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REVIEWING JUDICIAL REVIEW: A NOTE IN CONSTITUTIONAL HISTORY

William F. Swindler*

I. INTRODUCTION

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power," observed Alexander Hamilton in a famed early apologetic for judicial review.1 "It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts are declared void."

At the time he wrote—the first book edition of The Federalist had appeared in the spring of 1788 just prior to the final state acts of ratification of the new Constitution—Hamilton had only the experience of the new state constitutions and the debates and conjectures of the Philadelphia convention of 1787 upon which to rely. The Federalist is thus one of the earliest theoretical expositions on the federal Constitution; its enduring influence, however, as John Marshall pointed out in 1821, derives in large measure from "the part two of its authors [i.e., Hamilton and James Madison] performed in framing the constitution," which "put it very much in their power to explain the views with which it was framed."2

In the matter of judicial review, the supporting arguments which Hamilton put forth are perhaps less significant than the fact that he took for granted the duty incumbent upon the courts to apply a test of constitutionality to the acts of other branches of government. In the same number of The Federalist, he went on to observe:

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1. THE FEDERALIST No. 78, at 100 (Bourne ed. 1942) (Hamilton).
2. Cohens v. Virginia, 19 US. (6 Wheat.) 264, 419 (1821). From 1788 to the present, the publication of twenty-nine separate editions of these essays has attested to their continuing usefulness in the study of the American constitutional system. See, most recently, Dieter, THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT, esp. chs. 1-3, 9 (1960).
There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed; that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. 3

This basic assumption of constitutional theory in The Federalist reflected the prevailing sentiment of the Philadelphia convention itself. On August 15, 1787, Madison had moved—seconded by James Wilson, a future Supreme Court justice—"that all acts

before they become laws should be submitted both to the Executive and the Supreme Judiciary Departments;" and in discussing the motion John Mercer of Maryland stated: "It is axiomatic that the Judiciary ought to be separate from the Legislative: but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated." Madison's motion was one of a number of instances in which a "revisionary function" was debated in the course of the convention; in this instance (as in others) the motion lost, but inasmuch as the question involved Article I Section 2 of the proposed Constitution, defining the right of the respective houses of Congress to originate certain bills, judicial review was not in issue. It is true that at this point in the debates John Dickinson did protest that "no such power ought to exist" in the courts; but, reported Madison, the speaker "was . . . at a loss what expedient to substitute."

No one, indeed, seriously challenged the principle throughout the convention. Gouverneur Morris, opposing a proposition that state laws be subjected to Congressional review, stated categorically that any state law which had to be "negatived" would be so disposed of by the courts. It was not how to curb or prohibit judicial review, but how to complement it with the "revisionary power" vested jointly in the judiciary and an executive agency, which was brought up recurrently. Several states, including New York and Pennsylvania, had such agencies of review, reminiscent of the powers vested in the royal governors' councils of pre-Revolutionary periods. Other states, following the Virginia concept of legislative supremacy and in reaction to the abuses of the royal governor in council, strenuously opposed the "revisionary power," and in the process argued that judicial review was a sufficient safeguard against legislative usurpation. Thus Wilson, an advocate of the power, argued that court review did not go far enough. Luther Martin, in opposition, stated that "as to the constitution-

4. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 298 (rev. ed. 1937) [hereinafter cited as Farrand].
5. Id. at 299.
6. Id. at 28.
7. Compare N. Y. Const. art 5 (1777) in 5 THORPE, AMERICAN CHARTER, CONSTITUTIONS, AND ORGANIC LAWS 2628 (1909); and the analogous "council of censors" provided in Pa. Const. § 47 (1776) in 5 THORPE, OP CIT. SUPRA at 3091. At the time of its ratification of the federal Constitution, the New York convention proposed, inter alia, an amendment providing for a commission to review judgments of the Supreme Court. 1 ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 331 (2d ed. 1907).
8. 2 FARRAND 73.
ality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws." To give them a "revisionary power" would be to give them a double negative and they would thereafter lose the confidence of the people "if they are employed in the task of remonstrating against popular measures of the legislature." In this perhaps fortuitous anticipation of the logical extreme of judicial review vis-a-vis legislative policy, Martin appears more perceptive than George Mason, who supported the revisionary idea by insisting that the judiciary had a duty to help in "preventing every improper law."10

What the Founding Fathers thus said, in convention and in the a priori propositions voiced in the course of the debate over ratification, argues strongly for the now general persuasion of students that judicial review was indeed taken for granted in the new structure of American federalism. The almost legendary Marbury v. Madison11 thus belatedly attains its proper perspective as a strategic expression of the doctrine rather than its assertion de novo in the area of federal jurisprudence. Marshall himself, indeed, in the debate over ratification in the Virginia convention of 1788, demanded: "To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." In this context Marshall was speaking to the question of the power of federal courts to prevent federal encroachments upon the states; even more meaningful was his observation at another point in the debate when he added: "Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." (Emphasis Added).12

9. Id. at 76-77.
10. Id. at 78.
11. 5 U.S. (1 Cranch) 137 (1803). It is significant that none of the several proposed amendments to curb the jurisdiction of the court, introduced in the period of most vehement Congressional reaction to Marshall's opinion, sought to abridge the fundamental power of judicial review. Cf. 15 Annals of Cong. 68 (1806) (1789-1824); 16 Annals of Cong. 76, 216 (1807) [1789-1824]. Cf. also note 17 infra, and, generally, Orfield, Amending the Federal Constitution (1942).
12. 3 Elliot, Debates on the Adoption of the Federal Constitution 551, 553 (2d ed. 1907).
The significant fact which emerges from this evidence is not that judicial review was assumed from the outset in devising the federal constitutional plan, but that the primary concern came to be—then, and consistently throughout the national history—the means of counterbalancing its effect. Montesquieu's classic formula for democratic government, the separation of powers, was the keynote of the constitutional theory of the Founding Fathers; but the Philadelphia convention was dominated by the Virginia principle of legislative supremacy which, in the final analysis, meant that the powers of the tripartite structure of federalism were (to modify a phrase which has since taken on another connotation) separate but not equal. The chief importance of *Marbury v. Madison* thus appears not as the extension of judicial review to all acts of government but as a device for establishing the judiciary on a parity with the legislature. With Andrew Jackson's later demonstration of the role of the executive branch under the direction of a forceful President, separation of powers at length became synonymous with equality and attained the practical equilibrium necessary to validate Montesquieu's theory.\(^\text{12}\)

In any case, the basic issue of the early constitutional era was how to subject judicial review—or, more properly, judicial doctrines enunciated by the courts in the process of decision-making—to a reasonable degree of responsiveness to the popular will. Then as now, three methods seemed obvious: (1) Congress could enact laws defining limits to court jurisdiction in certain instances—subject, however, to the interpretations placed upon these very laws by the courts themselves. (2) The President could fill court vacancies with individuals favorable to the prevailing popular view—assuming that it were possible to predict the behavior of the individual once he came on the bench, an assumption which history has disappointed more often than not. (3) Most definitive of all was the amending of the Constitution itself, thus specifically altering the base upon which the unwanted judicial doctrine had been erected.

