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## Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail

WILLIAM G. ROSS†

### INTRODUCTION

The U.S. Supreme Court is the subject of perennial political controversy. Since the Court's adjudication of significant and highly contested issues ensures that the Court's decisions often will disappoint and offend powerful interests, the Court throughout its history has provoked proposals for diminution of its powers. The Warren Court was the target of particularly virulent hostility since it rendered dramatic and innovative decisions on so many politically sensitive subjects, including racial desegregation, the rights of political subversives and criminals, freedom of religion, and reapportionment. The many efforts to curb federal judicial power during the Warren Era have received considerable scholarly attention.<sup>1</sup> These works naturally

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1. See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); CLIFFORD M. LYTLE, *THE WARREN COURT AND ITS CRITICS* (1968); WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962); C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT 1957-1960* (1961).

have concentrated on congressional initiatives since many proposals to curb the Court through federal legislation or constitutional amendments originated in Congress, and several congressional efforts to pare the Court's jurisdiction came perilously close to success.

While these congressional attacks on the Warren Court were significant, the Court also was subjected to a unique and now largely forgotten barrage of criticism and Court-curbing initiatives from state officials. The Court's many decisions expanding federal judicial power at the expense of state courts and legislatures provoked a series of state-based Court-curbing proposals that would have reduced the Court's power over the states so radically as to transform the nation into a virtual confederation. At the peak of this neo-Confederate movement's activities in 1963, the Amherst historian Henry Steele Commager declared that "[n]ot for more than a century has the doctrine of states' rights been so defiantly proclaimed as now; not since Appomattox has it found such widespread support."<sup>2</sup>

This long-simmering states' rights movement began to boil during the 1950s with southern state legislative resolutions calling for defiance of the Court's desegregation decisions. After rendering controversial decisions on subversion and criminal procedure, the Court became the target of open and often blistering criticism by organizations of state chief justices, attorneys general and governors. The Court's 1962 decision to adjudicate reapportionment controversies<sup>3</sup> produced the culmination of this states' rights movement, when a group of state officials sponsored three constitutional amendments that would have radically altered the balance of power between the state and federal governments. The amendments would have permitted states to amend the Constitution without the participation of Congress, stripped the Court of jurisdiction over apportionment, and created a so-called "Court of the Union" composed of state chief justices to review U.S. Supreme Court decisions affecting the states. With only slight exaggeration, Professor Paul Oberst warned in 1963 that these amendments represented "one of the most drastic attacks on federal supremacy—especially

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2. Henry Steele Commager, *To Form a Much Less Perfect Union*, N.Y. TIMES MAG., July 14, 1963.

3. *Baker v. Carr*, 369 U.S. 186 (1962).

federal judicial supremacy—ever mounted on behalf of ‘states rights.’”<sup>4</sup> The amendments sailed through the legislatures of numerous states until a broad array of prominent federal officials, journalists, and academics sounded the alarm.

In contrast to the many studies of congressional efforts to curb the Court, these proposals have received almost no scholarly analysis and have largely been ignored ever since they collapsed during the middle and late 1960s.<sup>5</sup> This article will attempt to remedy this deficiency by studying the origins, development, and ultimate defeat of efforts by state officials to curb the Supreme Court’s powers during the Warren Era. The article will also place this states’ rights movement in the broader context of other efforts to curb the Court, during the Warren Era and at other times. Further, it will explain how this movement offers insights into the reasons why all movements to diminish the Court’s power have failed throughout American history despite intense opposition to many of the Court’s decisions.

## I. QUESTIONING THE COURT

### A. *Prologue I: Attacks on the Court before 1937*

Organized efforts to curb federal judicial power during the Warren Era were part of a long series of attacks on the Court that have stretched from the earliest years of the Republic to the present day. Since the perennial controversy over the Court’s power reflects widespread misgivings about the Court’s countermajoritarian role in the nation’s political structure,<sup>6</sup> volleys against the Court

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4. Paul Oberst, *The Genesis of the Three States-Rights Amendments of 1963*, 39 NOTRE DAME L. REV. 644, 644 (1964).

5. For brief discussions, see DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995*, at 371-74 (1996); JOHN R. VILE, *REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT* 97-100 (1991).

6. For detailed considerations of these controversies and the tensions between popular political movements and judicial independence, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

have been fired from many different points along the political spectrum.

The Marshall Court's decisions undergirding federal power and vested property rights provoked efforts by proponents of states' rights to impeach federal judges, and later to curtail the Court's power of judicial review and limit the Court's jurisdiction<sup>7</sup>. Although the firestorm over the Court's *Dred Scott* decision produced no organized movement to curtail judicial power, anxiety about the Court's response to reconstruction legislation inspired numerous abortive proposals for curbing the Court's power.<sup>8</sup> Hostility toward the Court reached new levels of intensity for nearly half a century after 1890, when populists, progressives, and labor leaders complained that the Court's decisions frustrated social and economic reform.<sup>9</sup> Franklin D. Roosevelt's unsuccessful effort to pack the Court in 1937 was merely the final and most dramatic chapter of a prolonged period of anti-Court agitation that had produced proposals to limit the Court's jurisdiction, permit Congress to override the Court's decisions, require the concurrence of more than a majority of justices to nullify legislation, recall federal judges, allow popular referenda to overturn decisions, elect federal judges, and limit judicial tenure.<sup>10</sup> As in previous eras, however, the Court emerged from this crucible with its powers intact in some ways even enhanced.

