52 American Bar Association Journal 326-31 (April 1966)

Reprinted 112 Congresssional Record 8383-87 (April 19, 1966)

An Antireapportionment Amendment: Can It Be Legally Ratified?

Mr. Wolf looks at comparatively unaired problems relating to whether malapportioned state legislatures may legally ratify an amendment to the Constitution under which the one-man, one-vote principle might be diluted. His conclusion is that the question of ratification by these legislatures would be justiciable, and that only state legislatures apportioned in accordance with present standards are able to give competent ratification to an antireapportionment amendment.

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CONGRESS IS ENGAGED again in the battle over reapportionment of state legislatures. An attempt made at the end of the second session of the 88th Congress to remove reapportionment litigation from the jurisdiction of federal courts was defeated by a filibuster in the Senate.[1] The first session of the 89th Congress witnessed an effort to limit the effect of the Supreme Court's extension of the one-man, one-vote principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), by means of an amendment to the Federal Constitution. That attempt failed to muster the required two-thirds majority in the Senate.[2] Senator Everett M. Dirksen of Illinois, the prime mover behind the antireapportionment drive, has renewed efforts to amend the Constitution in the second session of this Congress. The proposed amendments have taken various forms,[3] and not unexpectedly, they all provide for ratification by three fourths of the states.

But substantial and comparatively unaired legal questions arise with respect to this method of ratification—by state legislatures—of an amendment concerning apportionment of those legislatures. If "the equal protection clause demands no less than substantially equal state legislative representation for all citizens",[4] can a malapportioned state legislature ratify an amendment that would impair its citizens' rights to equal state legislative representation?[5] Stated another way, if "the equal protection clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis",[6] can a malap-

1. 110 CONG. REC. 21896, 22758 (September 10 and 24, 1964).

2. 111 CONG. REC. 18660 (August 4, 1965).

3. See *e.g.*, H. J. Res. 13, 14, 24, 151, S.J. Res. 2, 37, 38 and 44, 89th Cong., 1st Sess. (1965). The amendment proposed by Senator Dirksen has received the most attention. Extensive hearings were held on his (S.J. Res. 2) and other proposals (S.J. Res. 37, 38 and 44) in March, April and May, 1965, before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee. Those proceedings are printed in a 1,228-page document entitled *Hearings on Reapportionment of State Legislatures*. An amended version of S.J. Res. 2 was debated in the Senate in July and August, 1965, as an amendment to S.J. Res. 66 (National American Legion Baseball Week). After its defeat, Senator Dirksen introduced another version, S.J. Res. 103, for consideration in the current session of Congress. It reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years of its submission to the States by the Congress, provided that each such legislature shall include one house apportioned on the basis of substantial equality of population in accordance with the most recent enumeration provided for in section 2 of article I:

" 'Article—

" 'SECTION 1. The legislature of each State shall be apportioned by the people of that State at each general election for Representatives to the Congress held next following the year in which there is commenced each enumeration provided for in section 2 of article I. In the case of a bicameral legislature, the members of one house shall be apportioned among the people on the basis of their numbers and the members of the other house may be apportioned among the people on the basis of population, geography, and political subdivisions in order to insure effective representation in the State's legislature of the various groups and interests making up the electorate. In the case of a unicameral legislature, the house may be apportioned among the people on the basis of substantial equality of population with such weight given to geography and political subdivisions as will insure effective representation in the State's legislature of the various groups and interests making up the electorate.

" 'SEC. 2. A plan of apportionment shall become effective only after it has been submitted to a vote of the people of the State and approved by a majority of those voting on that issue at a statewide election held in accordance with law and the provisions of this Constitution. If submitted by a bicameral legislature the plan of apportionment shall have been approved prior to such election by both houses, one of which shall be apportioned on the basis of substantial equality of population; if otherwise submitted it shall have been found by the courts prior to such election to be consistent with the provisions of this Constitution, including this article. In addition to any other plan of apportionment which may be submitted at such election, there shall be submitted to a vote of the people an alternative plan of apportionment based solely on substantial equality of population. The plan of apportionment approved by a majority of those voting on that issue shall be promptly placed in effect.' "

4. *Reynolds* v. *Sims*, 377 U. S. at 568 (1964).

