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THE GENESIS OF THE THREE STATES-RIGHTS AMENDMENTS OF 1963

Paul Oberst*

In this symposium devoted to the three States-Rights Amendments, I have been assigned that task of sketching "The Genesis of the Amendments." I approach the task of the historian with some trepidation, conscious of my amateur standing and the perils of writing history too soon after the event. As a front-page headline in the *New York Times Book Review* recently inquired: "Can History Be Served Up Hot?"¹ The campaign for these three amendments began less than eighteen months ago, and, although some optimists have announced that they are dead, no one has seen their death certificate. This Symposium is predicated, in part at least, on the proposition that the fires may flame up suddenly again in 1965 unless we understand as fully as possible the origin and mischievous consequences of the proposed amendments.

There are fashions in history writing. As Alan Nevins points out in his standard text: "A considerable number of writers swallow unreservedly the mechanical view which considers it a regular process of evolution, a series of inevitable results proceeding from clear causes. . . . They hold that certain great facts and forces bring on other forces as logical and almost inescapable sequels."² Another view of history emphasizes the role which fortune or fortuitous chance plays in history, the most prominent of which is the intermittent appearance of great men. But Nevins warns us not to be dogmatic on the subject since a primary requisite for enjoying and understanding history is a catholic acceptance of its many types and forms. "The true path," he writes, "is the middle path."³

If we begin our search for the genesis of the amendments in this spirit we will need to do two things. First, we must seek for those "great facts and forces" which are identified with the cause of "states rights" in our nation and, second, we must look for the "accidents," including the appearance of a hero or heroes which may have made this most recent upsurge of states rights activity a matter of fortuitous chance.

BACKGROUND NOTES ON "STATES RIGHTS" — GREAT FORCES

Each of the three States-Rights Amendments has been thoroughly analyzed by one of the other participants in this Symposium. It is sufficient to say here that their analysis indicates that the three proposals add up to one of the most drastic attacks on federal supremacy — especially federal judicial supremacy — ever mounted on behalf of "states rights."

One proposal would change the amending clause in Article V to make it easy for the state legislatures, bypassing the federal Congress, to propose amend-

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1 N.Y. Times, Mar. 8, 1964, § 7 (Magazine), p. 1.

2 NEVINS, *THE GATEWAY TO HISTORY* 33 (1962).

3 *Id.* at 36.

ments to the federal Constitution with no adequate consideration of the national interests. A second amendment would expressly withdraw jurisdiction over apportionment from the federal government and vest it solely in the states to perpetuate the existing hegemony of the rural voter. The third would establish a Court of the Union — composed of the Chief Justices of the fifty states — to review certain decisions of the Supreme Court.

Perhaps some attack on the federal system at this time was inevitable. Certainly the controversy between federal power and states rights has been intermittent, if not constant, since the Constitution was established. It is the extreme character of these proposals that make them so startling. When the Chief Justice last May called all Americans to a Great Debate upon the Three Amendments,⁴ John Roche wrote wearily:

“Must we *seriously* consider a return to the Articles of Confederation?”⁵

It was dissatisfaction with the Articles of Confederation and a desire to form a more perfect union that led to the Constitutional Convention. Hamilton favored a truly sovereign central government with general powers to legislate for the common defense and the general welfare. Madison inclined to a compact of the existing states, which should retain residuary and inviolable sovereignty. The solution of the Philadelphia Convention was a compromise government of enumerated powers and a theory that the states were still “sovereign” in some way not completely clear. The force that blocked the more perfect union and kept “states rights” alive at the Convention was, probably more than anything else, the fear of the small states that they would be overwhelmed by the larger states in a truly general government of the people. Thus, the Convention was, in a sense, the first struggle over apportionment and the first effort to check any nonsense about “one man, one vote.”

The second big problem faced by the Convention was *who* was to keep the precarious balance between the federal supremacy and the sometimes sovereign states. The more nationalistic members of the Convention argued that the courts were not firm enough, that it was better to prevent passage of a law than to judicially annul it, and that a state which would violate the Constitution would not obey a judicial decree. They favored a *Congressional* negative on state law.

As Schmidhauser summarized the development:

The Philadelphia Convention record indicates unmistakably that the new Supreme Court had been clearly designated the final judicial arbiter in federal-state relations and it was the states-righters in the Convention who brought this to pass.⁶

States rights rebellions against the federal government and the Court have flared throughout our history. Some of the more important include:

1. The early dispute over the suability of the states in the *Chisholm* case.

⁴ Speech of the Chief Justice of the United States, Hon. Earl Warren, before the opening of the American Law Institute, May 23, 1963. It will be reported in the 1963 Proceedings. See also N.Y. Times, May 23, 1963, p. 1, col. 7.

⁵ N.Y. Times, June 2, 1963, p. 10E, col. 8, cited in Mason, *Must We Continue the States Rights Debate?*, 18 RUTGERS L. R. 60, 72 (1963) (“The short answer is ‘yes.’”)

⁶ SCHMIDHAUSER, *THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789-1957*, at 13 (1958).