The failure of persistent Court-curbing efforts between 1890 and 1937 reflected many factors, including a pervasive public respect for the judiciary as a guardian of personal and property rights; institutional obstacles that impeded the viability of legislation to curtail judicial power; divisions

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7. See Maurice S. Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 IND. L. REV. 386, 388-89 (1929) [hereinafter Culp, *Survey I*]; Maurice S. Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States-II*, 4 IND. L.J. 474, 482-84 (1929) [hereinafter Culp, *Survey II*].

8. See WILLIAM LASSER, *THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS* 102-03 (1988); Culp, *Survey I*, *supra* note 7, at 389; Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 928-29 (1965). In contrast to other proponents of Court-curbing, critics of the Court during Reconstruction did not profess opposition to federal judicial power itself. LASSER, *supra*, at 91, 109.

9. See WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, *passim* (1994).

10. See *id.*, *passim*.

and disputes among critics of the judiciary that precluded agreement on any plan of action; organized campaigns by the elite bar in opposition to plans to curb judicial power; widespread public and congressional support for the Court's decisions; recognition by the Court's critics that judicial power could ultimately serve their ends; and the flexibility of judges in adapting their decisions to the changing needs of society.<sup>11</sup> This final factor, judicial adaptability, is generally regarded as the principal reason for the defeat of Roosevelt's Court-packing plan, although scholars sharply disagree about the extent to which the Court's attitudes toward regulatory legislation had metamorphosed even before 1937 and whether such changes were generated by the Court's internal dynamics or by external pressure.<sup>12</sup> As this article will demonstrate, this factor along with the others that preserved the Court's powers during the controversies that reached their denouement in 1937 similarly frustrated efforts to curtail judicial power during the Warren Era.

### *B. Prologue II: Attacks on the Court, 1937-1954*

Studies of Court-curbing tend to skip from the so-called Judicial Revolution of 1937 to the attacks on the Court by segregationists in the wake of *Brown*.<sup>13</sup> It is impossible, however, to fully comprehend the fury against the Warren Court unless one considers the growing antagonism toward the Court by a broad range of conservatives during the period between 1937 and 1954. While the Court was not a

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11. *Id.* at 2.

12. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (arguing that the Court's decisions after 1937 represented an evolution of existing doctrine rather than a revolution resulting from external political pressure); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1896-98 (1994) (arguing that the Court's transformation occurred gradually during the 1930s and was jurisprudential); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 18 (1995) (arguing that the Court's response was heavily influenced by external political pressures); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (adopting and adapting features of both the "internalist" and "externalist" positions).

13. *Brown v. Board of Education*, 347 U.S. 483 (1954).

subject of major political controversy during the period between the Judicial Revolution of 1937 and the Supreme Court's 1954 decision in *Brown*, the Court did not escape criticism even during these years of relative calm. Many of the tensions over judicial power that reached a boiling point during the Warren Era had their origins during this period. Although the Judicial Revolution of 1937 ended hostility toward the Court among liberals and organized labor, antagonism toward the new constitutional order erupted almost immediately among some economic conservatives who during previous decades had staunchly defended the Court. In 1939, for example, the president of the American Bar Association (ABA) excoriated the Court's recent decisions for wreaking "the most devastating destruction of constitutional limitations upon Federal power, and the most unprecedented expansion of that power over the every-day affairs of individual citizens in the Republic's history."<sup>14</sup>

The following year, a Northwestern University law professor blamed the Court's unwillingness to check large scale taxation and public spending for "the low state of financing new ventures, the huge excess bank reserves, the low rates of interest, widespread unemployment, and the ever-mounting national debt."<sup>15</sup> Similarly, columnist David Lawrence alleged that the Court's radicalism in tax cases was resulting in "confiscation of private property by unjust administration of the tax laws in violation of the letter and spirit of the Constitution."<sup>16</sup> A Montana congressman hinted that the House should impeach unnamed Justices for disregarding "the plain letter and spirit of the Constitution,"<sup>17</sup> and an attorney published a pamphlet suggesting that Congress should impeach Justices who had transformed the Court "into the strong arm of the New

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14. Frank J. Hogan, *Important Shifts in Constitutional Doctrines*, A.B.A. J., Aug. 1939, at 638 (delivering presidential address before the Assembly at the sixty-second annual meeting of the ABA, July 10, 1939).

15. E.F. Albertsworth, *The New Constitutionalism*, A.B.A. J., Nov. 1940, at 867. Professor Albertsworth concluded that "private capitalism has no large confidence in the present Supreme Court's interpretation of the Constitution." *Id.*

16. David Lawrence, *Today in Washington-Supreme Court Tax Decisions Always Uphold the New Deal*, N.Y. SUN, Oct. 9, 1940, reprinted in 86 CONG. REC. 6320-21 (1940).

17. 86 CONG. REC. 2147-49 (1940) (remarks of Rep. Thorkelson).

