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IN CONVENTION ASSEMBLED

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I. INTRODUCTION

"IT WAS NEVER MEANT that this Court have such power," protested Justice Hugo Black in December 1967, "which in effect would make us a continuously functioning constitutional convention." The senior Associate Justice on the Supreme Court was discussing here what he called distortion of the fourth amendment in order, as was often said, to "keep the Constitution up to date," or "to bring it into harmony with the times." He acknowledged that constitutional language required interpretation and in interpreting the Bill of Rights he would "willingly go as far as a liberal construction of the language" took him, but anathema was the degree of judicial change which fell within the purview of the constituent power, the power specifically to construct the basic law of the nation. This power is formally lodged in no permanent governmental body although governmental bodies have effected substantial constitutional change through usage and interpretation. Such changes, as well as the 25 formal amendments, have never been the product of an assembly considering in broad perspective the country's fundamental problems, processes, and institutions. Whether or what kind of a gathering is possible is not certain, but it is unmistakable that the American people need a serious collective review of their situation. Problems face us that we avoid only at the peril of the nation itself.

For the first time since 1789, the year 1967 seemed to offer a real possibility of calling a convention to amend and perhaps to alter comprehensively the Constitution of the United States. The origin of the new convention movement, like the origin of many constitutional amendments proposed in Congress over the years, lay in protest against the use made by the Supreme Court of its power of constitutional

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interpretation. Beginning in 1962 with *Baker v. Carr*, a series of decisions required relative equality in apportionment of legislative districts to approximate the ideal of “one man, one vote.” Already disquieted by the Court’s decrees on segregation and other controversial issues of recent decades, vested political interests in many of the states resented and tried to counteract the redistricting decisions. Failing to get constitutional amendment through congressional proposal and state ratification, proponents of change sought to achieve their ends by resorting to the alternate but as yet untried mode of proposal set out in article V, a constitutional convention that Congress was directed to call upon “application” from two-thirds of the state legislatures.

By early 1967, petitions for a convention had been submitted by 32 states, but during the ensuing months, as other legislatures failed to add to the total, the prospect that a convention might be called seemed to have withered in the glare of publicity, and concern shifted to more pressing matters. Whether, however, a sufficient number of states puts Congress into a position where calling a convention becomes an obligation, and whether elements of danger derive from such an experience, its seeming imminence for a time highlighted the need for a careful look at the convention mechanism for changing the Constitution, and at the possible preparation and procedures to be undertaken, and most importantly at the vital, substantive needs for broad constitutional reevaluation which have not been but somehow must be adequately faced.

If the nation’s future is to be secured, we, as a people, must try to answer the vital questions at the core of our constitutional system. A review of past constitutional change, of present considerations, and of future possibilities may indicate the necessity for a new approach to such questions. In any event, we must examine our institutions, both public and private — their real and assumed operation, their place in the world of nations, their relationships with each other, and their relationships with the people in a democratic society. Greater than the danger of an uncharted constitutional convention is the danger that we will not in time take a critical look at what we are, at what we are becoming, and at what we want to be.


3. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application 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. . . .
II. CONSTITUTIONAL UNFOLDING IN THE UNITED STATES

It is a striking fact that in the United States we know about formal textual constitutional change primarily in connection with state constitutions, which in many states are in constant process of being reconsidered. Often these constitutions, either in their original form or as freely amended, are virtually codes of laws. The more details they contain the more frequently and extensively they require amendment or replacement. Very different has been our experience with federal charters. The Continental Congress gave us the first of our federal constitutions in the form of the Articles of Confederation. That document, virtually unamendable because of the requirement of unanimous consent of the states, gave way in 1789 to the present Constitution by way of a kind of constitutional revolution in that it was put into effect without unanimous approval and by methods other than those prescribed in the Articles. In terms of text the Constitution of 1789 remains unchanged except for the addition of 25 amendments, the first 10 of which were practically parts of the original document. Of the remaining 15, only the three growing out of the Civil War greatly altered the course implicit in the constitutional document — or in its interpretation apart from occasional aberrant decisions. The circumstances surrounding the adoption of these three amendments also suggest the degree of national upheaval apt to be required to bring about fundamental changes — a degree of disruption hopefully not now in prospect.

Over many decades Congress received applications calling for constitutional conventions to propose amendments on various subjects. By the middle 1950's the total ran to more than 200, involving such matters as the direct election of senators, federal income taxes, prohibition of polygamy, repeal of the eighteenth amendment, and world federal government. On no subject, however, did the number of petitions ever approximate the requisite two-thirds of the states. Moreover, substantial pleas to remake the Constitution went unheeded. William MacDonald's A New Constitution for A New America, published in 1921 in the light of reflections on the operations of American government through World War I and advocating use of a constitutional convention, received little attention even from the

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realm of theoretical scholarship. The same was true of Henry Hazlitt's *A New Constitution Now*, which appeared in 1942 under the impetus of the author's disapproval of the claims to power advanced by Franklin D. Roosevelt as President, and of liberal trends in judicial decisions arrived at in part by Roosevelt appointees.