This is a study of the third of these remedies, in which its effectiveness as well as its inadequacies—particularly for the present age—will be considered. Of the twenty-two amendments to the

Constitution to date, at least three may properly be said to have
grown directly out of a recognized need to nullify a fundamental
rule laid down by the Supreme Court of the United States, viz.: (1) the Elevenoth, offsetting the holding in Chisholm v. Georgia, which had confirmed the suability of states by private individu-
als; (2) the Thirteenth, rejecting the doctrine of the universality of slavery as a property right established by Dred Scott v. Sand-
ford; and (3) the Sixteenth, making possible a federal income tax in derogation of the rule in Pollock v. Farmers' Loan & Trust Co.

The first and third of these, illustrating the use of the amendment process to establish respectively a state right and a federal right, are the subjects of Parts II and III of this study.

That the amendment process readily suggests itself as a means of offsetting judicial pronouncements is reflected in the literal torrent of constitutional changes which have been proposed in Congress in more than a century and a half. On the other hand, the fact that only a microscopic number of such proposals have ever been submitted for state action emphasizes the practical difficulty of utilizing this method of reviewing judicial review. Merely that the proposals for amendment were made, however, is some indication of the political sensitivity to certain specific judicial holdings. Thus, the rule against state impairment of contracts, originally laid down in the Dartmouth College Case, and relied upon in the Railroad Tax Case, occasioned three different attempts in the 1880's to secure Congressional approval of

14. 2 U.S. (2 Dall.) 419 (1798).
15. 60 U.S. (19 How.) 393 (1857). There is also a case for the Fourteenth and Fifteenth Amendments as devices for reviewing judicial review. Cf., generally, 2 Warren, Supreme Court in United States History, chs. 20, 24 (1922), and see also the Civil Rights Cases, 109 U.S. 3 (1883).
16. 157 U.S. 429, modified on rehearing, 158 U.S. 601 (1895). For earlier efforts at drafting an amendment following this ruling and prior to 1909, see Part III infra.
17. An exhaustive study in 1896 reported a total of 1,736 amendments proposed in Congress or via state legislative memorials during the first century after ratifica-
tion. Most of these (more than 90%, in fact) never got out of committee; many were tabled as promptly as introduced, suggesting that, like many bills introduced at every session of Congress, the proposals were often pro forma. See Ames, Proposed Amendments to the Constitution of the United States During the First Century of Its History, 2 Am. Hist. A. Rep. for 1896, passim (1897). The Ames study has been continued in Musmanno, Proposed Amendments to the Constitution, H.R. Doc. No. 551, 70th Cong., 2d Sess. (1929), covering the period from 1889 to 1928; and in Johnson and Hupman, Proposed Amendments to the Constitution of the United States Introduced in Congress from December 6, 1926 to January 3, 1937, S. Doc. No. 65, 85th Cong., 1st Sess. (1957).
19. 77 U.S. (10 Wall.) 511 (1871).
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a proposed overriding amendment. *McCulloch v. Maryland*\(^{20}\) caused the Pennsylvania legislature to memorialize Congress proposing an amendment limiting the federal government’s authority to incorporate a national bank. The first *Legal Tender Case*\(^{21}\) brought a proposal in 1870 to make United States notes legal tender; while the reversal of the judicial rule in a subsequent opinion\(^{22}\) elicited a diametrically opposite proposal.\(^{28}\)

The reaction of Congress to key Supreme Court opinions has been even more acute in the years since the coming of the New Deal. The famous *Schechter* decision of May 27, 1935, invalidating the National Industrial Recovery Act, 48 Stat. 195, produced a rash of joint resolutions on proposed amendments.\(^ {24}\) Other proposals on wages and hours,\(^ {25}\) or on the proposition that the court be required to submit certain rules to popular referendum, or to Congressional review\(^ {26}\) were advanced in subsequent Congresses. The most recent decisions to excite a series of proposed constitutional revisions, of course, have been the *School Segregation Cases*.\(^ {27}\)

Occasionally, as it happens, the ideological orientation of the court undergoes a change and an unpopular judicial rule is reversed. Whether in these circumstances the threat of amendment—*e.g.*, the proposed women’s minimum wage amendment in 1924,\(^ {28}\) which was not adopted by Congress, or the child labor amendment, which is discussed in Part IV of this study—in any way affects the change in court thinking is a subject awaiting (and probably defying) extended research.

However cumbersome the process may be, the use of the constitutional amendment as the ultimate, supreme act of control of a specific legal proposition has not received the study it deserves. Of the amendments which are considered in Parts II and III herein, the first is perhaps the most significant in terms of clarifying constitutional theory: *i.e.*, it was the immediate result of

\(^{21}\) 75 U.S. (8 Wall.) 603 (1870).
\(^{23}\) On the proposed amendments for the foregoing cases, see Ames, *op. cit. supra* note 17, at 245, 256, 258.
\(^{24}\) *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); 79 CONG. REC. 57, 7546, 8482 (1935).
\(^{25}\) 80 CONG. REC. 1143, 8763 (1936).
\(^{26}\) Id. at 3202.
\(^{28}\) 65 CONG. REC. 43, 515, 479 (1924); Adkins v. Children's Hospital, 261 U.S. 525 (1923), rev'd, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
the judicial opinion it was designed to overturn, and its drafting was a dramatic confirmation of the fact that political leaders of the early republic had tacitly recognized from the outset this means of counterbalancing judicial review. If the *Chisholm* case did not involve the same clearcut issue of the extent of court power which was present in *Marbury*, it was in many ways the essential counterpart of the latter case, establishing the power of the courts to state a constitutional proposition on a subject on which the Constitution itself might be silent.