Deal” and a “battering ram for the destruction of the rights of the people.”<sup>18</sup>

Although impeachment of Justices for upholding congressional legislation was impracticable, this talk of impeachment reflected the acute frustration of conservatives who had lost control over all three branches of government and had no reasonable hopes of regaining it at any time in the foreseeable future. Conservative despair over Roosevelt’s appointment of all but one of the Supreme Court Justices and the overwhelming majority of lower federal judges was especially acute because these judges served for life.<sup>19</sup>

In addition to attacking the Court for assisting with the alleged drift toward socialism, conservatives throughout the 1940s also castigated the Court for eroding states’ rights. The Court’s growing interference with state restrictions on the liberties of African-Americans particularly antagonized many Southerners. The Court’s 1944 decision requiring Texas to permit blacks to participate in primary elections<sup>20</sup> probably inspired a Texas bar resolution blasting the Court for unsettling the law by overturning precedents on the basis of “casuistry and sophistry” rather than logic, and alleging that the Court was losing the esteem of the people.<sup>21</sup> The Court’s prohibition of judicial enforcement of racially restrictive land covenants in *Shelley v. Kraemer*<sup>22</sup> provoked especially hostile reactions insofar as it offended economic conservatives in addition to states’ rights advocates and segregationists. One congressman alleged that *Shelley* destroyed “the value of property owned by tens of thousands of loyal Americans,”<sup>23</sup> and a Mississippi

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18. Wade H. Cooper, *Shall the Judges of the Supreme Court of the United States Be Impeached for a Gross Perversion of the Constitution of the United States?*, reprinted in 86 CONG. REC. 5046 (1940).

19. See 90 CONG. REC. A1996 to A1997 (1944) (remarks of Rep. Crawford).

20. *Smith v. Allwright*, 321 U.S. 649 (1944).

21. *Resolution Adopted by State Bar of Texas at 1944 Annual Meeting, Fort Worth, Texas*, A.B.A. J., Aug. 1944, at 484-85. Although the resolution referred only to the Court’s decisions under the commerce clause, critics of the resolution contended that Allwright probably inspired the motion, particularly because it overturned the Court’s decision in *Grovey v. Townsend*, 295 U.S. 45 (1935). See Kenneth C. Sears, *The Supreme Court and the New Deal—An Answer to Texas*, 12 U. CHI. L. REV. 140, 172 (1944).

22. 334 U.S. 1 (1948).

23. 94 CONG. REC. 5256 (1948) (remarks of Rep. Rankin). Rankin averred that the decision must have inspired a celebration in Moscow because “the



congressman claimed that it brought about "a revival of the Ku Klux Klan."<sup>24</sup> Although proposals to make the Court more responsive to the rights of private enterprise and the states were most abundant in the South, they arose in every part of the nation. In 1951, for example, a New York congressman sponsored legislation to provide for the selection of Supreme Court Justices by a majority vote of the chief justices of the states.<sup>25</sup>

Already under attack by conservatives for its pronouncements on economic regulation and race, the Court during the late 1940s ventured into another controversial line of decisions when it began to hand down rulings on the Establishment Clause that tended to antagonize those same conservatives. In particular, the Court's 1948 decision striking down an Illinois law that permitted voluntary religious instruction to be conducted in public schools at private expense provoked allegations that the Court was unduly interfering with religious liberty. A Florida congressman complained that the Court had enabled atheists to "strike down the teachings of our public schools of religion, which is the strongest power to kill and destroy . . . communism,"<sup>26</sup> and an Alabama congressman introduced a bill to repeal the Fourteenth Amendment in order to prevent the Court from applying the First Amendment to any more state laws affecting religion.<sup>27</sup>

Meanwhile, hostility toward the Court was stoked by a series of opinions in which the Court limited the seaward boundaries of the states.<sup>28</sup> The decisions offended some of the more ardent proponents of states' rights, along with the oil and gas industry. Petroleum interests were further riled by a 1954 Supreme Court decision that subjected a

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Communists won their greatest victory in the Supreme Court." *Id.*

24. *Id.* at 5257 (remarks of Rep. Williams). Similarly, on the eve of *Brown*, Representative Forrester of Georgia denounced *Shelley* as "nothing less than a deliberate confiscation of property." 100 CONG. REC. 1517 (1954) (remarks of Rep. Forrester). Likewise, Representative James C. Davis of Georgia complained in 1954 that *Shelley* had caused property owners "to sacrifice property values and lose dollars and cents rightfully theirs." *Id.* (remarks of Rep. Davis).

25. S.J. Res. 168 (1951)

26. 94 CONG. REC. A1683 (1948) (extension of remarks of Rep. Rogers).

27. *Id.* at 4076 (remarks of Rep. Hobbs).

28. See *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. California*, 332 U.S. 19 (1947).

petroleum company to federal regulation.<sup>29</sup> When President Eisenhower vetoed a bill that would have undone the effects of this decision, the Attorney General of Texas called for the state to defy the decision, and other critics advocated a constitutional amendment to exempt oil and gas from federal regulation under the Commerce Clause.<sup>30</sup>

Growing opposition to the expansion of federal power produced a split in the Democratic Party in 1948, when a number of conservative Democrats refused to support Democratic nominee Harry Truman and formed a States' Rights Party whose presidential candidate, Strom Thurmond, carried four southern states and won more than a million popular votes.<sup>31</sup> The party's platform expressed opposition to "the usurpation of legislative functions by the executive and judicial departments."<sup>32</sup>

States' rights advocates supported an amendment proposed by Senator John Bricker of Ohio to limit the President's authority in foreign affairs.<sup>33</sup> Although the amendment was partly intended to prevent the erosion of national sovereignty through American participation in the United Nations and other international organizations and to prevent the aggrandizement of presidential power at the expense of Congress, states' rights proponents also feared that international accords could enlarge federal power at the expense of the states.<sup>34</sup> In particular, advocates of

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29. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

30. Fagan Dickson, *The Segregation Cases: Equal Justice Under Law for All Citizens*, A.B.A. J., Aug. 1956, at 731.

31. See ZACHARY KARABELL, *THE LAST CAMPAIGN: HOW HARRY TRUMAN WON THE 1948 ELECTION* 50, 255 (2000).

32. *NATIONAL PARTY PLATFORMS 1840-1956*, at 468 (Kirk H. Porter & Donald Bruce Johnson eds., 4th ed. 1970).