Differences in purpose partially explain the minimizing of formal constitutional alteration in the Federal Constitution, by contrast with frequent changes in many of the states. As Alexis de Tocqueville noted on the occasion of his American tour in the 1830's, constitutional forms were much the same at the two levels of government but they had different objects. While state constitutions provided for government in geographical areas wherein the people had a common sense of belonging and some experience at working together, the Federal Constitution was intended to make "more perfect" a recently established Union of States which, for all their common bonds of European heritage and problems of frontier living, were accustomed to unity and common action only in emergencies such as that of war. Whereas the state governments were the successors to colonial governments, the Union was a largely new instrumentality. Its worth was yet to be proved and its capacity for survival yet to be demonstrated. For the preservation of this still relatively new Federal Union Daniel Webster pleaded in 1830 in his "Reply to Hayne" when he appealed for "Liberty and Union, now and for ever, one and inseparable!" In the same year Andrew Jackson defended the ideal of Union against nullification in the terms of his famous toast, "Our Federal Union: it must be preserved," and during the Union's greatest jeopardy Abraham Lincoln lauded it as "the last, best hope of earth."

Out of preoccupation with a Union always threatened with dissolution, with a Union which despite its internal vulnerability stood as the mark of identity of Americans with respect to foreign friends and foes, rose a kind of "cult of the Constitution" which had no counterpart in attitudes toward the constitutions of the several states. None of the state constitutions was thought to be, as was the federal

document, the product of the Deity on only a slightly lower level than the Ten Commandments or perhaps the Scriptures generally. The original opponents of the Constitution, the so-called Antifederalists, shifted their strategy of opposition almost immediately upon adoption of the Constitution and sought to influence the course of government, not by attacks upon the new charter, but by challenging programs of their opponents as "unconstitutional." Even the growing dissidence in the South that resulted ultimately in the Civil War long showed itself not as antagonism to the Constitution, but rather as a protest against northern interpretation which allegedly denied to the South its constitutional rights.

With the termination of the Civil War the Union ceased to be in danger of dissolution, but critical issues of federalism, such as the scope of the congressional taxing and commerce powers, remained. The task of coping with these issues continued to punctuate the character of the Constitution as a fundamental document not lightly to be subjected to major change. Through Supreme Court interpretation the Constitution became more and more the instrument for defense of property rights against governmental intervention — intervention stimulated in part by the perpetual struggle among economic interests but necessitated also by the growing complexities of burgeoning industrialism and technology. The sanctity of the Constitution and the sanctity of private property tended to merge into the same set of convictions. By dominant elements in society, including the Supreme Court, both were viewed with reverence. "One of the periodic phenomena of American history," wrote Thomas Reed Powell with humorous sarcasm in 1923,

is the mystical adulation of the Constitution in the pious faith that it contains in itself the saving grace that it will shield the interests of the worshippers from the ambitions of those whose interests are adverse. Self-styled patriotic societies have spent themselves lavishly in expounding the gospel according to Mammon and identifying it with the parchment that came from Philadelphia.11

During the 1920's and 1930's a tendency to identify the Constitution with the content of judicial edicts became more and more widely recognized. Charles Evans Hughes, who in earlier years had been made to writhe by misuse of his statement torn out of context that "the Constitution is what the judges say it is,"12 was more careful in his phrasing in a book published in 1928, but he did say there that

since the Supreme Court's appellate power was determined by Congress, a body representing the people, it was the will of the people that sustained and made effective the extraordinary power of the Court.\(^\text{13}\)

He seemed to be saying, indeed, that although Congress and the people were governed by decisions of the Court in matters of constitutional interpretation, the will of the people in the long run determined what the Court said about the content of the Constitution. The spread of such sentiments and the promotion of more realistic understanding of the Constitution and of the Court which defined its meaning may have incidentally jeopardized the hitherto prevailing reverence for the Constitution and for the Court as its interpreter.

The Constitution passed a crisis when criticism of Supreme Court interpretation reached a climax with the New Deal period. However, as the Court held unconstitutional measure after measure enacted for coping with the depression, New Dealers argued, not that the Constitution be abandoned in the public interest, or for the most part even that it be amended, but rather that the Court should return to a true interpretation of constitutional provisions. When, under the threat of President Roosevelt's court-packing plan, the Court yielded skillfully to dominant public sentiment, the result, as phrased in the language of Attorney General Robert H. Jackson — soon to become a member of the Court — was "a rediscovery of the Constitution itself."\(^\text{14}\)

A vast redirection of constitutional interpretation saved the Court and the formal Constitution for a time, but agreement on the true contours of the Constitution was not reached. The decades of the 1940's and 1950's were marked by an enormous amount of controversy over constitutional issues among the people and simultaneously in the decisions of the Supreme Court. No doubt encouraged by dissidence among members of the Court, public debate about issues dealt with by the Court and its mode of dealing with them, led, during the late 1950's, to congressional attempts to limit its powers, with the outcome for some time in doubt.\(^\text{15}\)