2. The attack on the validity of the Alien and Sedition laws in the Kentucky Resolutions, which asserted the right of the Commonwealth to veto any law of Congress as unconstitutional.
3. The Resolutions of the Hartford Convention of 1814.
4. Kentucky's fight against the Supreme Court in 1824-1829, when the legislature urged the Governor to call forth the *physical* power of the Commonwealth to resist execution of the Court's decisions.
5. The nullification ordinance of South Carolina in 1832.
6. The declaration of the Wisconsin legislature of 1859 that the Fugitive Slave Law was null and void, and that it had a right as a sovereign state to judge the infractions of the federal government.⁷

The victory of the federal government in the Civil War and the subsequent centralizing tendencies seemed to Arthur Schlesinger in 1922 to have forever settled the theory of "states rights,"⁸ so far as nullification and secession were concerned. But who could foresee the events of the past decade? Following the decision by the Supreme Court in the *Brown* case in 1954, there was an outbreak of Southern Manifestoes, Petitions for Impeachment, Joint Resolutions of Interposition and Nullification in some of the Southern States, the like of which had never before been seen!

In August, 1958, the Chief Justices of the States, meeting in annual session prior to the American Bar Association meeting, adopted a Report and Resolution⁹ attacking the Supreme Court for pressing the rapid extension of federal power by its decisions in the field of labor law, national security, and criminal law.

At a 1959 Symposium on the Supreme Court and States Rights, the writer commented:

What we are facing today is a strange coalition of states' rights segregationists and left-over McCarthyites joined in an all-out attack on the Supreme Court. Once again the banner of states' rights has been lifted against the Court, but now it flies alongside the Stars and Stripes. I think there are reasons to be concerned about this development.

Previous attacks on the Court have usually been the result of Supreme Court decisions which resolved questions between competing political and economic groups. The losers attacked the Court as a matter of course, but the winners just as enthusiastically defended it.

In the present battle, the Supreme Court is suffering from a want of supporters. It has got itself into its present predicament by recognizing claims of liberty and equal protection from some litigants who are at least powerless and sometimes disreputable. How many will rush to the support of Negro school children — much less the procedural rights of robbers and subversives?¹⁰

Four years later, in 1962, a new component force was added to the brew — rural America as overrepresented in the state legislatures. The line from

⁷ See generally, WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1926).

⁸ SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* 220 (1922).

⁹ Reprinted in *Harvard Law Record*, Oct. 22, 1958, col. 1.

¹⁰ Oberst, *The Supreme Court and States Rights*, 48 *Ky. L.J.* 63, 88 (1959).

Baker v. Carr,¹¹ decided by the Supreme Court on March 26, 1962, to the second of the proposed amendments is obvious. A little thought will make it apparent that the line to the proposals to increase the powers of the state legislatures over the amending process at the expense of Congress and to the proposal to provide an appeal to the State Chief Justices from the United States Supreme Court is almost as clear. The thing to be accomplished is to put an end to the possibility of majority rule, which might concern itself with national needs. Hacker commented on this quite sharply, saying:

States' rights, then, is the philosophy for those Americans who look upon themselves as possessing an excellence setting them off from the general run of mankind. . . . The constitutional tradition of states' rights gives individuals with local power the ability to check, or at least delay, Federal activity designed to ameliorate social and economic activities. . . . It has seldom been a force for progress, even less a legal weapon for those wishing to move on from the status quo they consider unjust.¹²

So much for one strand of today's history — the "great facts and forces" that seem inevitably to push us back and forth between nationalism and decentralization along states-rights lines are surely present here. The writer once commented: "States' rights has been a shabby cloak for a variety of unsupported causes over the years. . . . It seldom involves dispassionate disinterested concern for the proper structure of the Union."¹³ Unfortunately, the proposed amendments seem to be only the newest illustration.

CHANCE AND THE HEROES

The most detailed account of the immediate origins of the three States-Rights Amendments which has so far appeared is in the September, 1963, *Progressive* magazine.¹⁴ The author, Fred J. Cook, described in the foreword as "a seasoned reporter-investigator," was assigned "to dig deeply into every phase of this dangerous development," aided by a grant from the Stern Family Fund. He found, he writes:

. . . a unique power-play of national dimensions, a play directed from the top by a group of powerfully placed legislators, supported by reactionary business and rural interests, whooped on by adherents of the lunatic fringe; a play that at its inception could boast virtually no grass roots demand or support, but that, if successful, would alter drastically the American system of government by stripping away Federal power, instituting state supremacy, and reducing the nation to little more than a confederation of states.¹⁵

In this view, the amendments were the result of a sinister conspiracy of Racists, Ruralists, Religionists and Right-Wing Reactionaries. Mr. Cook and other proponents of this theory emphasize variously: (1) the relative obscurity of the participants; (2) their undisclosed financial backing;¹⁶ (3) the speed

11 369 U.S. 186 (1962).

12 N.Y. Times, Oct. 21, 1962, § 7 (Magazine) p. 107.

13 *Op. cit. supra* note 10, at 88.

14 Cook, *The Federal Union Under Fire*, THE PROGRESSIVE, Sept., 1963, p. 10.

15 *Ibid.*

16 N.Y. Times, April 14, 1963, p. 1, col. 6.

with which the proposal developed; (4) the secrecy of the movement;¹⁷ (5) the Machiavellian nature of the confederation made up of groups otherwise opposed on many policy matters;¹⁸ and (6) the use of the Council of State Governments as the principal base of operations.