33. See DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* 70 (1988). The Bricker Amendment provided:

Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force and effect.

Section 2. A treaty shall become effective as internal law only through legislation which would be valid in the absence of a treaty.

Section 3. Congress shall have the power to regulate all Executive and other agreements with any foreign power or international organizations. All such agreements shall be subject to the limitations imposed on treaties by this article.

*Id.*, app. at 224.

34. See 2 ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENTS* 558-59 (7th ed. 1991). The Bricker Amendment would have

states' rights feared that adherence to such agreements as the United Nations' 1948 Declaration of Human Rights also could undermine the constitutional underpinning of state segregation laws.<sup>35</sup> After protracted deliberations, the Senate rejected the Bricker Amendment in 1954 by a margin of one vote.<sup>36</sup> The ability of the amendment to win the support of nearly two-thirds of the senators and the endorsement of the ABA and other prominent organizations was in part an expression of the intensity of states' rights fervor.

### C. Ignoring Appomattox: The Interposition Movement

Ten weeks after the Senate rejected the Bricker Amendment, the Supreme Court handed down its decision in *Brown*. Adverse reaction by Southern states' rights advocates was immediate and virulent. As a Georgia congressman alleged the day after the decision, *Brown* had "wiped out every vestige of States rights."<sup>37</sup> Although many commentators pointed out that opposition to *Brown* was based more upon unprincipled support for segregation than upon principled support for states' rights, *Brown* received criticism from some conservatives who did not necessarily favor segregation. Some suggested that the evil of *Brown's* damage to federalism was more pernicious than was the evil of segregation.

After biding their time for a year to see how the Court would enforce *Brown*, segregationists began to develop methods of open defiance after the Court in *Brown II* directed lower courts to fashion equitable decrees that would result in desegregation with "all deliberate speed."<sup>38</sup> School districts throughout much of the South began to develop such subterfuges and evasions as racially-discriminatory pupil-placement policies, restrictions on pupil transfers, state financial support for students to

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overturned the Supreme Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), which held that a treaty protecting migratory birds did not invade state powers in violation of the Tenth Amendment even if Congress lacked power to regulate migratory birds. KELLY ET AL., *supra* at 558.

35. KYVIG, *supra* note 5, at 340.

36. *See id.* at 342-45.

37. 100 CONG. REC. 6777 (1954).

38. 349 U.S. 294, 300 (1955).

attend private schools, and withholding of funds from desegregated schools.<sup>39</sup> Opponents of segregation understood, however, that such exercises of raw power needed a constitutional pretext.

Casting about for a legal theory that would justify opposition to *Brown*, opponents of integration dusted off the ancient doctrine of interposition, which would permit the states to interpose their own interpretation of the Constitution to oppose assertions of federal authority which unduly interfered with state sovereignty.<sup>40</sup> Although advocates of interposition were fond of pointing out that the redoubtable James Madison and Thomas Jefferson had articulated interposition in the Kentucky and Virginia Resolutions in 1798 and that interposition also found support in such other dubious precedents as the Hartford Convention of 1814 and antebellum opposition to the fugitive slave laws, proponents of interposition were hard-pressed to explain how their theory had survived the Union victory in the Civil War.<sup>41</sup>

Seemingly oblivious to the implications of Appomattox and the nation's subsequent constitutional history, Virginia's legislature endorsed interposition in a resolution on February 1, 1956, declaring that states have the duty pursuant to their "compact" with the federal government to interpose their rights whenever the central government "attempts the deliberate, palpable, and dangerous exercise of powers not granted to it."<sup>42</sup> Similar resolutions were adopted within the next several weeks by the legislatures of Georgia,<sup>43</sup> South Carolina,<sup>44</sup> Mississippi,<sup>45</sup> and Alabama.<sup>46</sup> Louisiana followed a year later.<sup>47</sup> The Mississippi resolution pronounced *Brown* to be "unconstitutional, invalid, and of no lawful effect within . . . Mississippi."<sup>48</sup> The South Carolina resolution, for example, declared that the "tragic"

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39. PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918-1969* 339 (1972).

40. See POWE, *supra* note 1, at 58-60.

41. See *id.* at 59.

42. 102 CONG. REC. 2020 (1956).

43. *Id.* at 2453.

44. *Id.* at 3348.

45. *Id.* at 3766.

46. 1956 Ala. Acts 42

47. 103 CONG. REC. 244 (1957).

48. 102 CONG. REC. 3767 (1956).

consequences of *Brown* "transcend[ed] the problems of segregation in education" and "planted the seed[s] for the destruction of constitutional government."<sup>49</sup> The resolutions called obliquely for "appropriate steps by Congress" and the states to halt the "usurpation."