III. CURRENT UNREST OVER THE CONSTITUTION

The early 1960's brought to the Constitution a threat beyond denunciation of the Supreme Court and proposals for statutory amelioration. So serious was the threat that it nearly culminated in a national constitutional convention and brought at least some awareness of questions our people should be facing in concert. The General Assembly of

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13. C.E. Hughes, The Supreme Court of the United States 27 (1928).
15. See W.F. Murphy, Congress and the Court (1962).
the States, held biennially by the Council of State Governments, proposed the adoption of three drastic constitutional amendments.\footnote{16} While the Council has in the past done much to create awareness of the problems of state and local governments and to bring about attempts at solution, it here made itself the instrument of some of the most reactionary elements in the country. One of the proposed amendments would have so modified article V as to require Congress to submit directly to the states for ratification any amendment proposed in identical form by two-thirds of the states. Congress would have played no part in official debate on such proposals, and no national constituent body would have been organized to act even as an automatic consenting agency. The states, in other words, would have been enabled to change the Constitution without any responsible national consideration or debate. Another proposed amendment, similarly drastic in character, would have subordinated the Supreme Court by setting up a Court of the Union, consisting of the chief justices of the states, with power in certain areas to reverse Supreme Court decisions. The third proposal would have deprived the federal judiciary of all jurisdiction with respect to the apportionment of state legislatures.

The combination of these suggested constitutional changes with the apparent support of powerful state and political interests caused such concern that Chief Justice Warren entered the political arena to the extent of asking for a great national debate, lest action be taken on the proposals without awareness of their implications.\footnote{17} Resolutions containing each of the three proposals were introduced in Congress. While the first two — as listed above — were so extreme that for the time being support for them was notably lacking, the third, to take from the federal judiciary all jurisdiction with respect to apportionment of state legislatures, had a severe impact. Controversy over the reapportionment issue dealt a blow to the "cult of the Constitution" and brought to the political surface the possibility of resorting to a national convention for constitutional change.

Displeasure mounted in Congress when in Reynolds v. Sims\footnote{18} and other decisions soon to follow, the Supreme Court fulfilled the pros-

\footnote{16} For a report of this action see The Sixteenth General Assembly of the States, \textit{State Gov't} 2, 10-15 (1963).


\footnote{18} 377 U.S. 337 (1964).
pect made clear in *Baker v. Carr* and held that both houses of a state legislature must be apportioned on a population basis. Almost at once the House of Representatives responded with a resolution adopting the Council of State Government's recommendation that federal judicial review be eliminated for state apportionment cases. The Senate moved more slowly. In 1965, the Senate Committee on the Judiciary held extensive hearings on various other more modest proposals to protect against the equal representation requirement, i.e., applying the requirement to only one house of each legislature. The following year a compromise measure, commonly known as the Dirksen Amendment, growing out of these resolutions and hearings, failed to pass the Senate.

While the Senate was still weighing the resolution in behalf of the Dirksen Amendment, its proponents, perhaps as a threat of more drastic action if the resolution was not adopted, were persuading state legislatures to file with Congress petitions calling for a constitutional convention to deal with the issue of reapportionment. Taking note of these petitions in the 1965 hearings on Dirksen's resolution, Senator Paul H. Douglas of Illinois predicted that Congress would refrain from calling a convention even if the requisite number of petitions were filed. Congress, he argued, could not be compelled to act and he shuddered to think what might happen if a convention were called. "I do not believe," he said, "either conservatives or liberals, Democrats or Republicans, would risk the possible results of such a constitutional convention."

Although the accumulation of state petitions calling for a convention continued to be noted from time to time in discussion of efforts in Congress to propose an amendment leaving the subject of legislative districting partly or wholly to the states, widespread concern developed only in the early part of 1967, when it became known that the states had submitted 32 of the 34 petitions needed to invoke congressional action. This "discovery" gave rise to anxious comments on the floors of Congress and in print about the risks implicit in assembling in a turbulent era a constitutional convention which, once assembled, might like its 1787 predecessor instead of merely proposing amendments go far beyond to change drastically and fundamentally our national charter. Various members of Congress began, as Senator

22. Many of these materials published down to June, 1967, were digested or discussed in *American Enterprise Institute, A Convention to Amend the Constitution? Analysis No. 5, 90th Cong., 1st Sess. (1967). See also Hearings on S. 2307 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967), House Judiciary Comm., supra note 5.*
Douglas had suggested, to intimate their intention to obstruct, either
directly or on the basis of challenge to some of the petitions submitted.\textsuperscript{23}

The workability of the convention provision of article V became a
central question. Although the article provided that on receipt of the
prescribed number of applications Congress "shall call" a convention,
no method was provided whereby legal coercion could be used against
that body. The Supreme Court, which a century earlier had refused
to act against the President on the ground that it could not coerce a
coordinate branch of the government,\textsuperscript{24} would presumably be no more
willing to attempt to coerce Congress. On policy grounds, indeed, its
reluctance might here be even greater. Not only was nullification of
its own reapportionment decisions centrally contemplated, but if the
convention were dominated by the conservative elements, initially most
to the fore, it might extend its action to some such device as the hitherto
advocated Court of the Union to review constitutional decisions of
the Supreme Court.