II. AMENDMENT XI: ESTABLISHING A STATE RIGHT

One subject on which the Constitution was silent was the nature of state sovereignty under the federal system which the Constitution itself created. The Articles of Confederation had, of course, been posited upon the supremacy of the states; in effect, virtual total sovereignty was vested in the state members of the parliamentary league which was the Congress under the Articles. By the same token, the new government under the Constitution of 1787 was a sovereign agency in itself, albeit this sovereignty obtained only in the areas of delegated power, as the states somewhat plaintively tried to reiterate in the Ninth and Tenth Amendments.

James Wilson, early in the 1787 convention, had made the Lockean point that, just as an individual, "naturally a sovereign over himself," could not retain this total sovereignty "when he becomes a member of a civil Government," so a sovereign state yields an essential portion of its sovereignty "when it becomes a member of a federal Government." This relatively simple proposition was complicated immediately, however, by the question of the relationship between the altered sovereignties both of the individual and of the state in a federal system. Did a citizen of the United States *ipsa facto* acquire certain privileges by virtue of the sovereignty of the federal power which were in derogation of a sovereign prerogative formerly enjoyed by the state? Specifically, was the state reduced in sovereignty to the point where any individual citizen of another state might sue it under the federal Constitution?

The convention had not settled this point. The Virginia plan had proposed (on May 22) original jurisdiction for the Supreme Court, *inter alia*, in "cases in which foreigners or citizens of other

29. 1 FARRAND 180.
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states applying to such jurisdictions may be interested."80 The committee of the whole (on June 12) had amended this by striking the words "other states" and substituting the words "two distinct states in the Union." By August, the committee of detail had rephrased the clause to describe "cases . . . between a State and citizens of another State," the final language of Article III Section 2.

This language, of course, compounded the problem rather than resolving it. Did the order of words assure that only states could sue individuals and not vice versa? Hamilton, in a surprisingly sweeping concession to the advocates of state sovereignty, flatly stated that this was so:

It has been asserted that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following consideration prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretentions to a compulsive force. They confer no right of action independent of the sovereign will.83

Long before John Marshall's rulings on the contract and commerce clauses, the Supreme Court of the United States was to reject the Hamiltonian argument, and the states were to reinstate it by constitutional amendment.

The issue was joined in the August term of the Supreme Court in 1792, only three years after the new government had gone into operation and one year after the ratification of the Bill of Rights.

80 Id. at 22. It is interesting to recall that this proposal was endorsed and introduced by Randolph as a delegate from Virginia, when considering his argument as attorney general of the United States, in 1793; cf. notes 38-40 infra.

31. 1 FARRAND 211.

32. 2 FARRAND 186, 600.

33. THE FEDERALIST No. 81, at 125-26 (Bourne ed. 1942) (Hamilton). Chief Justice Jay specifically rejected this proposition in 1793; cf. note 45 infra. Both Madison and Marshall had assured the Virginia ratification convention in 1788 that the clause was designed solely to aid states in actions against citizens of other states. 3 ELLIOT, op. cit. supra note 12, at 533, 555.
including the restatement of reserved powers in the Tenth Amendment. Chisholm, a citizen of South Carolina and the executor of a former resident of Georgia, brought an original suit in the Supreme Court of the United States to enforce a claim against the state of Georgia. Earlier, in 1791, actions had been brought against the states of Maryland, New York and Virginia by various creditors. Aghast at such developments, a committee of the Virginia legislature in January, 1792, had protested that “the jurisdiction of the Court does not and cannot extend to this case . . . and that the State cannot be made a defendant in the said Court at the suit of any individual or individuals.” Attorney General Randolph was fully conscious of this pronouncement from his own state when he moved for judgment against the state of Georgia if the defendant failed to file an appearance at the February, 1793, term. In December, 1792, the Georgia house of representatives reacted vigorously, adopting a resolution that this suit, “if acquiesced in by this State would not only involve the same in numberless lawsuits . . . but would effectually destroy the retained sovereignty of the States.”

The Georgia house resolution apparently did not pass, but neither did the state file an appearance at the February term of the Supreme Court, although it did submit a written remonstrance through Alexander J. Dallas and Jared Ingersoll of Philadelphia, denying the jurisdiction of the court. Randolph then began his argument for judgment in favor of the plaintiff Chisholm. Striking immediately at the heart of the matter, the attorney general conceded that the states were sovereign in areas not preempted by the federal sovereignty. But the federal power is derived “immediately from the people,” and vis-a-vis this federal power the states “are in fact assemblages of these individuals who are liable to process.” As for the jurisdiction of the court in “controversies between a state and a citizen of another state,” which the Georgia supporters insisted should be construed only to mean the state as plaintiff, Randolph cited the Judiciary Act

34. Cf. Madison: “Interference with the power of the states was no constitutional criterion of the power of Congress.” 2 ANNALS OF CONG. 1897 (1791) [1789-1824].
35. 1 WARREN, op cit. supra note 15, at 91-92. The factual data on the background of this case are taken from Id. at 93 n. 1.
37. AMES, STATE DOCUMENTS ON FEDERAL RELATIONS 10 (1907).
of 1789.\textsuperscript{39} which relied on the preceding clause in Article III Section 2, granting original jurisdiction in cases where “a state shall be a party.” When the controversy is between states, said Randolph, it is obvious that one of them must be a defendant. If his first argument (on sovereignty) was to be relied upon, he concluded, the state as an aggregation of its citizens could be made a defendant under the one clause as readily as under the other; the clear intent of the Constitution, by this argument, was that states should be suable by other states \textit{and} by citizens of other states.\textsuperscript{40}