5. Senator Dirksen's amendment does not in and of itself *deprive* citizens of their right to equal state legislative representation; it permits the states to base their legislative apportionment on factors in addition to population only after approval by a referendum of the people. But there is no question that the citizens' present rights to equal representation would be *impaired*, because they would be subjected to a popular vote, unlike other constitutional rights.

6. *Reynolds* v. *Sims*, 377 U. S. at 568 (1964).

portioned state legislature ratify its own unconstitutional existence? The issue has been poignantly framed by Senator Abraham Ribicoff of Connecticut: These proposed constitutional amendments would allow "the rotten boroughs to decide whether they should continue to be rotten". Can they so decide?

As this article will show, a good case can be made for answering these questions in the negative. Not only are the questions substantively raised by the Supreme Court's reapportionment decisions, but the negative answers are now procedurally possible because of their fountainhead, *Baker* v. *Carr*, 369 U. S. 186 (1962).

I. Prior Challenges to Constitutional Amendments

Ratifications of constitutional amendments have been challenged in the courts before. The first such case in the Supreme Court was *Hawke* v. *Smith (No. 1)*, 253 U. S. 221 (1920). The Constitution of Ohio extended the referendum procedure to any ratification by the legislature of proposed amendments to the Federal Constitution. The Ohio legislature ratified the Eighteenth Amendment (prohibition), but prior to a referendum the United States Secretary of State proclaimed ratification by the necessary thirty-six states, among them Ohio. A citizen-taxpayer-voter of Ohio sued to restrain the Secretary of State of Ohio from spending public money to prepare and print ballots for the referendum.

Ohio's highest court sustained a demurrer to the suit, but the Supreme Court reversed and held that the proposed amendment could not be referred to the voters of the state since the provisions of the state constitution requiring a referendum were inconsistent with the Constitution of the United States. The Court said ratification of an amendment by a state legislature is a federal function derived from Article V of the Federal Constitution;[7] it is distinct from a legislature's role as an organ of the state and therefore independent of any state constitutional requirements.[8]

In *Fairchild* v. *Hughes*, 258 U. S. 126 (1922), citizen-taxpayers sued to have the Nineteenth Amendment (women's suffrage) "declared unconstitutional and void". The Supreme Court held in a short opinion that they had no standing to bring suit; they had "only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted".

In 1931 in *United States* v. *Sprague*, 282 U. S. 716, the United States prosecuted an appeal from an order of a district court quashing an indictment charging Sprague and others with unlawful transportation and possession of intoxicating liquors in violation of the National Prohibition Act. The district court had held that the Eighteenth Amendment, by authority of which the National Prohibition Act was enacted, had not been ratified so as to become part of the Constitution.

The defendants made the ingenious argument in the Supreme Court that proposed amendments conferring on the United States new direct powers over individuals, such as the Eighteenth Amendment, must be ratified by conventions in the states and not by state legislatures. They reached this conclusion by arguing that "if the legislatures were considered incompetent to surrender the people's liberties when the ratification of the Constitution itself was involved, *a fortiori* they are incompetent now to make a further grant". The Court rejected these arguments. It found the language of Article V—"as the one or the other Mode of Ratification may be proposed by the Congress"—too clear to permit reading any exceptions into it by implication.

The last significant case on the subject was *Coleman* v. *Miller*, 307 U. S. 433 (1939). In 1937 the Kansas legislature considered the child labor amendment (proposed to the states in 1924) for the second time. A tie vote in the state senate was broken in favor of ratification by the vote of the lieutenant governor, the presiding officer of the senate under the Kansas Constitution. The right of the lieutenant governor to break the tie was challenged on the ground that under Article V ratification of constitutional amendments was solely the function of state legislatures.[9] It was also alleged that the proposed amendment had lost its vitality because of the previous rejection by the Kansas legislature and failure of ratification by the states within a reasonable time.