Apparently, therefore, the primary coercion to be exercised against
Congress would have to be not legal, but political — in the nature of
criticism for refusal to obey a clear constitutional command, with con-
sequent reprisals at the polls. Since legislators seek to avoid such risks,
they sought acceptable legal grounds for refusal to act. Some of the
petitions already filed were impugned as not having been filed or
phrased properly, or as having lost their potency through obsolescence,
or as invalid because the legislatures which had filed them had now
given way to legislatures equitably apportioned and not necessarily in
sympathy with the petitions resting in Washington in the names of
their states.\textsuperscript{25}

More and more, thoughtful persons began to consider questions
that had been weighed by some members and staff of the House
Judiciary Committee a decade earlier. It was suggested that in advance
of a possible crisis Congress should enact a general measure covering
the several aspects of the problem of calling a constitutional convention
should enough applications ever be accumulated. What, for example,
would constitute a valid application? Should the signature of the gov-
ernor be required? In what manner should the application be submitted
to Congress? Would the application retain its potency only during
the life of a particular legislature or of a particular session of Congress
or would it remain alive indefinitely with respect to the issue with
which it dealt? Could a subsequent legislature recall or nullify the

\textsuperscript{23} See \textit{American Enterprise Institute}, supra note 22.
\textsuperscript{24} Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867).
\textsuperscript{25} See \textit{American Enterprise Institute}, supra note 22, at 16–31. See also
Twyman, \textit{They Want to Tamper with the Constitution}, \textit{Sat. Eve. Post}, June 17, 1967,
application previously filed, so that it would no longer contribute toward the total of two-thirds of the states, or did it take on life independent of the legislature? Within what period was Congress obligated to call a convention? What should be done about a meeting place, compensation, length of session? How should the membership be allocated as among the states? Should voting be done state by state or should each delegate be authorized to vote independently? Could or should the convention be limited to the subject dealt with in the applications from the states, or could it in any event follow the example of the convention of 1787 and deal with other subject matter and perhaps present an entirely new Constitution? By what method should the proposals of the convention be submitted for ratification by three-fourths of the states? Might Congress in any way intervene so as to influence either procedure or content? Could and should the judiciary be permitted to play any part at all in these matters, or would it in any event regard the questions as "political" — as non-justiciable, to be resolved only by the "political" branches of the government?

From outside immediate official circles, a vehement, if not melodramatic, contribution to the debate came from Theodore C. Sorensen, astute former counsellor to President John F. Kennedy. Speaking to lawyer members of a Jewish group much concerned about the Arab-Israeli war, Sorensen sought to apply to our dilemma over a constitutional convention the lesson of that war, which nobody desired and which came upon the parties for lack of proper advance measures. "Far too long too much had been left undefined, unclarified, uncertain, or unorganized — and the result was a war which no one really wanted," he said. There was, he continued, "a coming domestic crisis of which most Americans are not yet aware and for which our leaders are not yet prepared — a constitutional crisis, potentially the most serious since our Civil War."26

Impressed by the peremptory requirement of article V with respect to action by Congress and presumably familiar with a draft bill which Cyril F. Brickfield had presented a decade earlier through the House Judiciary Committee,27 Sorensen urged advance enactment of a general bill with respect to many of the questions suggested above. Thus Congress might legitimately escape its current predicament by, for example, limiting the life of pending applications, requiring approval by state governors, and having convention voting done by individual delegates selected on a population basis rather than providing that states

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27. HOUSE JUDICIARY COMMITTEE, supra note 5, at 79-81. For reprinting of Brickfield's proposed bill see AMERICAN ENTERPRISE INSTITUTE, supra note 22, at 54-56.
should vote as individual units, with disproportionate power in the hands of small states. Sensing in the country "a growing mood of ugly irresponsibility and reaction — reaction against the Supreme Court, the Federal Government, civil rights and civil liberties," he feared from a convention dominated by state factions the kind of performance recently demonstrated in the General Assembly of the States. A convention selected in such a mood and without the kind of restrictions Congress could provide in a prior enactment would be likely to follow the example of its 1787 predecessor and, going beyond the subject matter which occasioned the call, deal with any subject it saw fit. "Even a convention dominated by liberals," he thought, "could not be expected to adjourn without trying its hand at improving on the classic work of 1787 — and that, too, could only lead to catastrophe."  

IV. THE ERVIN BILL

Convinced of the need for Congress to act in advance of a demand for a convention, Senator Sam J. Ervin, Jr., of North Carolina introduced on August 17, 1967, a bill to provide rules and regulations for the calling and administration of a constitutional convention. The problem of attempting clarification of the amending process, he contended, should not be permitted to be distorted by partisanship on the issue of reapportionment — a subject on which he himself was nevertheless admittedly a partisan. Redrafted from but drastically modifying the earlier Brickfield draft, the Ervin bill dealt with many of the questions phrased above, even though its author admitted that there were legitimate doubts as to the power of Congress to resolve some of the issues.