The state sovereignty advocates received comfort only from the words of Iredell, who declined to find jurisdiction unless Congress made it more specific in the judiciary statute.\textsuperscript{41} The other justices unequivocally voiced the most sweeping restrictions upon state sovereignty. States may not be sued without their consent \textit{in their own courts}, said Blair; but “when a state, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”\textsuperscript{42} Wilson added the moral argument that a state willfully refusing to discharge a contract should not be permitted to take refuge in a sovereignty which thwarted equal justice under federal sovereignty.\textsuperscript{43} Cushing considered, and rejected, the plea that states could not be sued by citizens of other states when the United States was not similarly suable; the sovereignty of the latter is superior to that of the states: “Whatever power is deposited with the Union . . . is so far a curtailing of the power and prerogatives of states.”\textsuperscript{44} Capping these opinions, Chief Justice Jay defined a constitution as a compact between people and government; by the federal constitution the people vested certain prerogatives in the federal compact and removed them from the state compacts. One of the essential prerogatives transferred insured equal justice to all by making both states and individuals equally subject to federal jurisdiction on federal questions.\textsuperscript{45}

\begin{itemize}
    \item \textsuperscript{39} Judiciary Act, § 13, 1 Stat. 73 (1789).
    \item \textsuperscript{40} 2 U.S. (2 Dall.) 419, 426 (1793).
    \item \textsuperscript{41} \textit{Id.} at 433. See the refutation of Iredell’s argument in Guthrie, \textit{The Eleventh Article of Amendment}, 8 \textsc{Columbia L. Rev.} 183 (1908).
    \item \textsuperscript{42} 2 U.S. (2 Dall.) 419, 452 (1793). This rule was corroborated in United States v. Texas, 143 U.S. 621, 642-46 (1892).
    \item \textsuperscript{43} 2 U.S. (2 Dall.) 419, 456; see also his denial of Georgia’s claim of sovereign immunity at 457.
    \item \textsuperscript{44} \textit{Id.} at 468-69. Marshall, C.J., accepted this principle in United States v. Clarke, 53 U.S. (8 Pet.) 436, 444 (1854). Its ultimate limitations were fixed by a divided court (5-4) in United States v. Lee, 106 U.S. 196 (1882).
    \item \textsuperscript{45} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471, 473, 477 (1793).
\end{itemize}
The speed with which the state representatives in Congress reacted to this bold assertion of federal supremacy has perhaps been unmatched in subsequent American history. The court's opinions were handed down on February 18; two days later, a resolution for amendment was introduced in the Senate. This failed of passage before the term expired, and a new resolution was introduced at the first session of the Third Congress which had passed both houses by March 4, 1794. In ratification, action was equally swift: between New York's on March 27, 1794, and North Carolina's on January 5, 1795, less than ten months were required to secure the necessary approval of three-fourths of the then fifteen states. Although a formal announcement that the Eleventh Amendment had become part of the Constitution did not issue from the Executive Department until January 8, 1798, the Supreme Court under Ellsworth was quite prepared to concede that the amendment had reversed the rule in the Chisholm case: A month after President Adams' proclamation, the court ruled that it had no jurisdiction "in any case past or future in which a State was sued by citizens of another State."

This did not end the matter, however. To have left the field so completely to the state sovereignty party as the Hollingsworth opinion did, would have been to encourage to a far greater degree the amendment process as a means of legislative rejection of judicial pronouncements. The validity of the constitutional process for altering the basis of the court's rule was dramatically and unequivocally established by the adoption of the Eleventh Amendment; but, as Marshall was to demonstrate, the full effects of constitutional revision could be contained, to a certain degree,
within subsequent interpretations of the amendment itself. The Eleventh Amendment, ratified within a decade after the adoption of the Constitution, reflected the still virulent resistance of state sovereignty to national power. The swiftness of its ratification was also an indication of the massive resurgence of anti-federalism which reached its zenith in the Jeffersonian "revolution" of 1800. But an antithetical development was even then taking shape, to be nurtured by Marshall's long tenure in the chief justiceship.

By 1821, when the Marshall court had a clearcut opportunity to fix certain limits to the extent of the Eleventh Amendment, the flood-tide of anti-federalism was passing. The experience of two decades on the bench and three decades of operation of the federal system in general had matured Marshall's own views; straws in the wind were decisions on state limitations and federal powers such as Hepburn v. Ellzey, Bank of the United States v. Deveaux, and Sturges v. Crowninshield. In Cohens v. Virginia, the court, speaking through the Chief Justice, construed the amendment narrowly, and then proceeded to determine that a writ of error bringing the case before the Supreme Court does not commence or prosecute a suit against the state but "acts only on the record," and preserves the appellant's "constitutional right to have his defense examined by that tribunal whose province it is to construe the Constitution and laws of the Union." Of the amendment itself, Marshall observed:

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union .... A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.

Three years later, in setting aside an Ohio statute authorizing

50. 1 FARRAND 180.
51. 6 U.S. (2 Cranch) 445 (1805).
52. 9 U.S. (5 Cranch) 61 (1809).
55. Id. at 407.
a tax upon the Bank of the United States, the court further refined the suability concept. The Eleventh Amendment "is the limitation of a power supposed to be granted in the original instrument," and this limitation is explicit in the language of the amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of a foreign state." Where the state is not a party of record, the action cannot be deemed to be against the state, said Marshall—a proposition he was compelled to retract four years later. But, insisted Marshall, an action against a state officer relying upon an unconstitutional grant of authority in a state statute is not inhibited by the Eleventh Amendment. In an opinion immediately following, the court further held that the amendment does not bar a suit against a state bank corporation, even where the state is a charter party.

Even Marshall had to concede that the Eleventh Amendment insured a state's immunity where the defendant was a state official acting within a legal scope of authority. Taney, C. J., in 1857, made this even more explicit by declaring that "[the] sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege . . . And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted; and may withdraw its consent whenever it may suppose that justice to the public requires it." Nor can the plaintiff avoid the prohibition of the amendment by making his state the agent for collecting his claim against another state.

The rule with reference to suits against officials of states was laid down by Harlan, J., in *Tindal v. Wesley*, on suits against

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56. 22 U.S. (9 Wheat.) 738, 850 (1824).
57. Id. at 850-858; and cf. Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).
58. Id. at 858-904.
63. 167 U.S. 204 (1897).
against states the rule of *United States v. Lee* on suits against the United States. In general, as Miller, J., pointed out in the latter case, the doctrine of sovereignty "is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not . . . a necessary party to the suit." Similarly, Harlan concluded, the Eleventh Amendment "gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law . . . If a suit against officers of a state to enjoin them from enforcing an unconstitutional statute . . . be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the state."