The Supreme Court held that these were federal questions and that the senators on the losing side had a cognizable right under the Federal Constitution—the right to have their votes given effect on the ratification or rejection of a proposed constitutional amendment. But on the question whether the lieutenant governor could break a tie vote on the ratification of the pro-

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7. U.S. CONST. art. V: "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; Provided, . . . that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate."

8. See also *National Prohibition Cases*, 253 U. S. 350, 386 (1920); *Leser* v. *Garnett*, 258 U. S. 130, 137 (1922).

9. *Hawke* v. *Smith (No. 1)*, *supra*; note 8 *supra*.

posed amendment, the Court was equally divided.[10] Was it a justiciable controversy or was it a political question and thus not susceptible of judicial decision? No opinion was expressed. The Court went on to hold that Congress, as the political department of government, had the ultimate control over proposed constitutional amendments and the efficacy thereof. The previous rejection of the proposed amendment by the Kansas legislature and the lapse of time since the proposal thereof were political questions not subject to review by the Court. The denial by the Supreme Court of Kansas of the relief prayed for was affirmed.[11]

II. *The Effect of* Baker *v.* Carr

How have these cases been affected by recent decisions? Prior to *Coleman*, which appears to be an exception rather than the rule on the justiciability issue,[12] the Court had taken cognizance of a number of diverse challenges to constitutional amendments. That each case had been rejected on the merits does not weaken the force of each one's implicit justiciability. Yet because of *Coleman*, the last decided case interpreting Article V, the hurdle of the "political question" must be overcome in any challenge to the ratification of an antireapportionment amendment.

The foremost case on the question of justiciability in recent times is *Baker* v. *Carr*, 369 U. S. 186 (1962), in which Tennessee voters claimed denial of equal protection of the laws under the Fourteenth Amendment by virtue of the debasement of their votes. The Court in *Baker* held (1) that the federal courts possessed jurisdiction of the subject matter, (2) that the voters had standing to challenge the Tennessee apportionment statutes and (3) that their complaint presented a justiciable cause of action on which they would be entitled to appropriate relief. Six of the eight justices participating in the decision joined in the majority opinion by Mr. Justice Brennan, in which "political questions" in prior cases were categorized as follows:

> . . . Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[13]

An examination of the problem of ratification of an antireapportionment amendment by a malapportioned state legislature reveals that none of these common characteristics of "political questions" is present:

(1) Although it is "textually demonstrable" that ratification of constitutional amendments is committed by Article V to state legislatures,[14] the *Baker* Court stated:

> . . . Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[15]

Furthermore, state legislatures are not a "coordinate political department" in the traditional sense of legislative, executive and judicial, although they are a concomitant of the federal system.

(2) Even if the plethora of judicial actions in the wake of *Baker* v. *Carr*[16] may have demonstrated great variation in the enforcement of reapportionment decisions, there is certainly no lack of "judicially discoverable and manageable standards" for determining whether any particular state legislature is constitutionally apportioned.

(3) No "initial policy determination" of a nonjudicial sort is required of a court prior to a decision whether a malapportioned state legislature participated in the ratification of its own unconstitutional existence.

(4) Surely it cannot be said that a court's "independent resolution" of the validity of a state's ratification would express "lack of the respect due coordinate branches of government" when the Court has, since *McCulloch* v. *Maryland*, 4 Wheat. 36 (1819), wielded its power to declare state enactments unconstitutional.

(5) A "need for unquestioning adherence to a political decision already made" does not exist when the challenge is whether the political decision itself has been formulated in a manner consistent with the requirements of the Constitution.

(6) The only danger of "multifarious pronouncements" would arise from the possibly varying decisions by lower courts on individual legislatures' ratifications of an antireapportionment amendment. Any conflicts would eventually be resolved by the Supreme Court, would provoke no worse situation than now already exists because of various court reapportionment orders and would be confined to the judicial department of government.