Among the provisions of the Ervin draft were many that were likely to be hotly controversial, politically and constitutionally, should the bill reach the floor of the Senate. A valid application from a state was required to be in the form of a request for a convention to propose one or more amendments "of a particular nature," thereby excluding any petition to survey the Constitution generally. Left to the state legislatures was the setting of procedures, and their decisions were made binding on state and federal courts and on Congress. Approval by the governor was not required. An application submitted through

prescribed procedure remained in force for 6 calendar years, but a state could rescind its application provided that it did so before the necessary two-thirds had filed petitions on the subject, with Congress having sole power to determine timeliness as to rescinding.

Prescribing the mode of assembling a convention, the bill allocated delegates to states according to the number of their Representatives in Congress, with each state determining its own mode of selection. Before taking his seat each delegate was to “subscribe an oath not to attempt to change or alter any section, clause, or article of the Constitution or propose additions thereto which have not been specified in the resolution calling the convention.” In the decisions of a convention a state would have one vote, determined by a majority of its delegates; in the event a state’s delegates divided evenly, the action of the state on that particular issue was not to be counted. A convention had to terminate its proceedings within 1 year unless Congress authorized extension. Further, to maintain state and congressional control, the bill provided that no convention “called under this act” could propose any amendment “of a general nature different from that stated in the concurrent resolution calling the convention” and that any controversy arising under this provision was to be determined solely by Congress.

By the end of 3 months of one of its own sessions, after receiving proposed amendments from a convention, Congress was to submit the proposals to the states unless in the interim a concurrent resolution had been adopted “disapproving the submission of the amendment to the States on the ground that its general nature is different from that stated in the concurrent resolution calling the convention.” Ratification was to be by state legislatures (without the option given to Congress by article V of requiring that ratification be by state conventions). State legislatures were to determine their own rules of procedure for ratification and their decisions were to be “binding on all others.” Once again the assent of the governor was not required. A state could rescind its ratification at any time prior to ratification by three-fourths of the states. Still debarring judicial intervention, the bill provided that Congress should have “the sole power of determining all questions relating to the ratification, rescission, or rejection of amendments proposed to the Constitution of the United States.”

Critical as might be the problems involved in the bill or in the accumulation of applications for the calling of a convention, hearings were held on only 2 days, as Congress and the nation faced more glaring crises in the war in Vietnam, the war on poverty, crime in the streets, and growing inflation. The hearings, presided over by Senator Ervin with Senators William Proxmire and Everett Dirksen, Professors Alexander Bickel and Wallace Mendelson, and Theodore
Sorensen as prominent participants, provoked scattered editorial and article comment. Immediate reactions included a *Washington Post* editorial urging elimination from article V of provision for the convention device and an article by Charles L. Black, Jr., of the Yale School of Law, scathingly criticizing many provisions of the bill and expressing the hope that it would be “sunk without a trace.” The bill went back to the committee for redrafting in the light of suggested changes and for re-presentation in 1968.

V. CLIMATE OF OPINION

A variety of inferences can be drawn from the fact that after the initial publicity given to the accumulation of 32 petitions for a convention to deal with legislative apportionment a year passed without additions to the list and in some states movements were started to rescind petitions already submitted. Hostility to apportionment on a strict population basis may be dissipating; original advocates may be having second thoughts about encumbering themselves with a convention whose performance cannot be predicted; and more than is sometimes apparent, the present Constitution may still have a strong hold on the sentiments of the people. Current inaction or slowness to act, furthermore, lends credence to assertions that many of the petitions already filed were railroaded through state legislatures or were adopted merely in a mood of irritable protest without any expectation that a convention would actually be called. The mood in which the petitions were adopted may well resemble that of members of Congress who year after year with no hope or intention of succeeding introduce resolutions calling for adoption through customary methods of numerous constitutional amendments in which minorities of their constituents are interested.

The opposition to formal constitutional amendment probably does not lie in fear of the geographical disintegration of the Union which prevailed down to the Civil War. Moreover, in the light of the persistent criticism being directed at the Constitution as now interpreted — the Constitution not as the work of the Framers but as the instrument of the current majority on the Supreme Court — there is not much indication that public sentiment is now dominated by that attitude of deep reverence and deference long ago called the “cult
of the Constitution." Certainly no informed and thoughtful person is so naive as to believe that the real Constitution, the living entity behind the document, remains unchanged apart from formal amendments.

What may well be involved is widespread conviction that under the Constitution as it now stands, interests, both individual and group, are so entrenched and balanced, and changes have been worked out so gradually and with such safeguards through implementation by the legislative, executive, and judicial branches of the government, that it would be disturbing, possibly dangerous, and in any event unwise, to assemble a convention which might propose constitutional amendments, the very discussion of which would create more public strife in an already tumultuous world and further disclose our internal dividedness to the watchful eyes and ears of menacing foreign powers. Better to live with a complex of present ills than to run the risk that sweeping changes might bring ills of kinds and dimensions not now known or imagined.