The Council and the Amendments

The Council of State Governments seems a rather unlikely base for a revolution of the right.¹⁹ Organized over 30 years ago with support of the Laura Spellman Rockefeller Fund and installed on the University of Chicago campus at 1313 E. 60th Street, the Council of State Governments and its numerous affiliated agencies have been dedicated to supplying scholarly assistance to the improvement of State governments, the promotion of interstate cooperation, and the betterment of federal-state relationships.²⁰

At the outset some description of the organization of the Council would be helpful. The Council is composed of Commissions on Interstate Cooperation, authorized by the statutes of the fifty states. The usual state commission consists of 15 members, ten from the legislature and five from the administrative branch. In theory at least the Council is controlled by a large Board of Managers consisting of 51 delegate members from each state and Puerto Rico, 19 ex officio members, ten members at large and the immediate past Executive Director. It meets annually.

The Board of Managers has a small Executive Committee composed of eight persons: the President of the Council (always a State Governor); the First Vice-President (always a legislator); three additional Vice-Presidents; the Auditor; and the Honorary President of the Council. The Executive Committee selects an Executive Director, who selects the professional staff, which operates under his direction.

The Council and Staff serve as a secretariat for nine affiliated groups: The Governors' Conference, The Conference of Chief Justices, The National Association of Attorneys General, The National Association of Budget Officers, The National Legislative Conference, The National Association of State Purchasing Officials, The National Conference of Court Administrative Officers, The Parole and Probation Compact Administrators' Association and The National Association of Juvenile Compact Administrators. The Council maintains an eastern regional office in New York, a southern office in Atlanta, a western office in San Francisco, and a Washington office.²¹

Still another affiliate of the Council is The General Assembly of the States which meets biennially in December of even years. This is a most amorphous assembly, which can be attended by any state legislative, judicial, or administrative officer and any members of any of the Council's affiliated organizations.

17 Newsweek, May 20, 1963, pp. 35-6. Mason, *Must We Continue The States Rights Debate?* 18 RUTGERS L.R. 60 (1963).

18 Burnham, *Hobbling the Court*, 78 COMMONWEALTH 531.

19 *Cf.*, Newsweek, May 20, 1963, p. 36: "Financed by state appropriations, the council is composed of government professionals, despite the amendments' right-wing flavor, right-wing groups have frequently attacked the council in the past for 'socialistic' tendencies."

20 See generally COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES*, Vol. 13 (1960-61) p. 225.

21 *Id.* at 226.

Voting is by states, but any qualified member who happens to be present may answer the roll-call on behalf of his state.²²

The proposal for the three amendments apparently developed from a series of four meetings in the latter half of 1962. These meetings were: the annual meeting of the Southern Regional branch of the Council at Biloxi, Mississippi, in July, 1962; the 15th annual meeting of the affiliated National Legislative Conference in Phoenix, Arizona, in September, 1962; the annual meeting of the Board of Managers of the Council on December 5, 1962, in Chicago; and the sixteenth biennial meeting of the affiliated General Assembly of the States on December 6-7 in Chicago.

To describe this process of development more fully let us begin with the Biloxi meeting in July, 1962, only four months after *Baker v. Carr*. Resentment against the decision of the Court was particularly strong among southern legislators, many of whom represented badly malapportioned rural districts, threatened by the Supreme Court's latest decision. The anger found its outlet at Biloxi in a resolution asking Congress to draft a constitutional amendment prohibiting the federal courts from interfering in apportionment. A second resolution was a broad-scale condemnation of the exercise of federal judicial power. A leader at Biloxi was the Speaker of the Florida House, William Chappell, Jr. — a staunch advocate of "dual sovereignty."²³

When the Fifteenth Annual Meeting of the National Legislative Conference convened at Phoenix on September 16, 1962, seven hundred fifty state legislators and officials, representing forty-six states, were present. Chairman of the Conference was the Speaker of the Pennsylvania House, W. Stuart Helm, a Sun Oil executive and representative for 24 years from the small rural town of Kittanning. After a rousing speech by Chappell, the meeting adopted a brief resolution, entitled "Strengthening the States in the Federal System,"²⁴ requesting its Committee on Federal-State Relations to consider a proposal to the states that the states act to call a Convention to discuss amending the U.S. Constitution. Instead of reporting, as customary, to the next annual meeting of the Legislative Conference, which was to be held in Hawaii in July, 1963, the Committee was instructed to report to the forthcoming Sixteenth Biennial Meeting of the General Assembly of the States which would be held on December 6-7, 1962, in Chicago, only three months later. Chairman Helm appointed a nine-man "Committee on Federal-State Relations" consisting of: Lloyd W. Lowrey, Assemblyman from California, chairman; Chappell, Speaker of the Florida House; Warren Wood, former speaker of the Illinois House; James Turman, Speaker of the Texas House; Thomas D. Graham, Speaker of the Missouri House; Robert D. Haase, Speaker of the Wisconsin Assembly; Clarence L. Carpenter, President of the Arizona Senate; Frank King, Assemblyman from Ohio; and Frederick H. Hauser, Assemblyman from New Jersey. The real work of shaping the three States-Rights Amendments was apparently

²² Cook, *op. cit. supra* note 14, at 11.