Since antagonists of the Court recognized that interposition could not succeed if it remained a southern, *Brown*-based phenomenon, some expressed hope that other states would approve interposition resolutions based upon non-racial grievances. When the Texas attorney general in March 1956 disparaged the use of interposition for segregation decisions but expressed support of the doctrine to overturn the Court's rulings in oil and gas cases,<sup>50</sup> proponents of interposition wishfully detected the beginnings of a national trend. As the conservative journal *Human Events* explained, "[i]f Texas and Oklahoma, for instance, invoked interposition for this reason, and some of the mountain states invoked it for some other reason, say of mineral resources, the issue of interposition and states' rights might well have a truly broad and national scope."<sup>51</sup>

Meanwhile, on March 12, 1956, 101 of the 128 southern members of Congress signed a "Declaration of Constitutional Principles," which attacked *Brown* as an exercise of "naked power" and pledged "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution."<sup>52</sup> Like so much other criticism of *Brown* by public officials, the Declaration, which became known as the "Southern Manifesto," complained about judicial activism and intrusion on states' rights rather than integration. Members of Congress who signed the Manifesto likewise defended it as a stand against federal tyranny. Signers of the Manifesto contended that they were upholding the law rather than flouting it. They claimed

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49. *Id.* at 3348.

50. Dickson, *supra* note 30, at 731 (citing Speech of John Ben Shepperd, *Interposition-Fact of Fancy*, delivered over Texas State Network, Mar. 22, 1956).

51. *Interposition*, HUM. EVENTS, Feb. 4, 1956, at 3. *Human Events* observed that "[b]ackers of interposition have deemed it rather unfortunate that the issue is now tied to the race question. But they see no reason why this should continue to be so." *Id.*

52. 102 CONG. REC. 4515-16 (1956). The only southern senators who did not sign the Declaration were Lyndon B. Johnson of Texas and Albert Gore, Sr. and Estes Kefauver of Tennessee, all of whom had presidential aspirations.

that allegations of their lawlessness were hypocritical because civil rights activists had themselves fought vigorously against the law in opposing segregation.<sup>53</sup> Representative James C. Davis of Georgia, for example, explained that he signed the Declaration “because the time is here to defend free government or to surrender to judicial dictatorship.”<sup>54</sup> As Professor Powe has aptly pointed out, however, “[o]f course, interposition was about race, but to admit the truth would result in an easy intellectual loss for the South.”<sup>55</sup>

The Southern Manifesto was radical even though it avoided specific endorsement of interposition and mostly eschewed the fiery rhetoric with which so many Southerners had blasted *Brown* in Congress, statehouses, courthouses, pulpits, and political rallies. Professor Powe has observed that the Declaration “did not say how there could be ‘lawful’ means to oppose a Supreme Court decision.”<sup>56</sup> Of course, the signers of the Manifesto knew that there were no lawful means, even though, as Alexander Bickel observed, they could not bring themselves to admit that *Brown* was “the binding verdict of a tribunal empowered beyond the shadow of a doubt to render it.”<sup>57</sup> They also knew that the unlawful alternative of armed insurrection would be as futile in the 1950s as it had been during the 1860s. As a University of Texas law professor pointed out, “[n]ullification or interposition just will not work”<sup>58</sup> because federal officials have both the will and the raw power to enforce any judgment of a federal court. Other critics of interposition likewise warned about the futility of interposition and its threat to public order. Late in 1956, for example, a politically and geographically diverse group of more than one hundred leaders of the bar signed a statement deploring the “recent attacks” on the Court as

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53. *A Milestone in the South's Fight*, RICHMOND TIMES-DISPATCH, reprinted in 102 CONG. REC. 4693 (1956).

54. 102 CONG. REC. 6821 (1956).

55. POWE, *supra* note 1, at 59.

56. *Id.* at 61.

57. Alexander Bickel, *Ninety-Six Congressmen Versus the Nine Justices*, NEW REPUBLIC, Apr. 23, 1956, at 11. According to Bickel, *Brown* represented “the price of deference to the national will which the South must pay for being neither a province nor an insignificant principality but an integral part of the greatest and richest civilized power on earth.” *Id.*

58. George W. Stumberg, *The School Segregation Cases: Supporting the Opinion of the Supreme Court*, 42 A.B.A. J., Apr. 1956, at 318, 319-320.

“reckless in their abuse . . . heedless of the value of judicial review . . . and dangerous in fomenting disrespect for our highest law . . . .”<sup>59</sup>

Despite the legal and moral deficiencies of the opposition to *Brown*, the interposition resolutions, the Southern Manifesto, and the countless judicial and administrative efforts to block *Brown*'s implementation made clear that hostility toward the Court's decision was formidable and found support at every level of white southern society. The *Wall Street Journal* aptly cautioned that the Manifesto was “not the voice of any calloused [sic] demagog. The hundred men spoke for millions of people, some frustrated, some bewildered, some disheartened, and some fearful.”<sup>60</sup>

White Southerners warned Northerners that the Court's “tyranny eventually would intrude upon their own interests.” As Davis cautioned in 1956, “[w]hile it may be Georgia or Arkansas which suffers today from such wrongful usurpation of authority, next year it may be Oregon, Maine, or Illinois.”<sup>61</sup> Davis contended that “while the subject today is schools,” the Court's “next usurpation may involve taxes, or criminal law, or the right to own property.”<sup>62</sup> After the Court began handing down its decisions on subversion, Representative Mason of Illinois reminded Northerners that the desegregation decisions affected “the whole country and not merely the South.”<sup>63</sup> Indeed, the Richmond journalist James J. Kilpatrick, whose fiery editorials were instrumental in encouraging the Virginia legislature to enact the first interposition resolution, believed that *Brown* was a blessing insofar as it

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59. *Recent Attacks Upon the Supreme Court: A Statement by Members of the Bar*, 42 A.B.A. J., Dec. 1956, at 1128, 1128-29. The attorneys declared that “the privilege of criticizing a decision of the Supreme Court carries with it a corresponding obligation—a duty to recognize the decision as the supreme law of the land as long as it remains in force.” *Id.*

60. *Statement From the South*, WALL ST. J., reprinted in 102 CONG. REC. 4693 (1956).