We may also have an aversion to looking at the kind of nation we have become other than in terms of our material prosperity and our great physical power. For these and other reasons we may be tacitly committed to the vaunted British policy — or lack of policy — of mere "muddling through." We have been a conservative rather than a revolutionary nation, preferring the processes of slow and largely imperceptible change to formal or sweeping interference with what are regarded as the normal adjustments of massive social pressures. Ethical and other theoretical implications of such change are almost never directly faced. We tend to shun, from whatever source, advocacy of changes that might affect our lives beyond the range of things familiar and already thought out. Rooted deep in our modern culture seems to be scorn for, or at any rate distrust of, the thinker, the orator, the man who writes persuasively, the professed and articulate man of principle. Herein lies our peril.

VI. Unanswered Questions

If the suggestions about our closed-mindedness are valid it may be well to remember in terms of historical illustrations that if, as has been said, Great Britain acquired an empire in a "fit of absent-mindedness" it also lost that empire with a similar lack of design. The United States could drift into a comparable predicament with respect to both its foreign and its internal relations. Our traditional and preferred pragmatism may not suffice. Going beyond and deeper than journalistic treatments of the surface problems of the hour or the publicity given to the proposals of the President or current controversies in Congress
and other agencies, we need creative and critical survey in depth of our overall purposes and our means for their achievement — the very kind of comprehensive thought and planning, both expert and grass roots, which our customary piecemeal and highly pragmatic approach to the complexities and dynamics of government tends to discourage. If we do not need, or dare not risk, a constitutional convention that might be merely an aggregation of pressure groups juggling and log rolling for mutual advantage, the kind of body that too often assembles in matters of state, we nevertheless need a "convention" of thought and speculation about the underlying assumptions of our constitutional system. We shall be better served by overcoming our aversion to bold, broad, hard thought in the tradition of the Founding Fathers than by merely considering adoption, by any means whatever, of constitutional amendments dealing narrowly and specifically with legislative apportionment, or prayer in the public schools, or the scope of Supreme Court jurisdiction.

No more than could the Founding Fathers can we properly avoid, for example, root distinctions between the provinces of the governors and the governed. With a heritage of monarchy which they sought to escape, the Framers of the Constitution went so far as to establish a republic rather than a monarchy but did not go so far as to institutionalize complete democracy. They provided for government not directly by the people but by elected representatives and their appointees. Even here an anchor to windward was furnished by setting legislators and the President in a system of balance of powers with a life-chosen independent judiciary.

In modern constitutional development, as always, we face the threat of tyranny from the few and incompetence of the many to wield the major powers of government. Even with education readily available beyond any past dimensions, the problems of living and of governing outrun the educational process. Yet if we are not to surrender without resistance to would-be rulers with few qualifications other than the desire to rule, we must find ways of developing the skills for operating with some kind of consensus the heritage we have acquired.

Although possession of information is not enough, the solution of problems under our constitutional system depends in part on the proper flow of information. In this respect the citizen who would play a part in governmental decisions has an increasingly difficult task. He is surfeited with propaganda from interested parties and at the same time debarred from critical facts placed in proper context. Since in fields such as national defense, industrial regulation, and space exploration, a high degree of secrecy is, and in some degree must be, maintained, information relevant to government policy is not generally available.
and may not always be available even to those directly responsible for policy-making. No layman and no officer of government has a sufficient synthesis of information to make him either fully at home in our complex society or an effective agent of it.

Unavailable in a representative democracy is the solution of the tyrant or dictator who promotes and perhaps believes the theory of his own supreme wisdom and his right and capacity to rule. During World War II, Soviet Prime Minister Vyshinsky, when told by President Roosevelt that the American people might not like some proposal under discussion, is said to have remarked that it was time for the American people to learn to obey their masters. Most Americans resent the concept of "master" and have no inclination to accept as masters their elected or appointed officers.

Yet, for some kinds of activities, concessions to leadership must be broad. Modern wars, for example, are not won by merely "citizens' armies." To mount a major war effort the entire society must be in some degree mobilized, disciplined, and reordered. Always there is the question of the extent to which the lives of the people ought to be caught up and molded by official government. To what extent must obedience be yielded to increasingly regimented and often militarized governmental leadership so that it may execute programs not understood or of which individuals and groups deeply disapprove? The fact remains that unless society is to succumb to tyranny or anarchy, we must be able to choose and accept leadership. It is essential that we search constantly for the best ways of choosing, working with, and, if necessary, dispensing with leaders according to some kind of constitutional, orderly pattern.

Any constitutional system must take into account all major concentrations of power within the society encompassed by it, including concentrations which constitute or represent powerful private governments. As of the 1780's, power in the United States was well dispersed among individuals and very small groups, save as it was exercised or planned to be exercised by national, state, and local governments. The business corporation, as a conditioner of our entire way of life, existed only in embryo. Both the opportunity and the peril of individuals lay in the fact that they were for the most part on their own, to do as they pleased and to survive or perish.