²³ Look Magazine, Dec. 3, 1963, p. 76. This article emphasizes Chappell's role and includes an extended interview.

²⁴ The resolution is reprinted in Council of State Governments, "Amending the United States Constitution to Strengthen the States in the Federal System" (June, 1963) p. 9, and also in *State Government*, Winter, 1963, p. 10.

done in this committee some time during the three months between the Fifteenth Annual Meeting of the National Legislative Conference and the Sixteenth Biennial General Assembly of the States in Chicago.²⁵

The Committee on Federal-State Relations met on November 8, and again on December 4 in Chicago to prepare final drafts of its report. On December 5, the Committee took its proposals before the Council's Board of Managers, seeking its indorsement. The Board did not pass on the proposals, but allowed the report of this Committee of the National Legislative Conference a place on the agenda of the General Assembly of the States.

The Report begins with a Statement of Principles and went on to propose a plan of action to secure prompt adoption of three proposed amendments to the Constitution. After two paragraphs extolling the division of powers under the Constitution, the Statement of Principles observes:

The most sacred duty of all public officials, whether state or federal, and the highest patriotic responsibility of all citizens is to preserve, protect and defend the Constitution, including that portion of the Constitution intended to guarantee a government of dual sovereignty.²⁶

The Statement of Principles alleges that "some federal judicial decisions involving powers of the federal and state governments carry a strong bias on the federal side," and that self-restraint by the Supreme Court is not likely to be sufficient. The Supreme Court is an organ of the federal government and this, according to the Statement, makes the Court necessarily an agent of one of the "parties in interest." As such, its decisions should not be assigned the same finality as the words of the Constitution itself, and "there is a need for an easier method of setting such decisions straight when they are unsound."

This Statement of Principles was followed by the Recommendations proposing the three amendments to the Constitution. According to the plan of the Committee every state legislature was to cause itself to be in session on January 16, 1963, and pass three *uniform* joint resolutions addressed to Congress, each requesting it to call a convention to propose one of the amendments. If Congress before January 1, 1965, passed legislation proposing the amendments to the States, the resolutions were to be void, however.

At the General Assembly meeting were three hundred "delegates" from 47 states. Any and all state officials present were "delegates," but voting was by states. After only two hours of discussion the motions to approve the recommendations of the Committee had passed, although by steadily decreasing margins.²⁷ The proposal to amend Article V was approved 37-4, with 4 abstentions. The proposal for a constitutional amendment on apportionment was

²⁵ Cook, *op. cit. supra* note 14, at 14 (quotes Rep. King as reporting that the proposals were formalized by a drafting committee at a meeting held in Chicago on Nov. 8, 1962). Rep. King quotes reports that Mr. Chappell of Florida was accompanied by a "whole delegation of judges, lawyers and constitutional experts. Any question that came up he had an expert there to answer it. They were well-financed, well-prepared. . . ."

²⁶ The Report is reprinted in *Council of State Governments, supra* note 24, at pp. 10-16. (Emphasis added.)

²⁷ At the Symposium discussion at Notre Dame on Feb. 29, 1964, Mr. Jenner advanced the thesis that the narrowing margin between the vote on the first and third proposals did not reflect a judgment on their respective merits as much as it did a gradual awakening of the delegates to the radical character of the committee's whole program.

approved 26-10, with 10 abstentions. The proposal to establish the "Court of the Union," was passed 21-20, with 5 abstentions.²⁸

Some of the success of the proponents of the amendments has been attributed to the eloquent speech in their support by Millard Caldwell of Florida, former Governor and Congressman, now Florida's Chief Justice.²⁹ Another reason given is surprise. Apparently copies of the proposals were not distributed to the delegates until the day on which the Assembly convened. It is charged that most of those present had no previous information about the proposals and at the best they were easily swept along by the debate; at worst, surprise becomes an essential ingredient of "conspiracy."³⁰ On the other hand, a Kentucky delegate assured the writer that most of the delegates had some general knowledge of the proposals before they arrived in Chicago. The failure to place the proposals before the delegates in advance of the Assembly meeting could have resulted from the fact that they apparently were not put in final form until the December 4 meeting of the Committee on Federal-State Cooperation, hours before the meeting of the Assembly. This in turn might indicate poor organization, but not conspiracy.

The great haste with which the Committee drafted and proposed the three amendments within a few months has been the subject of adverse comment. At the Honolulu meeting of the National Legislative Conference in August, 1963, Representative Wood explained that although originally it was anticipated that the Committee would report to the Honolulu meeting, it was decided that since virtually all state legislatures would be meeting in early 1963, it was important to develop the proposals in time for their consideration by the 1963 legislatures. For this reason, he said, it was decided to launch the proposals via the General Assembly of the States only three months later.³¹

It is sometimes charged also that the amendments were "sneaked" through the Assembly with the minimum amount of publicity. The Director of the Council, Brevard Cribfield, has denied this: "All the charges that have been made that these were sneak amendments are a lot of nonsense. The meeting

28 Voting:

Resolution 1. — amending Article V: approved 37-4, 4 abstentions.

