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OBSERVATIONS ON THE PROPOSED ALTERATION OF THE CONSTITUTIONAL AMENDATORY PROCEDURE*

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The enactment of the amendments now under consideration would, I feel, lead to an outright revolution in this country, a revolution not in the gradual sense, but a fighting one conducted by the nation's great majorities who would be, in that eventuality, under the complete domination and subjection of minorities of both states and people.

The first of these proposals, the subject of the present inquiry, would alter the amendatory process prescribed by Article V of the Constitution. It is designed to vest the amendatory power in the state legislatures to the exclusion of the Congress.

The sponsors of these amendments seem to have erred, strategically at least, in going beyond their first proposition for it is the remaining two amendments, that calling for the overruling of *Baker v. Carr* and the last to create a "Court of the Union" to review the rulings of the United States Supreme Court, which betrayed their underlying purpose and intent, thus giving warning of the extremes to which the minority group of states and the minorities within these states might go.

The adoption of the first of these amendments would effect a complete redistribution of governmental power, channelling to the states much of which now rests with the federal Congress. The ultimate result would be a confederation or league of states similar to that under the Articles of Confederation of 1777. No longer would we maintain in the central government the power and jurisdiction so essential to the preservation of the Union. While the states would be afforded sufficient sovereignty to devote their attentions to purely local problems, their participation in the national picture would be barely adequate to make known the parochial views of the fifty separate jurisdictions. It should be noted in this connection that this process would not be a mere transference of power to the states *as states,* but to the state *legislatures.* The importance of this distinction is obvious upon the slightest consideration of the present maldistribution of representation in the legislative bodies. The inequalities presented by these apportionments would thus be preserved, and, by the increase of power, worsened. A representative form of government would vanish.

Apparently, then, the lessons of the errors and impracticality of the Articles of Confederation have been lost to the amendments' sponsors. The blood bath of the Civil War, fought in great part to accentuate the indissolubility of the Union, will have been for naught.

Political, as well as legal, repercussions would ensue. There would be

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precluded any possibility of a national forum for the debate of *national* and international issues. Limited debating societies would obtain in each of the fifty states. With Nebraska as the only state with a unicameral legislature, we would be left with ninety-nine such societies.

How, then, did such proposals ever come about? While there is general agreement that the danger of their passage is slight, the meandered method of their genesis is highly pertinent to a fair evaluation. The sponsorship rests with the general assembly of the Council of State Governments, a normally conservative group and one of our most highly respected organizations and institutions. It consists almost exclusively of legislators of considerable prominence and ability from each of the several states selected from commissions on interstate cooperation existing in each of the states. The National Legislative Council, an affiliate of the Council of State Governments, was the initial proponent and drafter of the amendment. While this National Legislative Council meets annually, the general assembly convenes only half as often. This fact, as we shall see, becomes quite significant. In September of 1962, with a meeting of the general assembly but three months distant, the National Legislative Council met, fully realizing that whatever proposals were not submitted in December to the general assembly would not be acted upon for at least two additional years. It issued a report critical, in a fairly statesmanlike but direct fashion, of the action of the Congress and the executive department of the federal government over the preceding decade, which action, it alleged, had served to erode the powers and functions of the states, an erosion which had progressed to that point where the Union itself might be adversely affected. While it is true that the Union depends upon alert, dynamic and powerful states for its most effective functioning, the Council, rather than discuss the central requisites of that delicate balance between Union and state, chose to devise a "meat-cleaver" method of rectification. Rather than restore the scale's balance, if such seemed necessary, the Council's amendments so weighted the opposite pan as to plummet the scale to the ground.

This report was circulated among the delegates and a committee drawn up to draft the present amendments. The actual draft of these amendments was not submitted to the delegates of the general assembly until the opening day of its convention. In the course of but one day, the day following the opening, the delegates read, debated, and acted favorably upon all three of these amendments. Hence, as a special order of business, on the sixth of December, 1962, it was proposed completely to revamp the government of the United States. The complete unpreparedness of these delegates to pass upon motions of such moment is perhaps best evidenced by the fact that the second amendment received fewer favorable votes than the first, and the third still fewer. This suggests that the delegates became relatively more informed as the afternoon wore on.

Under Article V of the Constitution, amendments may be initiated either by the Congress or by the legislatures of the several states; the latter method has never been used. Under the former, the Congress, on a two-thirds vote of both Houses, submits the proposal to the state legislatures or to state con-

ventions. The proposal becomes a constitutional amendment when and if it is ratified by three-fourths of such legislatures or conventions, depending upon which avenue Congress has chosen. At present, then, the consent of thirty-eight such legislatures or conventions conditions the adoption.

The alternative method *requires* the Congress, upon the application of two-thirds of the state legislatures, to "call a convention for proposing amendments." Nothing further is said concerning what this convention is to do. The proposals which emanate from that convention take effect in the same manner provided for the alternative passage, namely, ratification by three-fourths of the state legislatures or state conventions.

The general assembly's proposal seeks to eliminate completely the national convention method of amendment. It further proposes to abolish the *state* convention alternative method of amendment regardless of whether the original proposal was initiated by Congress or by a national convention. It is intended, then, that the state legislatures control the amendatory process. Also, if three-fourths of the state legislatures submit identical proposals by way of application, then the Congress is required, by purely ministerial procedures, to certify these proposed amendments to *the very same state legislatures*. This empty course of action serves to circumvent completely the Congress, relegating the entire amendatory procedure to the mercy of the state legislatures. The potential effects of this procedure to the Constitution need not be listed. The combined effects of this and the other two amendments would possibly include the destruction of the Supreme Court of the United States, the elimination of Congress, and the sharp modification of at least the first eight amendments to the Constitution, at least as applied to the states *via* the Fourteenth Amendment.

As an incidental point, it is interesting to note that Section Two of these resolutions recites that the article shall be inoperative unless ratified, within seven years of the date of its submission, by the legislatures of three-fourths of the several states. This is apparently an adroit attempt to prevent the Congress from employing the state convention alternative method, which it is empowered to do under the Constitution. Yet it is only through this alternative method that any semblance of representation of all the people can be obtained.

Finally, the amendment under consideration is perhaps the most extraordinary and astounding governmental proposal of recent times. If there is at present an imbalance in the federal-state area of action (and such an imbalance is by no means conceded), correction of the defect lies in the strengthening of the states under our present system and not in the virtual demolishing of the Congress by its reduction to a pleasant debating society.