Today, in a mass of highly complex business relationships, the individual has been merged into and has become the instrument — perhaps the victim — and also the beneficiary of the business corporation. While many of these corporations are relatively small, the dominant ones penetrate vast segments of the economy. Some of them wield more power, determine the use of more money, and affect dras-
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tically the lives of more people than do the governments of some states. Yet the Constitution is utterly silent as to such instruments of power. They have had to be rationalized into connections with public government by assumptions that they were effectively controllable by regulation of them through their "members" — stockholders or officers as the case might be — and finally that under the Constitution they were themselves in effect "persons" and subject in many areas to treatment as such. By way of this legal fiction it is as if, for example, the General Motors Corporation, the American Telephone and Telegraph Company, and the man in the street — or at any rate the rapidly disappearing individual entrepreneur — were one and the same kind of entity. While for many purposes useful, this fiction is enormous and often leads to gross distortion of thought and action. These private governments are highly undemocratic, even by comparison with the feebleness of democracy in much of public government. They are primarily oligarchies, for all their formally held stockholders' meetings and their collective bargaining with workers — who often express themselves only through equally oligarchic labor unions. Yet the patterns of all our lives are being shaped through the operations of such instrumentalities, which are only ill-fitted appendages to our present constitutional system.

The picture of what our constitutional system is really like is infinitely complicated. A striking illustration occurs in the field of civil-military relations. In a statement made in connection with the retirement of Secretary of Defense Robert S. McNamara on February 29, 1968, President Lyndon Johnson spoke of the Pentagon as "one of the most important buildings on this earth." With defense and war expenditures making up by far the largest single segment of our national budget, the growth of a powerful military establishment has been only natural, as is the evolution from within its own mechanism and its own dynamics of the policies which determine the conditions of peace or war. Equally natural is the development of a working affinity between such an establishment and the gigantic industrial corporations to which contracts are let for the production of defense and war materials.

This military-industrial alliance became a matter of so much concern to President Dwight D. Eisenhower, who had the opportunity to see it from the point of view of both civilian and military leader, that in his farewell address as President in 1961, long before we had reached our present military situation, he issued the following admonition:

This conjunction of an immense Military Establishment and a large arms industry is new in American experience. The total influence — economic, political, even spiritual — is felt in every city, every statehouse, every office of the Federal Government. We
recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources, and livelihood are all involved; so is the very structure of our society.

In the councils of government we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. 36

It is not, of course, suggested that to prevent a dangerous affiliation of industry and the military we should return to the miniature military establishment of earlier years or seek to atomize the business world. Neither the military nor industry can be “made safe for democracy” by being themselves completely democratized. But unless we look at this fraternization of oligarchies for what it has become and anticipate the transformations still to take place, we cannot know our constitutional system for what it really is nor evaluate its adequacy to cope with current and future conditions.

All of our traditional doctrines and institutions should be re-assessed in the light of historical developments within and outside our constitutional system. More strictly within the realm of the operations of the machinery of public government, we should rethink the constitutional mechanisms of the separation of powers and federalism — despite the diverse and often hackneyed treatment these topics have continually received. Given the swiftly changing complexity of modern society, it is dangerous to assume that our constitutional structure contains enough flexibility and dynamism to respond to growing demands.

The Presidency should be viewed afresh, all the way from the weird and hazardous device of the Electoral College37 to the President’s relationships with the gigantic and often peculiarly independent civil service as well as with the powerful military establishment. Needed is better understanding of his use or possible use of his Executive Office, of the National Security Council, of the Cabinet, and of the diverse departments of government with differing fields of activity and dimensions of power and prestige. However dominating the personality of a particular occupant, much of what the President can and cannot do, and will and will not do, is determined by the structure and personnel of the branch of government he heads. For purposes of understanding and perhaps of restructuring, we should consider what is helpful, harmful, inevitable, or merely immaterial.

36. President Eisenhower’s Farewell to the Nation, 44 DEPT STATE BULL. 179, 180 (1961). For commentary on the background of President Eisenhower’s concern with the military-industrial complex see Banzhaf, Military-Industrial Complex: A Way of Life, 192 NATION 187 (1961).

37. See Banzhaf, supra note 2.
Needed also is reconsideration of the organization and place in
the government of Congress, under the Constitution a coordinate
branch with custodianship of "all legislative powers herein granted." The Congress of today belies its origins as much as does the Presidency.
Financially, since the institution of the executive budget in the 1920's,
and with respect to other important legislation since the New Deal,
Congress has received most of its legislative programs from the executi-
ve branch. Through its hearings, reports, and debates Congress
educates, informs, criticizes, and often obstructs, but provides little in
the way of inventiveness and leadership.