For: Ala., Ark., Calif., Colo., Del., Fla., Ga., Idaho, Ill., Ind., Iowa, Kansas, Ky., La., Maryland, Minn., Miss., Missouri, Nebraska, N.H., N.J., N.M., N.Y., N.C., Okla., Oregon, Pa., R.I., S.C., S.D., Tenn., Texas, Utah, Va., W.Va., Wisc., and Wyoming.
Against: Conn, N.D., O., Vermont.

Abstain: Arizona, Hawaii, Mich., and Wash.

Resolution 2. — apportionment approved 26 to 10, abstention 10.

For: Ala., Ark., Calif., Fla., Ga., Idaho, Ill., Ind., Iowa, Kansas, La., Me., Maryland, Miss., Mo., N.H., N.J., N.M., N.C., Okla., Pa., S.C., Texas, Wisc., Wyoming.
Against: Colo., Conn., Del., N.Y., N.D., Tenn., Utah, Vermont, Wash., W.Va.

Abstain: Arizona, Hawaii, Ky., Mich., Minn., Nebraska, O., Oregon, R.I., and Va.

Resolution 3. — Court of Union: approved 21-20, 5 abstained.

For: Ala., Calif., Fla., Ga., Idaho, Ill., Iowa, Kansas, Ky., La., Me., Maryland, Miss., N.C., Okla., S.C., S.D., Texas, Va., Wisc., and Wyoming.
Against: Colo., Conn., Del., Ind., Minn., Mo., N.H., N.J., N.M., N.Y., N.D., O., Oregon, Pa., R.I., Tenn., Utah, Vermont, Wash., and W.Va.
Abstain: Ariz., Ark., Hawaii, Mich., and Nebraska.

29 Cook, *op. cit. supra* note 14, at 15-16.

30 *Id.* at 16. ("well-staged, well-planned. . . the whole thing had caught the delegations, most of them, flat-footed.")

31 Council of State Governments, Summary of Proceedings, Sixteenth Annual Meeting of the National Legislative Conference. Part I, p. 68. (1963).

in Chicago was open to the press, the press was there, but frankly they paid no attention to it."³² Cook himself commented: "[F]ew persons were awake, few gave a damn. This applies with almost impartiality to virtually everybody — to a soporific and superficial press, to labor leaders, to liberals, to lawyers and to intellectuals."³³

The *New York Times* on December 7, 1962, reported the remarks of the new President-Elect of the Council, Governor Rossellini, to the General Assembly, concerning the responsibilities of the states to the Cuban refugees.³⁴ The content of the resolutions was not commented on by press, news magazines, or TV. The *Chicago Tribune* carried a small article on a back page, mentioning the resolutions in passing. It was not until April 14, 1963, that the *New York Times* published its first "exposé" of the proposals.

A final word might be said about the role of the Council, particularly the Director, Staff, and the Board of Managers, in the adoption of the amendments. The Director's report to the Board of Managers on December 5, 1963, called attention to the proposals of the Federal-State Relations Committee of the National Legislative Conference. He went on to say "I think it is imperative for the Board of Managers of the Council to decide today whether it will support the various recommendations in this important and controversial field." It is possible to read these remarks as those of an administrator, merely calling for a clear policy decision he could follow. Cook asserts that Crihfield indicated later that he intended to support proposals I and II, but not the "Court of the Union." In any event, the Board of Managers took no action. Several members of the reporting Committee were members of the Board of Managers, but apparently they could not carry the day. It may be that a Board which included nine state governors felt differently about the amendments than a General Assembly heavily weighted with minor state legislative officials.

In contrast to the charges of secrecy and sneak attack, there is some evidence that the proponents of the proposals were the ones most bitterly disappointed by the apparent lack of interest in their plan to save the nation by strengthening the States.³⁵ A "Volunteer Committee on Dual Sovereignty" was established, apparently to work out of Harrisburg, Pennsylvania, under the guidance of its chairman, W. Stuart Helm. The only paid employee of the Volunteer Committee was a Florida newspaperman named George Prentice, working out of Tallahassee.³⁶

Perhaps the real point is that made in an editorial in the October issue of the *American Bar Association Journal*. Noting that the bar and general public were unaware of the amendments and they learned with surprise and shock of the passage in their state legislatures, the editor comments:

No real effort seems to have been made by the proponents to give either the Bar or the public an opportunity to consider the amendments in advance of their introduction in the legislatures . . .

32 Cook, *op. cit. supra* note 14, at 18.

33 *Ibid.*

34 N.Y. Times, Dec. 7, 1962, p. 4, col. 7.

35 Cook, *op. cit. supra* note 14, at 18.

36 N.Y. Times, April 14, 1963, p. 50, col. 2.

Whether or not this failure to consult the Bar and the public was part of the plan of any of the proponents, the very fact that state legislative action on amendments to the Federal Constitution could be taken with so little awareness on the part of the Bar and the public shows the dangers inherent in the proposed amendment to Article V of the Constitution. . . . If it were adopted and ratified the state legislatures of 38 of the states might quietly amend the U.S. Constitution . . . without national consideration or any opportunity given to the Bar or public for deliberation or to make their views heard.³⁷

The State Action on the Proposals

The drive for adoption of the three amendments got off to a slow start. The legislatures of the 50 states did *not* assemble on January 16 and simultaneously petition Congress. By the end of January, Oklahoma, the New Jersey Senate, and Texas alone had passed the resolutions.

