeat Morgan's arguments here, but I agree with his conclusion that the Jeffersonian system is most satisfactory as a model for describing the relative responsibilities which "ought" to prevail.

Our reliance on the informal method is apparent in the record: only twenty-five formal changes in almost 180 years. The difficulty of the initiating process has contributed significantly to this; the congressional screen has been so fine that only five proposed amendments have failed of ratification by the states.³⁷ There are, of course, good reasons why informal change is often preferred: it can be introduced tentatively and shaped gradually; it requires less mobilization and less political effort; it helps to diffuse responsibility; and it provides alternative channels for action to bring about change.

The proper mix of formal and informal change is necessarily difficult to ascertain. Some constitutional provisions are so specific that only formal amendment will suffice as, for example, the selection of Senators or the schedule for congressional sessions. In other cases, the formal amending process is a kind of ultimate weapon to be drawn only when the agents of informal change are too hostile or too divided, exemplified by the hostility of the courts in delaying the income tax for two decades. And too, because formal changes are paramount over informal ones, they are often desired as a means of fixing some policy or principle more securely. When the leading agents of informal change are not politically responsible it would seem particularly important to provide a relatively liberal amending process. On the other hand, when those agents are popularly chosen one can safely tolerate a much more rigid procedure for formal amendments.

Turning now to the method of initiating formal amendments, what general principles can we draw from the previous examination of national and state procedures? It should be abundantly clear that the legislative assembly constitutes the principal avenue of initiation—every federal system reviewed and all of the American states

³⁷. By comparison, in a large number of American states from two-fifths to one-half of all proposed amendments fail to be ratified; in a few cases the rate of failure is even higher. COUNCIL OF STATE GOVERNMENTS, *supra* note 32, at 10.

so empower their legislatures. Equally striking is the frequent apparent exclusion of the executive from the initiating process. In parliamentary systems, the justification behind this is doubtless the integral relationship between legislative and executive branches—indeed, ultimate control may be legislative in theory but executive in fact, but in either event the two are closely intertwined. No such explanation justifies the exclusion of the chief executive in presidential systems. The problem appears to be in part one of cultural lag. The early stages of the development of self-government were dominated by representative assemblies, and we have not yet adjusted our thinking about constitutional amendments to take into account the fact that in a modern presidential system the chief executive is equally apt to be representative of the popular will and hence entitled to share in the process of initiation.

As to the provision of alternative modes of initiation which bypass legislative bodies, the comparative evidence is mixed—some nations and some states provide alternatives, others do not. The principal justification for such an alternative is presumably that advanced long ago by George Mason, who was worried that the representative assembly might become oppressive and refuse to initiate needed reforms.³⁸ I am not much persuaded by this argument, since an oppressive legislative body that will not conform to existing constitutional limitations is unlikely to heed new ones no matter how initiated and ratified. However, if an alternative mode of initiation is to be provided, almost certainly it should not take the form of allowing state legislatures to force the calling of a convention or to initiate specific proposals. We found no case for subnational assemblies being so empowered in any of the seven federal democracies examined, nor on a substate level in the American states. If the theory is to reserve to the people a means of forcing changes in the fundamental law when their representatives are unresponsive, why should initiation be left to intermediate representatives? State legislatures, traditionally and inherently, are agents of parochialism and cannot be expected to maintain the national perspective needed in proposing amendments to the federal constitution. Thus, if an alternative mode of initiation seems necessary, it should be based upon popular action in the fashion of the initiative provided in Switzerland and in a number of American states.

The same reasoning applies equally to the ratification process. Of the seven nations examined, only Mexico and Venezuela provide for ratification of amendments by state legislatures; the remainder either specify popular vote or national legislative action. All but one

38. 2 THE RECORDS OF THE FEDERAL CONSTITUTION 629 (M. Farrand ed. 1966).

of the American states require a referendum on state constitutional amendments. Thus it is more than a little incongruous that article V has been construed to prohibit direct popular control of ratification. My forte is not writing legal briefs, but surely a bench and bar that can find a constitutional right to a fairly apportioned Congress in article I³⁹ or to the franchise without payment of a poll tax in the fourteenth amendment⁴⁰ should have no trouble demonstrating a right of state voters to instruct their legislatures to approve or disapprove proposed amendments to the national constitution.