The judicial branch likewise requires rethinking in such a way
as to discourage some of the wild schemes recommended — such as
popular election of judges, periodic reconfirmation of judges by the
Senate, congressional elimination of controversial areas of Supreme
Court jurisdiction, or review of major decisions by a "supercourt"
composed of the chief justices of the states. We face as always, though
under the changed conditions of a new era, the enormous problem of
efficient administration of justice. The Supreme Court's traditional
role as final interpreter of the Constitution is complicated in that, as
we move further and further from the time and conditions of the
18th century, the phrasing of decisions in terms of the Constitution
assumes an air of ever increasing unreality. Constitutional mandates
and prohibitions have meanings in terms of particular contexts of
thought. As contexts change meanings become obscure. A Court
forced to rely on the more general statements and on the "spirit" of
the Constitution must then, in modern times, carry so far the process
of interpretation which Justice Black, as quoted at the beginning of
this Article, is willing to accept, that it comes very close to being what
he disclaims, namely, "a continuously functioning constitutional
convention." Whether it operates, for example, through the adoption of a
"new constitutional code of rules for confessions," or through deter-
mination of the point at which a private business achieves such relation
to the state that it is subject to the "No state shall" provision of the
fourteenth amendment, the Court in effect makes, as well as interprets,
the Constitution. Under existing circumstances of legislative or popular
abduction it cannot responsibly do otherwise, but the result is con-
stitution-making by default. We may well ask ourselves whether we
want the Court coerced into such a constitutional convention status.

Comparable in dimension to the transformation of the separation
of powers is the transformation of federalism. Since more and more

of what goes on in any state has national import, the intermixing of state and federal administration inevitably increases. Furthermore, states still nominally jealous of their independence clamor for expenditures within their borders of funds raised by the federal taxing power and provoke discussion about the possibility of using the federal machinery to raise most taxes for state as well as for federal purposes. Whether for fiscal reasons or others, states prove unable to cope with urban problems so that the federal government, through a variety of agencies old and new, bypasses the states and deals directly with municipalities and other local governmental districts, all as a part of a drifting process not thought out from the point of view of the broad constitutional pattern. The utility of the states as units of government — whether they are effective and how they could be made more so — or the substitution of other units should be closely examined.

Central to evaluation of the Constitution is evaluation of the concept of law in the minds of the American people. Theodore Sorensen, quoted above, stressed "a growing mood of irresponsibility and reaction"41 against the Supreme Court, the federal government, and civil liberties. The phenomena of disorder do indeed permeate our society. In many quarters equal application of the Constitution to the descendants of former slaves is resisted with unyielding determination. Civil rights workers are assaulted and intimidated. Unremedied inequality of economic and other circumstances leaves the poor crowded in festering ghettos. Amid the preaching of war between the races, riots and crime are used as techniques of obtaining relief. Producers and merchants raise prices and workers strike in their own selfish interest without concern for national defense, continued national prosperity, or the welfare of consumers.

The abnormally prevalent flouting of law may signify rebellion both of organized groups and of unorganized masses lost within the incomprehensible mechanisms of a vast and impersonal society, a society which either does not seek or is unable to find highly personalized leadership. In any event, it is hard to sense the basic respect for law which underlay at least the leadership of the "rabble at arms" which fought our Revolution against Great Britain and tugged at the hearts and minds of men during the formative years and for decades thereafter. A constitution without a commitment to law is but a concentration of power, conditioned by power elements and subject to such changes as shifts in the power structure may bring about. Such government, whatever the name attached to it, however "constitutional" it
may appear, can have few of the merits assumed to inhere in government under law with an ethical content. We need, therefore, a re-examination of our ideals and of society generally before looking to the possible recasting of the Constitution.

A constitutional convention grooved in terms of Senator Ervin's bill would meet none of the needs here outlined. It would probably not endanger the country as some critics have warned, but neither could the country expect from it anything worthwhile in the way of a contribution to constitutional wisdom or practice. It is of course possible that, in spite of the restrictions now incorporated in the bill, a convention might go beyond its specific assignment, as, for example, changing the law with respect to legislative apportionment. Whatever the dominant elements in a convention, it might propose tinkering with the Constitution in various other ways. Such danger as might be involved therein, however, would probably lie not in constitutional changes actually brought about, but in a demonstration of futility. As a necessary preliminary assignment to holding a useful constitutional convention we have not done, and except sporadically here and there we do not seem to be doing, the overall thinking about our constitutional system that is prerequisite to making significant changes.

If we could persuade ourselves to think our problems through, not merely in response to immediate interests but in broad perspective, the process might or might not inspire new respect for the Constitution as it now stands, for the Supreme Court, for Congress, and for the Presidency. Short of total breakdown as a result of disaster from international or internal strife, it is hardly conceivable that we should go to the opposite extreme and scrap the whole body of machinery and start anew. What is more probable is that we should come to see more clearly the pattern of our institutions and adjust it more simply and directly to the fulfillment of modern needs. Certain it is that if we are to remain in any high degree a self-governing people with a deep sense of purpose as a nation we must give hard and persistent thought to the abounding complex of our constitutional problems.