Baker greatly refined and diminished the force of the "political questions" impediment to constitutional adjudication. Having spawned the vast sweep of reapportionment litigation and the attempts to thwart reappor-

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10. Just how this division of an apparently odd number of justices came about, however, is unclear. See Note, *Sawing a Justice in Half*, 48 YALE L. J. 1455 (1939).

11. See Note, 122 A.L.R. 717 (1939) and *Chandler* v. *Wise*, 307 U. S. 474 (1939).

12. Another exception, however, voiced in *Leser* v. *Garnett*, *supra* note 8, was that official notice of ratification by the several states was conclusive on the courts. Yet *Coleman* itself greatly diminished the force of this exception by its ruling that the state senators possessed federal rights and privileges that gave the Court jurisdiction over the controversy.

13. 369 U. S. at 217.

14. The Court in *Baker* cited *Coleman* v. *Miller* as demonstrative of a "political question" on this very matter of commitment to a coordinate political department. 369 U. S. at 214. But it did so only on the basis of *Coleman's* refusal to decide, because committed to Congress, how long a proposed amendment to the Federal Constitution remained open to ratification and what effect a prior rejection had on a subsequent ratification. *Coleman* was not cited as illustrative of nonjusticiability on the question of the validity of the actual ratification process by a state legislature. Of course, it could not have been so cited since the Court in *Coleman* was equally divided and expressed no opinion on whether the lieutenant governor could cast the deciding vote.

15. 369 U. S. at 211.

16. A graphic summary of reapportionment actions in the states was presented in the Washington Post, November 7, 1965, page E1.

tionment as well, *Baker* should also permit a return from the deviation in *Coleman* to the line of cases that have considered without hesitation the validity of ratification of constitutional amendments.[17]

III. Results of a Challenge to Validity of Ratification

Once the Supreme Court is loosed from the judicial restraints imposed by the justiciability issue, a challenge to the validity of the ratification by a malapportioned state legislature of a proposed antireapportionment constitutional amendment would rely on little more than an axiom of constitutional government. It may be stated as follows: Since the Constitution is the supreme law of the land, governmental action not in compliance with its requirements as authoritatively interpreted is, provided the requisites of standing and justiciability are met, subject to invalidation by the courts.

This axiom imposes constraints on all actions governed by the Constitution. But how is it applicable to attempts to alter one man, one vote by constitutional amendment?

First, it should be said there is no fundamental reason why a constitutional right may not be altered or eliminated by a constitutional amendment. During the hearings on reapportionment of state legislatures, some witnesses expressed horror at the idea that the Bill of Rights, for example, could be repealed. They instinctively felt there must exist a constitutional reason why such a repeal could not lawfully be brought about. Generally, the amendments have greatly enlarged constitutional rights. But by a form of majority will, as specified in the Constitution, constitutional rights may be altered or repealed, even in light of our tradition that these rights may not be infringed simply because the majority wills it.[18] In this sense constitutional government is reversible.

In another sense, however, constitutional government, short of revolution, is irreversible, for no one could seriously contend that while the Bill of Rights was being reconsidered its operation would be suspended. As part of the existing Constitution and as interpreted by the courts, it would remain effective until lawfully repealed or altered by constitutional amendment. Any attempt to repeal the Bill of Rights that violated those rights in the process of repeal would be subject to challenge. The constitutional axiom is just as applicable while amending the Constitution as it is at any other time.[19]

This must also be true with respect to equal protection, as that Fourteenth Amendment phrase encompasses the right of equal state legislative representation; that right remains in effect until repealed and must necessarily span the amending process. The Constitution has been authoritatively and unequivocally interpreted to require that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis".[20] The very least the constitutional axiom requires is that when a state legislature participates in the amending process—the only specifically delineated function of state legislatures under the Federal Constitution—concerning an impairment of constitutional rights as embodied in that legislature's own composition, the courts will demand that that legislature accurately reflect the only majority by which our system permits impairment of such rights. Thus, a malapportioned state legislature may not lawfully ratify a constitutional amendment that might permit that malapportionment to be perpetuated.[21]

This statement requires elaboration to some degree, for practical considerations must be permitted to impose upon legal theories in the now-violated political thickets of reapportionment. These considerations have a twofold effect.