To sum up the discussion to this point, the initiation of proposed amendments should be in the hands of those who are most directly responsible to the nation as a whole. This means, in particular, representative assemblies, but includes as well the chief executive in presidential systems. If an alternative mode is thought desirable, the popular initiative should be chosen rather than allowing initiation by state legislative or convention action. A ratification process which is not based on direct popular approval or disapproval cannot be justified in our democracy. Those who insist on building federalism into the amending process should recognize that this goal may be achieved in a variety of ways.⁴¹ For example, representation by states in the national legislature, as in the United States Senate or German *Bundesrat*, structures a federal element into the initiation process, and the use of double majorities for ratification, as in Switzerland and Australia, does likewise for ratification.

The shortcomings of article V have been detailed at earlier stages in our history, most notably in the period around the turn of the century when those in the Progressive movement, doubtful as to the possibility of getting certain policies adopted, engaged in a serious critique of the amending process.⁴² Senator La Follette's proposal for initiation by a simple majority in both houses of Congress and for ratification by either a majority of voters in the nation or a majority of the voters in a majority of states appears to have been the most forthright assault on the problem. These changes, however, were themselves proposed as a constitutional amendment, and therein lay their fatal deficiency.

But, though formal revision of article V seems unlikely, some possibilities exist as to informal modification. As Fred Graham has called to our attention, article V has already been so modified in practice that the states have been stripped of any meaningful role in

39. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

40. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

41. See W. LIVINGSTON, *supra* note 25, at 303-10.

42. These and other reform proposals are summarized in Martig, *Amending the Constitution—Article Five: The Keystone of the Arch*, 35 MICH. L. REV. 1253, 1277 (1937).

proposing constitutional amendments.⁴³ Congress has been the chief agent of this development by its refusal to call a convention in response to the various petitions from the states. Were article V to be reinterpreted to abandon the notion that its provisions are exclusive, several possible developments are apparent. For example, such an interpretation would allow Congress to call a convention on its own volition (conceivably by a simple majority vote).⁴⁴ It would also permit state laws which would bind legislatures or ratifying conventions to the results of referenda on proposed amendments. Provision could likewise be made for the entry of the President into the initiating process on a formal as well as an informal basis. While I would not wish to be accused of incitement to barratry, it is my considered judgment that we would be further along with the rationalization of article V if more legal talent were devoted to promoting such revisionism.⁴⁵

In conclusion, Congress has over the years been most wise in its refusal to traffic with state calls for a constitutional convention. As it happens, my sympathies lie with the decisions since 1962 designed to ensure the principle of "one man-one vote" in the apportionment of legislative bodies, and hence I have no enthusiasm for the attempt to obtain a constitutional convention to undo that principle. More important than my feelings about that substantive issue, however, are the larger questions of sound and proper amending procedure. If new ground is to be broken in connection with article V, it should be in the democratizing directions indicated above. To allow the initiation of proposed amendments by state legislative petitions would be a step backward toward acceptance of a principle carried to its logical conclusion by the Confederate States of America, for in that system the *only* mode of initiating constitutional amendments was by state action.

43. Graham, *supra* note 3, at 1176. Graham's treatment of the subject is distinguished from most others by his calm assessment of the realities, as opposed to the legalities, of the matter.

44. For a way of viewing congressional powers that would support such an interpretation, see Corwin & Ramsey, *The Constitutional Law of Constitutional Amendments*, 26 NOTRE DAME LAW. 185, 196 (1951).

45. A good place to start might be with persuading Congress that it can indeed reinterpret article V to bring about a more democratic process of amendment. In this effort one might have recourse to the words of Justices Black, Roberts, Frankfurter, and Douglas, concurring in the result of *Coleman v. Miller*, 307 U.S. 433, 459-60 (1939):

Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas Courts. Neither state nor Federal courts can review that power. Therefore any judicial expression amounting to more than mere acknowledgement of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority.

One of the more fascinating aspects of the current debate over article V is the extent to which this viewpoint has been ignored by both sides.