In February, Florida and Arkansas followed and Alabama endorsed the Court of the Union only. In March, Idaho, Montana and Illinois adopted one or both of the first two, and Wyoming voted for all three. In April, Alabama endorsed the article V resolution, and Missouri adopted the first two amendments.

It is surely not by coincidence alone that the Speakers in Texas, Missouri, Illinois and Florida and Assemblyman Hauser of New Jersey had been members of the Committee on Federal-State Relationships and the Volunteer Committee had included the Speaker of the Oklahoma house.

The Counter Campaign

The counterattack on the amendments seems to have originated with a St. Louis lawyer, Arthur J. Freund, a veritable Paul Revere of the battle, who wrote Professor Charles Black of Yale on December 29, 1962.³⁸ Black responded with a letter on January 7, 1963,³⁹ and then published an article in the April, 1963, issue of the *Yale Law Journal*.⁴⁰ Anthony Lewis gave the matter wider audience with a front page article in the April 14, 1963, *New York Times*.⁴¹

Chief Justice Warren, with a Law Day address at Duke on April 27,⁴² and an address to the American Law Institute on May 22,⁴³ stated his concern and called for a Great Debate. The American Bar Association, through its Board of Governors' meeting in Washington, May 21, went on record condemning the Article V and Court of the Union, but put off the apportionment amendment for study.⁴⁴ At its meeting in August, the Board of Governors

37 *Amending the Constitution*, 49 A.B.A.J. 970 (1963).

38 The letter is listed in the extensive bibliography prepared by Mr. Burton C. Bernard of the Illinois Bar. See also speech of Senator Paul Douglas in Washington, Sept. 6, 1963, commending Mr. Freund, Louisville Courier Journal, Sept. 7, 1963, p. 1, col. 7.

39 109 CONG. RECORD, 8263 (1963).

40 Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).

41 N.Y. Times, April 14, 1963, p. 1, col. 6. Lewis's article was apparently suggested by Professor Black's article.

42 Warren, *Dedication of the New Duke Law School Building*, 1963 DUKE L.J. 387, 393 (1963).

43 N.Y. Times, May 23, 1963, p. 1, col. 7.

44 *Id.* at p. 23, col. 3.

was confronted with a recommendation of the Committee on Jurisprudence and Law Reform, under the chairmanship of Louis Wyman, to endorse the apportionment amendment. The Board of Governors, by a vote of 10-7, rejected the Committee's recommendation. When the matter went before the House of Delegates, the Committee introduced resolutions stating that the American Bar Association "disapproves" the Article V and Court of the Union proposals, and "approves" the apportionment proposals of the Council of State Governments. Upon the motion of Mr. Stammer of the Essex County, New Jersey, Bar Association, the House of Delegates amended each of the resolutions to state that the Association "disapproves and *opposes*" each of the three proposals. The sharpest debate came on the apportionment proposal, but the final vote was 136 for and 74 against on the amended motion.⁴⁵ Subsequently, the American Bar Association Journal printed an editorial strongly condemning the proposals and calling upon lawyers to take an active part in opposing and defeating the "ill-advised" amendments.⁴⁶ The editorial noted that the proposals to amend Article V and to establish a "Court of the Union" had been defeated by an "overwhelming vote." The editor also noted that in the course of the debate it was reported that all three proposals had been condemned by the New Jersey State Bar Association, the New York State Bar Association, the Pennsylvania Bar Association, the Chicago Bar Association, The Association of the Bar of the City of New York and the Philadelphia Bar Association.⁴⁷

At the meeting of the American Bar Association in August, 1963, Mr. Burton C. Bernard of Illinois introduced a resolution proposing a referendum by mail on the three amendments to obtain a vote in opposition to the amendments "more meaningful to state legislators" than the vote of the House of Delegates. The resolution failed to pass the Assembly, however.⁴⁸

In May, Ohio defeated the proposed amendments and the New Jersey Senate recalled its unanimously passed resolutions when they were defeated in the house. In Oregon, they were tabled. In June, the resolutions were stopped or defeated in Pennsylvania and Louisiana. In July, they were defeated in North Carolina. Amendments one and two were eventually passed in *Kansas* and *South Dakota*, one alone in *New Hampshire*, and two alone in *Nevada*, *Utah* and *Washington*. *South Carolina* passed all *three*. By the end of 1963, the amendments had been considered by the legislatures of half the states, and seventeen had acted favorably on one or more of the amendments. The proposal to amend Amendment V had received 12 adoptions; the apportionment amendment had received 13; and the "Court of the Union" proposal had succeeded in five states. Only Arkansas, South Carolina and Wyoming had adopted all three.⁴⁹

Meanwhile, the attacks proceeded apace. The American Civil Liberties

45 See, *Proceedings of the House of Delegates*, 49 A.B.A.J. 984, 986-87 (1963).

46 *Id.* at 970.