Practicalities affect the constitutional issues of ratification in a restrictive sense because of the ever-present legal question of retroactivity. Malapportionment of a state legislature does not demand a declaration of retroactive invalidity of all acts of that legislature from the time it was first malapportioned. Such a vindication of citizens' rights to equal representation would be not only impractical but chaotic.[22] A state legislature, more than most litigants, is entitled to a presumption of the legitimacy of its acts and so are the citizens who rely on those acts.[23] It is true that a court may give retroactive effect to a declaration that any given act of a legislature is inconsistent with the Constitution. But when the attack is against the legitimacy of the legislature, rather than against a particular act, the presumption will prevent blanket invalidation of acts prior to any authoritative determination of the acting body's illegitimacy.

Therefore, it is reasonable to require that a successful challenge to the ratification of an antireapportionment amendment by a malapportioned state legislature can be made only when the legislature in question has already been determined by a court to be constitutionally unrepresentative at or before the time it attempted to ratify. Ratification by a legislature in fact malapportioned, but which had not been so determined by a court before it ratified, would be valid. If this were not the case, no amendment to the Constitution could ever be ratified finally and relied upon, because it would never be immune from retroactive attack.

Second, the inevitable practical aspects of reapportionment law have an expansive effect where ratification of the Constitution is involved. Because of pragmatic considerations it cannot be required that a state legislature's apportionment continuously change with shifts in population. Apportionment after each decennial cen-

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17. *Baker's* undermining of *Coleman* was recognized in a memorandum made a part of the record by Senator Thomas H. Kuchel of California in the *Hearings on Reapportionment of State Legislatures, supra* note 3, at 30.

18. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736-737 (1964).

19. See *Graham* v. *Jones*, 198 La. 507, 3 So. 2d 761 (1941), and cases cited; *Crawford* v. *Gilchrist*, 64 Fla. 41, 59 So. 963 (1912); 16 Am. Jur. 2d *Constitutional Law* §§ 39, 43.

20. *Reynolds* v. *Sims*, 377 U. S. at 568 (1964).

21. These grounds for invalidation of a state legislature's ratification would hold true for *any* constitutional amendment. But it is doubtful that a litigant would have standing to bring suit for any but an amendment directly affecting his personal constitutional rights, of which an antireapportionment amendment is the prime example. No voter would have standing to challenge ratification of the pending constitutional amendment on presidential succession, for example.

22. *Cf. Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966).

23. *Fletcher* v. *Peck*, 6 Cranch 87, 130-131 (1810).

sus is probably sufficient.[24] For example, relief to a litigant claiming infringement of his voting rights five years after a legislature's reapportionment might reasonably be denied on the ground that his suit was premature in relation to the practicalities of reapportionment. This could be done even though intermediate census figures showed that population shifts actually made the representation in that legislature significantly unequal. Yet, it is perfectly true that such practicalities do not prevail against the constitutional arguments set forth above, especially when the context is the federal function of ratification of a constitutional amendment dealing with the very issues which give rise to those practicalities.

As long as a legislature is not apportioned within realistic constitutional bounds, no matter if just before or just after a decennial census, the arguments for invalidating its ratification of an amendment on the subject of apportionment are completely applicable. It may be that higher standards of apportionment should be required in the constitutionally prescribed process of amending the Constitution than for ordinary legislative purposes. It might be possible for a legislature to be in fact malapportioned, and therefore unable lawfully to ratify an antireapportionment amendment, yet for that same legislature not to be obligated to reapportion itself for legitimacy of its day-to-day activities. The legal means for bringing such an argument to bear, especially in light of the aforementioned limitation requiring that a determination of malapportionment be made prior to the legislature's actual act of ratification, unfortunately may depend, however, on the legal complexities of enjoining a malapportioned state legislature from considering a constitutional amendment.