The tenor of judicial interpretation of the Eleventh Amendment in the more recent period of American history has been essentially the preservation of state sovereignty within strict circumscription. Thus adjudications since *Lee* and *Tindal* have tended to treat all suits against either state or federal governments as actions governed both by Article III and the Eleventh Amendment. Courts have been at pains in this period to distinguish between mandamus and injunction proceedings as means of controlling the actions of state officials, to be relatively liberal in assuming jurisdiction over tort actions against state officers, and to be relatively strict in discouraging tax actions against states. Finally, the general rule is that consent to be sued in its own courts does not imply a waiver of immunity from suit in the federal courts.

Most recently, of course, the issue of suability and state sovereignty has been raised in cases growing out of the school segregation decision in *Brown v. Board of Education*, where actions against school boards have been almost uniformly held not to be actions against the state. The explanation has been relatively technical: "Full relief can be obtained from the named defendants

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64. 106 U.S. 196 (1883).
65. *Id.* at 207.
without requiring the state to take any affirmative action."\textsuperscript{72} As Parker, Chief Judge for the Fourth Circuit, observed in 1956: "A state can act only through agents; and whether the agent be an individual officer or a corporate agency it ceases to represent the state when it attempts to use state power in violation of the Constitution and may be enjoined from such unconstitutional action."\textsuperscript{78}

With this trend of judicial thought, the refinement of the right asserted by the Eleventh Amendment would seem to be virtually complete. The amendment, historically viewed, represented the high tide of constitutional accomplishment by the states' rights school. It is significant that the Twelfth Amendment, adopted in 1803 and culminating the process of limitation upon federal authority begun with the Bill of Rights, was the last amendment until the Twenty-Second in 1951 to be essentially a restraint upon federal power, directly or indirectly.\textsuperscript{74} In the intervening century and a half, constitutional amendments aimed at strengthening federalism or at asserting individual rights as against the states. The following part of this study relates to one of the amendments adopted at another high tide—this time, the high tide of the progressive movement—when the times stressed the application of the federal power to broad national social objectives.

\textbf{III. AMENDMENT XVI: ESTABLISHING A FEDERAL RIGHT}

The reorganization of the American federal system resulting from the Civil War, and occupying the years through the first Wilson administration, is one of the most significant and familiar chapters in our national history. Socially and economically, the United States in the last half of the nineteenth century was changing from a congeries of sections to a more homogeneous society increasingly interconnected by communications, transportation and corporate organization. Constitutionally and politically, it was shifting from a structure of government in which federal power was essentially devoted to supervising the relationships between states, to one in which this power was being called upon


\textsuperscript{73} School Board of Charlottesville v. Allen, 240 F.2d 59, 63 (1956), cert. denied, 353 U.S. 911 (1957).

\textsuperscript{74} The Twenty-First Amendment, repealing the Eighteenth, might be considered as a reduction in federal authority; the peculiar social aspects of prohibition, however, and the fact that the effect of the latter amendment was to restore the \textit{status quo ante}, renders the question moot.
to deal with economic problems which were not merely interstate but extra-state—in other words, problems peculiarly and exclusively national.75

In this period of fundamental reorientation, the courts were caught in a cultural lag which precipitated a renowned series of cases, in the generation after the Civil War, striking down efforts to broaden the federal regulatory authority.76 Once more the original intention of the framers of the Constitution, with respect to the nature of federal power, became the subject of impassioned controversy; and in the issue involving the extent of the federal taxing power there developed an impasse which, like the earlier question of state sovereignty, was at length to require a clarifying amendment.

The specific restraints upon the national government expressed in Article I Section 9—a forerunner, in its way, of The Bill of Rights as a restraint upon the federal government—presented the knottiest problem in the fourth clause: "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."77 It became essential at the outset to distinguish between "direct" and "indirect" taxes, something which, in spite of Mr. Chief Justice Fuller's generality expressed in 1895, was definitely-not clearly understood in 1787.78

Rufus King, who had demanded of the Philadelphia convention a definition of direct taxation to which "no one answered," told the Massachusetts ratifying convention that the primary purpose of the clause was to insure that representation and taxation would be apportioned and hence taxation evenly distributed.79 The record of the convention tends to bear out his contention.80 Hamilton pointed out that indirect taxes (e.g., "on articles of consumption") "must for a long time constitute the chief part of the revenue raised in this country. Those of the direct kind, which principally relate to land and buildings, must admit of a

76. E.g., Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873); Munn v. Illinois, 94 U.S. 113 (1876); Adair v. United States, 208 U.S. 161 (1908); Employers' Liability Cases, 207 U.S. 463 (1908).
77. Quaere, whether this clause, from its very wording, was intended to be more than a temporary provision.
78. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 579 (1895); and cf. Mr. Justice White's elaborate dissent, esp. at 630.
79. 3 Farrand 255; 2 Farrand 350.
80. 1 Farrand 590-606.
rule of apportionment.” However, the main objective, he agreed, was to insure a balance between representation and tax liability.

In 1796, almost precisely a century before the Pollock case, the question of direct taxes came before the Supreme Court in Hyilton v. United States, with Hamilton, as recently retired Secretary of the Treasury, arguing the case for the government. Mr. Justice Chase supported the judgment of the original court that the tax in question, a levy upon carriages, was not a direct tax but one on use or “expense.”

A general power is given to Congress, to lay and collect taxes, of every kind or nature, without any restraint, except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment. Three kinds of taxes, to wit, duties, imposts and excises by the first rule, and capitation, or other direct taxes, by the second rule.

I believe some taxes may be both direct and indirect at the same time. If so, would Congress be prohibited from laying such a tax, because it is partly a direct tax?

The constitution evidently contemplated no taxes as direct taxes, but only such a Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule. (Emphasis Added.)

Mr. Justice Paterson, a member of the Philadelphia convention, recalled that “the principal, I will not say, the only, objects that the framers of the Constitution contemplated as fully within the rule of apportionment were a capitation [e.g., poll] tax and a tax on land.” Iredell stressed that “as all direct taxes must be apportioned, it is evident that the Constitution contemplated
none as direct but such as could be apportioned; since this levy could not be so apportioned, he found it not to be a direct tax.