61. 102 CONG. REC. 6821 (1956) (speech of Rep. Davis).

62. *Id.* Similarly, Senator Eastland warned in 1954 that *Brown* adopted “a line of reasoning that would give [the Court] the power to do anything,” including the imposition of socialism. 100 CONG. REC. 11,524 (1954).

63. *Id.* at 6386.

“awakened a legion of conservatives” outside the South to the erosion of states’ rights.<sup>64</sup>

*D. Reactions to the Subversion Decisions: The Beginnings of an Anti-Court Coalition*

These prophecies attained at least some credence when the already intense controversy over the Supreme Court suddenly escalated and greatly broadened during the spring of 1956, as the Court began to hand down decisions that protected the liberties of political subversives. Undeterred by the storm from the South that already was raging around the Marble Palace, the Court announced its first major Cold War defense of the liberties of subversives early in April 1956 in *Pennsylvania v. Nelson*,<sup>65</sup> striking down a state sedition law on the ground that Congress had preempted prosecution of political subversives in the 1940 Smith Act.<sup>66</sup> Although the Court’s decision arguably strengthened the battle against domestic subversion by freeing federal officials from the meddling of state officials, most conservatives predicted that the decision would seriously undermine efforts to fight subversion. And, although the Court had affirmed a decision of the Supreme Court of Pennsylvania, conservatives regarded the decision as another blow to states’ rights since it nullified a state statute. Moreover, federal preemption of state law threatened the right-to-work laws that many states had enacted at the behest of conservatives to impede the growth of labor unions.<sup>67</sup>

Two weeks later, in *Slochower v. Board of Education*,<sup>68</sup> the Court aggravated the ire of Cold Warriors and states’ rightists by invoking due process to invalidate a New York City law that provided for summary dismissal of employees who invoked the privilege against self-incrimination.<sup>69</sup> The Court’s decision in this case, like *Nelson*, seemed to the Court’s critics to evince a lack of concern about domestic

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64. James Jackson Kilpatrick, *The Sovereign States: How Americans Can End Federal Usurpation*, HUM. EVENTS, Nov. 3, 1956.

65. 350 U.S. 497 (1956).

66. *Id.* at 518-20.

67. “Curbing” the Court, NATION, June 9, 1956, at 481-82.

68. 350 U.S. 551 (1956).

69. *Id.* at 555.



subversion. In another decision, *Cole v. Young*,<sup>70</sup> the Court interpreted the Smith Act as prohibiting summary dismissal of federal employees who occupied non-sensitive positions.<sup>71</sup>

The Court provoked even greater controversy a year later, when in one fortnight it handed down six decisions that even more sharply limited the attempts to investigate and regulate subversion. Four of the decisions involved the federal government<sup>72</sup> and two arose out of actions by state officials. In the state cases, the Court ruled that due process prohibited state bar associations from refusing to admit otherwise qualified candidates because of actual or alleged communist activities<sup>73</sup> and that a state legislature could not give a state attorney general a roving commission to investigate subversion.<sup>74</sup> One week later, in *Mallory v. United States*,<sup>75</sup> the Court further antagonized conservatives by extending the duty of law enforcement officials to inform criminal defendants of their rights.<sup>76</sup>

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70. 351 U.S. 536 (1956).

71. *Id.* at 546. The Smith Act, 18 U.S.C. § 2385 (2000), made it a crime to advocate the overthrow of the federal government by force or violence.

72. See *Jencks v. United States*, 353 U.S. 657, 671-72 (1957) (allowing union official prosecuted for perjury to obtain and bring into court copies of FBI reports to rebut testimony about his alleged Communist activities); *Watkins v. United States*, 354 U.S. 178, 215 (1957) (reversing contempt citation for refusal to answer questions of House Un-American Activities Committee because Committee had not explained their pertinence); *Yates v. United States*, 354 U.S. 298, 334 (1957) (reversing the convictions of nine Communists on the ground that advocacy of overthrow of the government within the meaning of the Smith Act required overt action rather than mere argument); *Service v. Dulles*, 354 U.S. 363, 386-88 (1957) (finding that Secretary of State could not independently dismiss foreign service officer who had been cleared of disloyalty through prescribed State Department procedures).

73. *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 247 (1957).

74. *Sweezy v. New Hampshire* 354 U.S. 234, 254-55 (1957) (reversing conviction of college professor who had refused to answer questions from state attorney general concerning his political views).

75. 354 U.S. 449 (1957).

76. *Mallory* particularly vexed many members of Congress because it arose out of a case in the District of Columbia, where crime was increasing. Complaining that the Court was turning criminals loose "just as fast as the prosecuting officers and the police can send them to jail," Representative Hoffman noted in a debate in January 1958 that three persons had been viciously assaulted in the District during the previous night and that the wives of congressmen were not safe to walk on Capitol Hill. "How long does this have to go on, or do we have to arm ourselves?" he asked. 104 CONG. REC. 954 (1958). Meanwhile, the city's chief of detectives and chief of police blamed *Mallory* for rising crime in the Capital. *Fear in the Streets of the Nation's Capital*, U.S.