The arguments based on the constitutional axiom are further sustained by the need for consistency among the Supreme Court's decisions. The failure of state legislatures to reapportion themselves because of a preference for the expedient *status quo*, often in violation of their own state constitutions, brought about the legal anathema of the deterioration of a right (to vote) without a remedy (even by "political" means). In the tradition of the common law a judicial remedy was forged in *Baker* v. *Carr*. Were the Supreme Court to permit unconstitutionally constituted legislatures to be entrusted with the option of perpetuating their unconstitutionality, it would be turning its back on the very same plight of the voter without a remedy that initially prompted judicial intervention. A new vicious circle would be created: Citizens with the right to equal state legislative representation would be deprived of the power to enforce that right when that right's very continuation was at stake.

The entire problem was accurately summarized in a portion of the testimony before the Senate Subcommittee on Constitutional Amendments by Royce Hanson, associate professor of government at American University, when in discussing Senator Dirksen's proposed amendment, he stated:

> Finally, S. J. Res. 2 provides for ratification by the legislatures of the States. This procedure for this amendment presents every legislature with an irresistible conflict of interest. Every member has a personal interest in the amendment. Too often such interests exceed the public interest. If legislatures were to vote on it, I think we can predict in about every State where the legislature is under court mandate to reapportion, lawsuits challenging the capacity of a malapportioned legislature to sit in judgment of this amendment, would occur. Even if all the suits are lost, it seems to me incredible that the Congress would be a party to so cozy an arrangement as this procedure permits.[25]

Professor Hanson's misgivings that ratification would be far more on the level of self-preservation than on the higher plane of constitutional concern are amply illustrated by the fact that some state legislatures that have enacted reapportionment plans under court order have provided that the plans shall be immediately and automatically rescinded if an antireapportionment amendment becomes effective.[26] Similar misgivings arise from a realization of the misleading quality of the question used as the battle cry of those supporting an antireapportionment amendment—"What is wrong with letting the people decide?" It is not the people who would ratify an antireapportionment amendment; it is the state legislatures. If "letting the people decide" refers to the referendum provisions of the Dirksen amendment, those provisions are totally irrelevant to the amending process itself.

As pointed out earlier, challenges to ratifications of an antireapportionment constitutional amendment by malapportioned state legislatures now appear to be justiciable in the courts. Such an amendment and the operation of the constitutional axiom in the context of its ratification are unique in our constitutional history. For not only does a proposed antireapportionment amendment specifically impair a pre-existing constitutional right, but its ratification by legislatures that may be malapportioned attempts alteration by means that inherently violate that same constitutional right. The outcome of each challenge can logically and constitutionally result only in an invalidation of a malapportioned state legislature's bootstrap ratification of its own unconstitutional composition.

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24. The words of the Supreme Court in *Reynolds* v. *Sims* are applicable, 377 U. S. at 583-584 (1964): "That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. . . . While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect."

25. *Hearings on Reapportionment of State Legislatures, supra* note 3, at 660.

26. See *e.g.*, North Dakota Statutes, ch. 338, § 5 (March 20, 1965): "*Amendment to United States Constitution—Results.* Upon the effective date of any amendment to the United States Constitution which delegates to the states the right to apportion their legislatures in a manner to be determined by each state or its citizens or in accordance with the amendment to the United States Constitution, the provisions of . . . [this Legislative Apportionment] Act shall become null and void and the apportionment of the representatives and senators of the legislative assembly of this state shall be as provided by the laws of North Dakota in effect on July 1, 1963. . .".

A statute such as this is clearly suspect on the same constitutional grounds applicable to the ratification of a constitutional amendment: it is the act of an illegitimate legislature apportioning a future legislature in violation of existing constitutional rights to equal representation.

IV. Permissible Forms of Ratification

If ratification by malapportioned state legislatures of an antireapportionment amendment can be successfully challenged in the courts, does that mean the Supreme Court has enunciated a constitutional concept which is irrevocably insulated from alteration? Or are means still available by which to amend the Constitution? If so, are there operative constraints imposed as a result of the present requirement that every citizen's vote count as much as another's?