47 A number of other state and local bar associations have produced committee reports, resolutions, and assembly votes. See Bernard, *op. cit. supra* note 38, at pp. 9-10, and supplement No. One. Whether all were opposed to all three amendments is not indicated.

48 See, *Proceedings of the Assembly*, *op. cit. supra* note 45, at 982.

49 Look Magazine, Dec. 3, 1963, p. 88.

Union declared its opposition on May 11, 1963,⁵⁰ and the U.S. Conference of Mayors voted to denounce the amendments on June 12, 1963.⁵¹

Two organized groups entered the lists to oppose the amendments. In July, "The Committee Against the Dis-Union Amendments" was formed at Princeton, New Jersey, by representatives of State Bar Associations, law schools and universities.⁵² On Sept. 5, at a meeting sponsored by the AFL-CIO, and addressed by Solicitor Archibald Cox, representatives of some 30 national liberal, labor, welfare and church organizations undertook to organize a central clearing-house in Washington with subsidiary units in each of the 22 states whose legislatures meet in 1964.⁵³

The amendments also met with difficulty in the Council and its affiliates. The Conference of Chief Justices, which had denounced the Supreme Court with apocalyptic fervor at its 1958 session, met and adjourned at Chicago in August, 1963, without a mention of the amendments — other than a passing slap at "judicial fiat" by the chairman, Judge J. Edwin Livingston, in his final address.⁵⁴ At the 16th Annual Meeting of the National Legislative Conference, Aug. 19-23, 1963, a determined effort, led by the Hawaiian delegation, was made to atone for the action of the 15th Annual Meeting eleven months earlier at Phoenix. The resolutions committee had before it a noncommittal Resolution X "To Preserve and Strengthen the Independent States, Integrity and Dignity of the Legislature" by resolving to "recognize the right of our legislatures to make independent determinations of the disposition of the recommendations of the General Assembly of the States on the proposed amendments." It was adopted by a vote of 26-16.⁵⁵

Among the five resolutions tabled by the resolutions committee was one entitled "Preserving the Federal System of Government" which resolved that the National Legislative Conference "without hesitation specifically and unqualifiedly rejects the report and amendments sponsored by its Federal-State Relations Committee" and that "the three proposed amendments would, by the process of erosion, disintegrate the foundations of the Constitution of the United States of America."⁵⁶ Another tabled resolution, opposing amending Article V and the "Court of the Union" asserted that the National Legislative Conference is dedicated to "the Federal System of government as established and guaranteed by our Constitution, which through the years has proved to be the most perfect system of government yet devised by men" . . . and should oppose the amendments.⁵⁷

Efforts to discharge these two resolutions proved unsuccessful by margins of 26-15 and 24-15, but the drive of the opponents of the amendments stirred

50 N.Y. Times, May 12, 1963, p. 60, col. 3. American Civil Liberties Union, *Civil Liberties*, no. 208, "Danger to Civil Liberties Seen in Three States Rights Amendments."

51 United States Municipal News, July 9, 1963, at p. 170; United States Conference of Mayors: the Summary of the Annual Proceedings.

52 52 National Civic Review 416 (1963).

53 Louisville Courier Journal, Sept. 7, 1963, p. 1, col. 7.

54 N.Y. Times, August 11, 1963, p. 49, col. 1.

55 See Council of State Governments, Sixteenth Annual Meeting of the National Legislative Conference, Summary of Proceedings, Part I, p. 70. The text of resolution X appears on p. 88.

56 *Id.* at 56.

57 *Id.* at 76.

up tempers.⁵⁸ Senator King finally conceded the point and invited any delegates so desiring to join him in a joint statement, following adjournment, opposing the amendments. Actually the vote in favor of Resolution X was something of a victory for the anti-amendment forces. According to the National Civic Review: “. . . the sponsors of the amendments had gone to the conference proclaiming that the assembled state legislators would vote overwhelmingly in favor of them.”⁵⁹

When the Board of Managers of the Council held its annual meeting on Dec. 5, 1963, and the Council itself met the next day, no action was taken on the proposed amendments. There was, of course, no meeting of the Biennial Assembly since it meets only in even-number years.

SOME PARTICULAR ANTECEDENTS

Some additional comments on the background history of the details of the three “States Rights” amendments may be useful. Granted they represent a resurgence of a constant and intermittent dispute, the question arises whether the particular proposals are a novel solution for an ancient struggle, or whether they have a respectable lineage.

We can dispose quickly of the proposal to deprive the federal government in general, and the federal judiciary in particular, of any power over apportionment. It is, of course, a direct reaction to the decision of March 26, 1962, in *Baker v. Carr*. It has its source in various attitudes, ranging from disinterested concern at the entrance of the Supreme Court into the political thicket to the interested and bitter anguish of state legislators facing court-supervised reorganization of rotten boroughs.