The Court's new series of decisions on subversion renewed outcries of outrage from the Court's critics.<sup>77</sup> In particular, critics of the Court alleged that these decisions crippled efforts by law enforcement officials to combat subversion.<sup>78</sup> The Court's decisions on subversion and crime rapidly transformed organized opposition to the Court from an isolated southern phenomenon into a nationwide movement. Conservatives who resented the Court's refusal to second-guess economic legislation and Cold Warriors who feared that the Court's decisions on subversion would deter the nation's ability to ward off threats to domestic security now joined segregationists in attacking the Court and demanding curbs on its powers. Between 1956 and 1959, this formidable coalition of segregationists and hardline anti-communists sponsored Court-curbing legislation that made more headway in Congress than had nearly any of the countless Court-curbing measures that had fallen into the

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NEWS & WORLD REP., Feb. 14, 1958, at 51. FBI Director J. Edgar Hoover later indirectly criticized the Court in a speech before the ABA's Section of Judicial Administration, warning that excessive judicial solicitude for the rights of criminals could "infringe upon the freedom of all individuals." J. Edgar Hoover, *The Law and the Layman: Faith in the Courts Must Be Preserved*, A.B.A. J., Dec. 1958, at 1155, 1157-58.

77. A week after "Red Monday," for example, the Senate's Internal Security Subcommittee, chaired by Senator Eastland of Mississippi, issued a report alleging that the Court's recent decisions had provided "comfort for Communists and criminals, frustration for law-enforcement officials, serious interference with Congress's self-informing function, and destruction of all efforts of the American people to protect themselves against subversion at home through their State governments." *Senate Report: Court is Giving "Comfort" to Communists*, U.S. NEWS AND WORLD REP., May 30, 1958, at 46. Similarly, the past president of the Maryland Bar Association alleged in 1958 that "the Court has once again extended the Bill of Rights to a point where it presents great obstacles to the fight against Communism which has been carried on by the Executive, Congress and the states." Frank B. Ober, *Communism and the Court: An Examination of Recent Developments*, A.B.A. J., Jan. 1958, at 35, 89. He charged that "the net effect of such decisions seems to subordinate the national security to an extreme extension of civil liberties." *Id.* With more bluntness, an attorney declared at a 1958 congressional hearing that "Communists are dirty rats and there is no use in being so damned considerate of them, as some agencies of government have been." *Limitation of Appellate Jurisdiction of the U. S. Supreme Court, Hearing Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the Comm. on the Judiciary, U. S. Senate on S. 2646, 85th Cong.* 148 (1958) (hereinafter *Hearings on Limitation of Supreme Court's Appellate Jurisdiction*), (testimony of Irving G. McCann).

78. See, e.g., Harold Lord Varney, *Earl Warren: Ike's Worst Appointment*, AM. MERCURY, Aug. 1958, at 10.

hoppers of the House and Senate during the previous century and a half. Although virtually none of these measures was enacted, the remarkable support that they received in Congress demonstrated that efforts to abrogate the Court's power were not necessarily chimerical.

The Court's subversion decisions continued to provide a subterfuge for opponents of desegregation to attack the Court. As *The Nation* explained:

Right wing Republicans from Northern states cannot afford to oppose desegregation no matter how eager they may be to assist their Dixiecrat coalitionists; but they can, of course, join the Dixiecrats in a campaign "to curb the Court." Conversely, the Dixiecrats realize that it is easier to attack the Supreme Court on the charge that it is "soft on communism" or that it is "usurping legislative functions," than on the score that it is safeguarding the civil rights of Negroes. By making common cause in defense of "states' rights," both factions hope not merely to reverse the trend of decision in civil-rights and civil liberties cases but to force the Court to uphold various state right-to-work laws which are now endangered by the precedent in the Nelson case.<sup>79</sup>

Similarly, Professor Powe has remarked that *Nelson* and *Slochower* "were a godsend to Southerners. The decisions gave them allies against the Court's national security conservatives. The decisions also offered a potential legitimacy to anti-Court criticism. With a little care, the claim could be made on the newer and higher ground of anticommunism without mentioning race."<sup>80</sup> This point was not lost on contemporary observers. As one newspaper observed at the time, the use of the Court's national security decisions to discredit the desegregation decisions, however disingenuous, was a clever strategy.<sup>81</sup>

Like the progressives who had complained of a "judicial oligarchy" forty years earlier, critics of the Court during the 1950s often accused the Court of tyranny, which in the 1950s was equated with Communism. Early in March 1956, the president of the National Association of Attorneys General publicly castigated the Justices as "Constitutional 5th Columnists [who] march with hobnailed boots across

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79. "Curbing" the Court, *supra* note 67, at 481.

80. POWE, *supra* note 1, at 85.

81. *Far Reaching Decisions*, PORTLAND OREGONIAN, June 19, 1957, reprinted in 103 CONG. REC. 10,295 (1957).

the face of sacred traditions and with legal sabres slash whole concepts of free government out of the Constitution.”<sup>82</sup> In the wake of the Soviet invasion of Hungary later in 1956, Senator Strom Thurmond compared Soviet tyranny with American judicial tyranny.<sup>83</sup> And a Georgia congressman warned that the court’s steady and insidious erosion of all protective safeguards against subversion, if not arrested by the Congress, would prove far deadlier to the nation’s security and future than the hydrogen and atomic bombs.<sup>84</sup> Although even the Court’s most vociferous critics, generally refrained from alleging that the Justices were Communists,<sup>85</sup> a 1957 resolution of the Georgia legislature accused Chief Justice Warren and Justices Black, Douglas, Clark, Frankfurter, and Reed of “high crimes and misdemeanors,” and “of being involved in activities that were counter to the United States Constitution.”<sup>86</sup> Other critics of the Court were ambiguous, perhaps deliberately, about whether the Court was the knowing or simply the

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82. Dickson, *supra* note 30, at 730 (quoting Attorney General John Ben Shepperd, Speech at the Texas Independence Day Celebration at Old Washington-on-the-Brazos (Mar. 2, 1956)).