The pragmatic view adopted by the court in the *Hylton* case was taken as settled law for ninety-seven years. As the economic pressures of the Civil War forced Congress to seek additional sources of revenue, several taxes on income in various forms were enacted. The chief of these was the Act of June 30, 1864, which as amended reached to several forms of income, whose taxibility in turn was upheld by the court—including an insurance company’s receipts from premiums and assessments, an inheritance tax on realty, a levy upon state bank notes, and a general tax upon individual incomes. Against the background of this unbroken line of judicial interpretation extending from *Hylton* in 1798 to *Springer* in 1881, Congress in 1894 incorporated in the Wilson-Gorman Tariff Act a levy upon income derived from real estate. In challenging this section of the law, counsel for plaintiffs insisted that such a levy was barred by Article I Section 2 and Section 8 of the Constitution. To adopt such a view would require the court to upset a long line of firm judicial opinions to the contrary; doing just this, Mr. Chief Justice Fuller declared that it was necessary to “correct a century of error.” He then said:

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment. The prohibition is not against direct taxes on land, from which the implication is sought that indirect taxes on land would be constitutional, but it is against all direct taxes, and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. . . .

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state.93

The court was evenly divided on the first hearing of the case, Mr. Justice Jackson being unable to participate because of illness. Upon reargument, and with a shift in vote by Mr. Justice Shiras, the entire tax under the statute was held invalid.94 The shock of the opinion, the 5-4 division of the court, and the delivery a few months earlier of a ruling narrowly construing the new Sherman Anti-Trust Act95 precipitated a storm of criticism over the strict (some would say strained) construction of the Constitution.96 Nine resolutions for an income tax amendment were introduced in Congress between December, 1895, and the end of 1897;97 and between the time of the Pollock opinion and the submission of the Sixteenth Amendment in 1909, a total of thirty-three proposals on the subject came before Congress.98

The Sixteenth Amendment was introduced at the first session of the 61st Congress, and had passed both houses by July 12, 1909. Within a month, Alabama had ratified it, and on February 3, 1913 three states (Delaware, New Mexico and Wyoming) tied for the honor of completing the ratification.99 In this same period (1895-1909) the court itself was retreating steadily from the position its bare majority had taken in Pollock. There was a distinction, the court held, between taxes levied "because of ownership" and those levied upon "privileges" of ownership.100 Under the latter heading, however much the Pollock rule might make them resemble taxes under the former heading, the court found it possible to place taxes on sales on business exchanges,101 inheritance or succession taxes,102 a tax on manufactured tobacco in the hands

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93. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 580-81 (1895). Cf. the dissent of Harlan, J., on reargument, 158 U.S. 601, 639 (1895), stating that the Fuller opinion for the majority is "a judicial amendment to the Constitution."
94. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895). Cf. Fuller, C.J. at 635: "If it be true that the Constitution should have been so framed that a tax of this kind could be laid, the instrument defines the way for its amendment."
96. 2 Warren, Supreme Court in United States History 702 (1922).
97. Musmanno, Proposed Amendments to the Constitution 211. (1929).
98. Id. at 212.
99. Secretary of State Knox certified ratification on February 25, 1913.
100. Knowlton v. Moore, 178 U.S. 41, 80 (1900).
of a dealer which had already been subjected to a manufacturer's excise tax,\textsuperscript{103} a stamp tax on sales of stock certificates,\textsuperscript{104} a special tax on the business of refining sugar,\textsuperscript{105} and finally, an income tax on the privilege of doing business as a corporation.\textsuperscript{106}

By 1911, with the amendment already before the states and within a few months of ratification, the court found it possible to uphold the corporation income tax as an excise because it was imposed upon "business done in a corporate capacity," distinguishable from the kind of income tax which was "direct" because the latter "was imposed upon property merely because of its ownership."\textsuperscript{107} This, the same theme which had been sounded in the \textit{Knowlton} case, came very close to reducing the \textit{Pollock} rule to bankruptcy, or at least to creating a strong suspicion that with the Sixteenth Amendment becoming momentarily more likely to be ratified by the necessary majority, the court was engaged in a certain degree of "face-saving." This suspicion was not allayed by the judicial reaction soon after completion of ratification. As in the case of the Eleventh Amendment, the court found an early opportunity to comment upon the new constitutional provision and to concede that it specifically reversed all points of the \textit{Pollock} case. In a passage which is a remarkable example of obfuscation, Chief Justice White said:

[There] is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the \textit{Pollock} case was decided, that is, of determining whether a tax on income was direct not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment. From this in substance it indisputably arises, first, that all the contentions . . . concerning the assumed limitations as to the nature and character of income taxes . . . are in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish. Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved from apportionment . . . is

\textsuperscript{103} Patton v. Brady, 184 U.S. 608 (1902).
\textsuperscript{104} Thomas v. United States, 192 U.S. 563 (1904).
\textsuperscript{105} Spreckel's Sugar Ref. Co. v. McClain, 192 U.S. 397 (1904).
\textsuperscript{106} Flint v. Stone Tracy Co., 220 U.S. 107 (1911).
\textsuperscript{107} \textit{Id.} at 150.
also wholly without foundation since... the Amendment... forbids the application to such taxes of the rule applied in the Pollock case by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity and were placed under the other or direct class.\textsuperscript{108}

However, just as the judicial concession in the \textit{Hollingsworth} case was followed by a gradual restatement of limitations upon state sovereignty under the Eleventh Amendment,\textsuperscript{109} so the Sixteenth Amendment was to undergo subsequent interpretative refinements. The major step in this instance was taken in \textit{Eisner v. Macomber}.\textsuperscript{110} In this case, Mr. Justice Pitney took pains to reverse the sweeping concession of White in \textit{Brushaber}, that the Sixteenth Amendment restored income taxation to "the category of indirect taxation to which it inherently belonged." Instead, it was now held, the amendment merely removed the apportionment rule from direct taxes on income, and the key to constitutionality, declared Pitney, now became the definition of "income" rather than the historic distinction between direct and indirect taxes. Under this rule, "the essential matter" is that income is "a gain, or profit, something of exchangeable value \textit{proceeding from} the property, \textit{severed} from the capital... \textit{received} or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal." Where the subject of the tax is mere growth or increment of value in a capital investment, it is not income taxable within the meaning of the Sixteenth Amendment.\textsuperscript{111} The amendment, said the 5-4 majority, "applies to income only, and what is called the stockholders' share in the accumulated profits of the company is capital."\textsuperscript{112}

The \textit{Macomber} rule is a striking illustration (recalling the earlier judicial attitude with respect to the Eleventh Amendment) of the opportunities for reducing the impact of a constitutional amendment, particularly one which overturns a judicial position.\textsuperscript{113} However, there are obvious limits to the extent to which courts can read subtle refinements into the language of an amend-


\textsuperscript{109} Supra notes 51-62.