It is by now apparent that an antireapportionment amendment may be ratified by legislatures in three fourths of the states when both houses of each legislature are lawfully apportioned on a population basis.[27] The proposed amendment adopted by Congress could specifically so provide.[28] The real question, perhaps, is pragmatic: *would* lawfully apportioned legislatures ratify an antireapportionment amendment? Fear that they might not has apparently influenced the backers of the various antireapportionment proposals and may account for their early attempt in the 88th Congress to remove reapportionment litigation from the jurisdiction of federal courts until, allegedly, Congress could consider an amendment to the Constitution. As reapportionment proceeds apace through the courts, this practical question becomes more and more important, for fewer and fewer malapportioned legislatures will exist.

Another method of ratification is set forth in Article V—ratification by conventions in three fourths of the states. This method has been used only once—for ratification of the Twenty-First Amendment (repeal of prohibition). None of the joint resolutions introduced in the 89th Congress adopts this method. Apparently, supporters consider it more doubtful that ratification could be obtained by conventions in the states. Ratification certainly would be less likely than if self-serving state legislatures passed on it. It is no doubt true, however, that ratification by the convention method may be subject to abuse. It is the state legislatures that would set up the ratifying conventions. If provisions for free selection of delegates on an equal population basis were not provided, successful challenges in the courts on grounds similar to those mentioned could well result. Nevertheless, ratification by state conventions provides a justifiable alternative.

A final method of change relates to the means of proposing an amendment for ratification. Article V provides for proposing amendments by a constitutional convention called by Congress upon application by two thirds of the state legislatures. This approach to amending the Constitution has never been used and, indeed, many have cautioned against it.[29] As many as twenty-six state legislatures have passed resolutions requesting Congress to call a constitutional convention on the reapportionment issue. More than a third of the states have rejected such a resolution, however, so that this method of amendment appears remote at the present time.

Amendments proposed by constitutional convention would require ratification by three fourths of the state legislatures or by three fourths of the states meeting in convention. Ratification would, therefore, be subject to challenge on all the grounds set forth above. It is possible, though perhaps unlikely, that these same arguments could be applied to invalidate a malapportioned state legislature's mere application to Congress to call a convention for the purpose of proposing an antireapportionment amendment.

Conclusion

It can fairly be said that very real constitutional problems exist that have not been considered properly by Congress in its study of antireapportionment proposals. These issues go to the heart of the controversy. Supporters of an antireapportionment amendment appear to have avoided them. One can hope, however, that they would not wish to put forth a hasty proposal that would merely invite countless lawsuits because of the method adopted for ratification. Their course should be to have fair and open discussion of these issues and to ensure fair and just ratification procedures that are not beset by the spectacle of politicians attempting to validate their own unrepresentativeness.

At the same time, opponents should point out the difficulties that can be expected since they may bear directly on the very desirability of an attempt to amend the Constitution to permit even partial malapportionment. Insofar as possible invalidity of state ratifications of an antireapportionment amendment may affect the desirability of change—indeed, the possibility of change—the debate should be open and above board. The voters deserve no less.

27. Nebraska is the only state without a bicameral legislature.

28. S.J. Res. 103, *supra* note 3, goes only half way in this regard by requiring that each ratifying state legislature "shall include one house apportioned on the basis of substantial equality of population". *Reynolds* v. *Sims*, *supra*, and *Lucas* v. *Colorado General Assembly*, *supra* note 21, provide no basis for such a partial compliance with present constitutional requirements. See Killian, *State Legislative Apportionment: An Analysis of Proposed Constitutional Amendments*, Library of Congress Legislative Reference Service, American Law Division, pages 6-12 (December 7, 1965).

29. Knotty questions arise from this method of constitutional amendment. What happens if Congress refuses to call a convention? Must the applications of the states to Congress be identical in form or content or both? Can matters outside the scope of the states' applications to Congress be considered in a constitutional convention? Proposal of amendments in this fashion has been called a form of "constitutional end run" because there is no direct guidance or participation by the Federal Government. Washington Post editorial, October 27, 1965, page A20. The danger of a runaway convention, venting deep-seated angers at the Supreme Court, is also said to be a risk.

Reprinted from
American Bar Association Journal

April, 1966