The proposal is a blood brother, surely, to other proposals of disappointed litigants to counter particular decisions of the Supreme Court by taking away its jurisdiction in a particular class of cases. The process began at least as far back as *Chisholm v. Georgia*,⁶⁰ and the Eleventh Amendment. It includes the Congressional withdrawal of the appellate jurisdiction of the Supreme Court in certain habeas corpus cases in *Ex Parte McCordle*.⁶¹ It comes down to recent times with the Jenner Bill,⁶² which would have created exceptions to the appellate jurisdiction of the Supreme Court in cases involving federal employee security programs, state subversive legislation, and state bar admissions.

The lineage of the proposal of the “Court of the Union” still evades me. Clearly it was put forth by Warren Wood, an Illinois legislator, farmer and vice-president of the Union National Bank and Trust Co. of Joliet, Illinois. He has been speaker of the Illinois House four times and in 1959 became minority leader. The Court of the States is said to be his brain child.⁶³ There is an ancient analogy in the political veto on federal actions by the States pro-

58 N.Y. Times, August 25, 1963, p. 78, col. 4.

59 52 National Civic Review 504, 505 (1963).

60 2 U.S. (2 Dall.) 419 (1793).

61 74 U.S. (7 Wall.) 506 (1869).

62 S. 2646 85th Cong. 1st Sess. (1957) (The Jenner Bill). See Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958).

63 Cook, *op. cit. supra* note 14, at 14; Morgan, *op. cit. supra* note 23, at 88.

posed in the Constitutional Convention and there rejected. The proposal of Rep. Wood, however, is for a state judicial veto — if indeed the Court of the States would be a court deciding cases between parties. Nowhere before have I found a proposal that any federal action be reviewed by an interstate group of state judges — and, least of all, that the decisions of the United States Supreme Court be so reviewable.

The proposal for amending the amending clause has a livelier history. By 1953, some eighty-three proposals to amend the amending clause had been introduced in Congress.⁶⁴ Before the 1963 applications from 12 states, there had been three earlier applications within the decade from Illinois in 1953, South Dakota in 1955, and Idaho in 1957. These applications seem to go back to the so-called Ebinger Proposal.⁶⁵ John B. Ebinger, described as an "Oregon attorney of substance," organized in January, 1953, "The Committee for the Preservation of State and Local Government" with offices in Chicago. It was a nonpartisan, nonprofit, educational corporation of which he was executive director. This proposal, based on original research done years earlier by Mr. Ebinger, was to amend the Constitution to provide that when the legislatures of any twelve states had proposed to the other states an amendment to the Constitution, it should, when adopted by three-fourths of the states, become part of the Constitution. The proposal was far more drastic than the current proposal of the General Assembly of the States to amend Article V. It was incorporated in a bill and was introduced in Congress on July 26, 1954, by Reps. Chauncey M. Reed of Illinois and Francis C. Walter of Pennsylvania as H.J.R. 568 and 569.

The Ebinger Proposal had a lively life in the *American Bar Journal*. It was introduced in the House of Delegates, which on August 27, 1953, referred it to its Committee on Jurisprudence and Law Reform with directions to report to the March 8, 1954, meeting of the House of Delegates. It thereupon began an active life of shuttling back and forth between the House and the Committee through motions to adopt, to table and recommit.⁶⁶ Finally it was withdrawn at the annual meeting of the American Bar Association in 1956, on motion of Mr. Martin, the Chairman of the Committee on Jurisprudence and Law Reform, who stated he was acting at the request of Mr. Ebinger.⁶⁷

SUMMARY

And so we end — or at least pause — in the short and simple annals of the Three States Rights Amendments. I am inclined to summarize the history in this fashion:

64 See Graham, *The Role of the States in Proposing Constitutional Amendments*, 49 A.B.A.J. 1175 (1963). See especially Graham's Appendix, *State Application to Congress Calling for Conventions to Propose Constitutional Amendments (1787-1963)*, *id.* at 1179-83.

65 The Ebinger proposal is described in Martin, *The Amending Power: The Ebinger Proposal*, 40 A.B.A.J. 767 (1954). The author, Wm. Logan Martin of the Birmingham Bar, was afterwards active in promoting the proposal as chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association.

66 See, *Reports of Proceedings of the House of Delegates* in 40 A.B.A.J. 438, 445; 40 A.B.A.J. 871, 909; 41 A.B.A.J. 333, 377-78, and 383; 41 A.B.A.J. 1068, 1075; 42 A.B.A.J. 371, 386.

67 *Proceedings of the House of Delegates*, 42 A.B.A.J. 1051, 1054 (1956).

1. It is the latest demonstration of a series of "states-rights" rebellions based on opposition to particular federal policies.
2. It differs in that it is based on a multi-pronged reaction of segregationist, ruralist, and rightist sentiments which gave it wider than usual support.
3. The local elements were able to unite, not through a common interest, but through the chance of their common participation in the activities of the Council on State Governments, which is now clearly somewhat divided and embarrassed by the proposals.
4. The modest success enjoyed by the proposals was not due to a well-financed, secret conspiracy, but to lack at the beginning of any interested, cohesive group operating in opposition to them. Eventually, the organized bar rose to the occasion and did a responsible and effective job.
5. The lesson of this history is that Eternal Vigilance is the Price of Liberty, and the Constitution has to be saved all over again every day.