\textsuperscript{110} 252 U.S. 189 (1920).

\textsuperscript{111} Id. at 207-08.

\textsuperscript{112} Id. at 219. Cf. Mr. Justice Holmes' dissent at 219, and the detailed dissent of Mr. Justice Brandies, esp. at 220, 226, 233-37.

\textsuperscript{113} Supra notes 51-59.
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ment; and the amendment itself tends to limit the range of judicial pronouncement upon the specific subject. Thus, although the court has declined to retreat completely from the Macomber rule, it has certainly not enlarged upon it. Macomber dealt with a stock dividend, which Pitney held to be capital until sold or converted; but the same court, a year later, treated as taxable income a dividend of stock in a new corporation to which the old corporation had transferred all its assets.

Not the niceties of tax law, but the court's attitude toward the controls implicit in the Sixteenth Amendment is in point here. As Mr. Justice Stone was to point out in 1932, the touchstone of the taxing power of Congress is the constitutional stipulation found in the amendment vis-à-vis the general tax provisions of Article I Sections 7-9: "Congress, having constitutional power to tax [income], and having established a policy of taxing it, may choose the moment of its realization and the amount realized" for the exercise of its power. Whatever the disposition of the courts to set bounds to the language of the amendment, Stone's enunciation of this broad concept of plenary authority within the language seems to have assured the attainment of the amendment's primary objective—to bar the road back to the Pollock theory.

IV. CHANGING THE CLIMATE OF JUDICIAL OPINION

The Wilson administration of 1913-17 rode the high tide of the progressive movement which had begun with the Populists and had attained its first great national goals in the administration of Theodore Roosevelt. Popular election of senators, the federal income tax, national prohibition and universal woman's suffrage were written into the Constitution in quick succession as the groundswell of reform continued. In addition, various statutory branches of progressivism were enacted under the New Freedom: the Sherman Anti-Trust Act was supplemented by the Clayton Act, in an effort to counteract judicial construction which had narrowed the benefits of the earlier law; the Federal Reserve System and the Federal Trade Commission were created; and,

117. The Sixteenth Amendment, of course, had been passed by Congress and ratified by the states during the Taft administration.
in the Act of September 1, 1916, shipment in interstate commerce of goods manufactured with child labor was prohibited.

But the continuing cultural lag in the judiciary, gaining strength from the reaction against reform in the period immediately following the first World War, brought much of the Wilson legislative program to grief. Most emphatically was this demonstrated in *Hammer v. Dagenhart* decided in 1918; the manpower pinch of the war, and the slowing of the reform movement as national energies were diverted to the military effort, enhanced the conservative argument: commerce itself is subject to regulation under the Constitution, not the manufacture of goods before being put in transit; child labor was an incident of manufacture and hence a local problem. "To uphold the act upon the theory of police power it must be clear that interstate commerce is menaced and not something else outside that domain." By a 5-4 majority, Mr. Justice Day for the court accepted this line of reasoning.

The Congressional reaction to this opinion was reflected in two resolutions for amendment in the first session of the 67th Congress. Two years later, the movement had gathered the necessary momentum; and an elaborate report, submitted by the majority of the House Committee on the Judiciary, buttressed the argument for an overriding constitutional enactment with detailed information from the 1920 census on the extent of child labor in the national economy. By June 3, 1924 the amendment had passed both houses and was referred to the Secretary of State for submission to the states. Its provisions were perhaps ineptly phrased; in any case, there were words which were not calculated to allay the ever-present and ever-sensitive traditions of state sovereignty:

120. 247 U.S. 251 (1918).
121. *Id.* at 263 (argument for appellee).
122. *Id.* at 275; *cf.* the dissent of Holmes, J. at 277.
123. 61 Cong. Rec. 100 (1921). As early as 1914, an amendment relating to labor of women and children had been proposed. *Cf.* MUSMANNO, *op. cit. supra* note 97, at 157-45.
125. 65 Cong. Rec. 10139-40 (1924).
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1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

2. The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.126

The reasons for the wording of Section 2 of the "proposed Twentieth Amendment" were varied; at best, it was vague and in the nature of a policy statement rather than a specific constitutional provision.127 However this might be, the proposal appeared on the American scene at a highly inauspicious time. It was the "heyday" of normalcy, when the "Golden Twenties" displayed their greatest glitter. If the amendment was to be understood to be a bid to overturn an existing judicial rule, in the manner of the Eleventh and Sixteenth Amendments, its poor showing before the states upon ratification can only be attributed to a general public apathy with reference to the question, or perhaps even a distinct trend in local political sentiment in favor of the Dagenhart majority opinion. Within seven months after its submission to the states, the amendment had been rejected by thirteen legislatures. Aside from the question of national attitude toward child labor, two problems presented themselves as an outgrowth of this development: (1) Did the action of thirteen states (that is, one more than enough to block the necessary three-fourths majority of the then forty-eight states) automatically defeat ratification? (2) If not, and if one or more states might later reverse their vote, how long could an amendment reasonably be expected to remain before the states for action?128

These questions, while interesting aspects of constitutional theory, are only pertinent to this study insofar as they affected the continuing effort to override the rule in the Dagenhart and Drexel Furniture cases. In the absence of a stipulated time limit for becoming operative,129 the amendment continued to remain before

127. Cf. Musmanno, op. cit. supra note 97, at 129-44. Only five amendments of the twenty-seven which had eventually been submitted to the states have failed of ratification; two in 1789-91, on details of representation; one in 1810-12 on loss of citizenship; one in 1861-62 on protection of slavery; and the child labor amendment of 1924-37.
128. On a reasonable time for consideration of an amendment, see Dillon v. Gloss, 256 U.S. 868 (1921); this view, however, was specifically rejected by the court in Coleman v. Miller, 307 U.S. 433 (1939).
129. The Eighteenth, Twentieth, Twenty-First and Twenty-Second Amendments each provided a seven-year limit for state action on ratification.
the states, until by 1937, twenty-eight states had ratified it (including ten which reversed their former vote against ratification) and eleven stood on record as rejecting it, while three others had simply recorded a refusal to ratify. At that point, this state of affairs prompted one state court to assert that the amendment was no longer open to ratification inasmuch as (1) it had failed of acceptance by more than one-fourth of the states (counting the three refusals to ratify as equivalent to rejection), (2) when more than one-fourth were thus on record as rejecting, the other states were estopped from reconsidering their action (a proposition which could not be true in 1937, if it were not true in 1925, when the original one-fourth-plus-one opposition was first registered); and (3) the thirteen years which had elapsed since the original submission to the states exceeded any reasonable time limit. However, in the same year another state court came to exactly an opposite conclusion. Inasmuch as the Supreme Court declines to leave the final settlement of a constitutional question to state tribunals, it accepted jurisdiction in the Coleman case. In the 7-2 majority opinion, Mr. Chief Justice Hughes, speaking through Mr. Justice Stone, declared:

When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conceptions which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice. . . . On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve . . . can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic

130. See the "Chronology of the Child Labor Amendment" in Coleman v. Miller, 307 U.S. 433, 473 (1939). See also the court's review of the ratification and rejection problems in relation to the Thirteenth and Fourteenth Amendments; Id. at 448-51.
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conditions which have prevailed during the period since the submission of the amendment.  

In a concurring opinion, Mr. Justice Black declared that the Constitution gave Congress "exclusive power to control submission of constitutional amendments;" Congress is subject to no judicial review in this matter, and "the views of any court upon this process cannot be binding upon Congress."  

The Coleman case bears a relationship to the proposed child labor amendment roughly analogous to the relationship of Flint v. Stone Tracy Co. in 1911, to the impending ratification of the Sixteenth Amendment in 1913, with the fundamental distinction, of course, that the child labor proposal was not to attain final ratification. Both Coleman and Flint were in essence the shadows cast before a coming event, in this instance, the reversal of the Dagenhart rule two years later. The court which spoke so generously of Congress' prerogatives in determining upon policies of submission of constitutional amendments, and which so conspicuously by-passed the opportunity to apply the coup de grace to the child labor amendment itself, was a court which had undergone a massive readjustment in the years immediately preceding Coleman, from the period of systematic rejection of early New Deal legislation through the court reorganization struggle of 1937 to a new majority philosophy. Not since the Carter Coal Co. case, in the spring of 1936, had a major piece of New Deal legislation been struck down, and a succession of New Deal laws had been upheld. Soon to come on for review was a statute in which Congress, recognizing the moribund prospects for the child labor amendment, had clearly set the stage for a reversal of the Dagenhart rule. The Fair Labor Standards Act of 1938, inter alia, had declared:

Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum stand-  

119. Id. at 457, 459.  
120. Supra notes 100-109.  
121. This familiar phase of constitutional history need not be recapitulated here. Of interest in this general connection, however, is 2 Pusey, CHARLES EVANS HUGHES, chs. 70, 71 (1952); Jackson, STRUGGLE FOR JUDICIAL SUPREMACY passim (1941).  
ard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; ... and (5) interferes with the orderly and fair marketing of goods in commerce. (Emphasis added.)

Under the following section on definitions, the act dealt in detail with labor by children between the ages of fourteen and eighteen.

In reviewing the constitutionality of the act, Mr. Justice Stone, for a unanimous court, found that "Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision, and that such vitality, as the precedent, as it then had has long since been exhausted. It should be and now is overruled." Like Pollock, the Dagenhart case had at length entered the limbo of constitutional obsolescence. In the meantime, the child labor amendment had quietly died. The overturning of the former judicial rule had been effected, in this instance, by a statutory proposition enacted with a full consciousness of the changed climate of judicial opinion. This clear evidence of change was the key to success; it is worth noting that a Congressional enactment making reference to child labor had been struck down by the court as late as 1935, when the National Industrial Recovery Act was held unconstitutional. The climate of opinion, in this case general local political opinion, was equally a determining factor in the failure of the child labor amendment in the twenties and thirties.

In view of the continued rejection of the child labor amendment, even in the "heyday" of the New Deal, it can hardly be maintained that the proposal presented any threat to which the

142. United States v. Darby, 312 U.S. 100, 116-17 (1941).
143. See a series of court decisions leading away from the Dagenhart rule, cited in United States v. Darby, 312 U.S. 100, 116 (1941); compare this with the judicial retreat from Pollock, supra notes 100-106.
144. Technically and theoretically, each of the five amendments submitted but never ratified by a three-fourths majority, cited Musmanno, op. cit. supra note 97, is still before the states, with the exception of the amendment of 1861-62 which was specifically rejected by the Thirteenth Amendment. See, in general, Burdick, Law of the American Constitution 637 (1922).
court eventually paid heed. In the case of the income tax, the trend in judicial thought had already turned away from the unpopular rule; the Sixteenth Amendment reflected the trend rather than directing it. As for the child labor amendment, the deep-rooted opposition of many states, principally agricultural, made it practically impossible to utilize this method of reversing the existing judicial rule. This is not to say that the amendment method will not continue to serve this particular function, however, in cases where there is sufficient and determined popular disapproval of the position taken by the courts. Under such circumstances, ratification of constitutional change is fairly expeditious. Proposed amendments have sometimes been attacked on the ground that their subject-matter was not properly the province of the federal government; it is fairly well settled, however, that by the act of ratification the people of the United States deliberately place the subject-matter in the federal domain. Sometimes, too, as in the case of Darby, the court may ultimately find that federal competence in the subject-matter already exists.

Madison understood the practical value of the amendment as a means of correcting mistakes or adapting the national political organization to problems which might arise in the course of time. "That useful alterations will be suggested by experience could not but be foreseen," he wrote. Therefore,

it was requisite . . . that a mode for introducing them should be provided. The mode preferred by the convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the general and State governments to originate the amendment of errors, as they may be pointed out by the experience on the one side or on the other.

147. Stone, J., noted the argument of counsel in Coleman v. Miller that "one year, six months and thirteen days was the average time used in passing upon amendments which have been ratified since the first ten amendments; that "three years, six months and twenty-five days has been the longest time used in ratifying." 307 U.S. 453, 455; and cf. supra notes 46-48.


149. "But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal constitution; and it transcends any limitations sought to be imposed by the people of a state." Brandies, J. in Lesser v. Garnett, 258 U.S. 130, 137 (1922).

150. The Federalist No. 43, at 301-302 (Bourne ed. 1942) (Madison).