83. Thurmond began an attack on the Court by remarking that “[w]hile we are thinking of the tyranny in Hungary, I wish to . . . discuss . . . the tyranny of the judiciary in the United States.” 103 CONG. REC. 10,333 (1957). Similarly, Representative Rivers of South Carolina declared in 1956 that the Justices were “a greater threat to this Union than . . . Soviet Russia.” 102 CONG. REC. 6385 (1956). And Representative Alford declared in 1959 that “the greatest emergency which confronts our country today is not the Soviet or Red China or the Berlin crisis or inflation; it is the destruction of the Constitution . . . by the oath-breaking usurpers who are now members of the Supreme Court.” 105 CONG. REC. 7505 (1959).

84. 103 CONG. REC. 9887 (1957) (remarks of Rep. Davis). Likewise, a Louisiana businessman argued that “while an atomic-weapon invader could do us tremendous damage, he could not destroy all of our liberties and blight our lives with one blow. But the Court could! And the Court will, if it continues its present course.” Paulsen Spence, *Get the Supreme Court Out of Politics*, AM. MERCURY, Oct. 1957, at 26-27.

85. Representative Sam Evins, for example, emphasized that he did “not impugn the patriotism of the members of the Court.” 105 CONG. REC. 1431 (1959). Brent Bozell of the *National Review* denied that the Justices were “partisans of communism,” but alleged that “the Supreme Court is living in a dream world” because “99 percent of the people of the United States know that the Communist Party is a subversive organization . . . [b]ut the judicial system of the United States does not know it.” *Hearings on Limitation of Supreme Court’s Appellate Jurisdiction*, *supra* note 77, at 657-58.

86. *Impeachment Pushed*, N.Y. TIMES, Feb. 19, 1957, at 63.

unwitting tool of Communism.<sup>87</sup> Defenders of the Court warned, however, that intemperate attacks on the Court played into the hands of Communists.<sup>88</sup>

E. *Close Calls: The Rise and Fall of Congressional Court-Curbing Bills*

The firestorm over the Court's decisions inevitably inspired a spate of Court-curbing legislation. While most Court-curbing bills vanished into obscurity the moment they were dropped into the hopper, more Court-curbing measures received serious consideration during 1957-58 than at any time in the nation's history. Bills to curb the Court enjoyed formidable support in both the House and the Senate. Even the valiant efforts of Emanuel Celler, the chair of the House Judiciary Committee, could not keep a lid on anti-Court bills in the House. In the Senate, where Court-curbing bills enjoyed the support of James Eastland, the powerful Judiciary Committee chair, several proposals might have received Senate approval but for the brilliant political skills of Majority Leader Lyndon B. Johnson. In

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87. In 1958, for example, a Senate Subcommittee of the Judiciary Committee published a thirteen-page document prepared by an unidentified group called SPX Research Associates entitled: "*The Supreme Court as an Instrument of Global Conquest.*" *Hearings on Limitation of Supreme Court's Appellate Jurisdiction*, *supra* note 77, at App. IV to part 2. The document, which excoriated the court's decisions on race and subversion, declared that the Court was "the most powerful . . . instrument of the Communist global conquest by paralysis." The authors did not deign to explain whether the Court knowingly advanced the Communist cause. New York attorney Charles A. Horsky spoke for many Americans when he expressed horror that "this intemperate and unprincipled attack on the Supreme Court should be printed for general circulation as a separate document of the Committee on the Judiciary . . . and without comment on or criticism of its content." Charles A. Horsky, *Law Day: Some Reflections on Current Proposals to Curtail the Supreme Court*, 42 MINN. L. REV. 1105, 1107 (1958) (based upon address given at the University of Minnesota Law School Alumni Banquet, April 29, 1958).

88. See, e.g., Charles S. Rhyne, *Defending Our Courts: The Duty of the Legal Profession*, A.B.A. J., Feb. 1958, at 121, 123 (1958). Rhyne warned that

[t]he forces of Communism are constantly trying to undermine our institutions. One of their principal goals is to create distrust and dissention within our nation—to make us doubt our way of life. Certainly this is no time for our own people to add impetus to the Red attack. For no institution in our government is so directly opposed to the concept of a supreme state as our courts. The rule of law and the supreme state cannot co-exist.

*Id.*

contrast to the broad array of Court-curbing schemes advocated by earlier critics of the Court, most of these bills focused on curtailment of the Court's jurisdiction.<sup>89</sup>

One of the most prominent measures, the Jenner-Butler bill, received serious attention during 1957-58 and came perilously close to approval in the Senate. The bill originated with William Jenner, an Indiana Republican, who proposed to legislatively overrule the Court's controversial decisions on subversion by stripping the Court of appellate jurisdiction over a broad range of cases.<sup>90</sup> As later amended by Senator Butler of Maryland, the legislation would have explicitly deprived the Court of jurisdiction only over state bar admissions, and would have amended various federal statutes to clarify and expand congressional power to combat domestic subversion.<sup>91</sup> Prolonged hearings on the measure during 1958 produced vigorous opposition from numerous prominent persons and organizations, including the AFL-CIO, the ABA, the ACLU, the NAACP, and the American Jewish Congress.<sup>92</sup> Opponents of the measure hailed the Court for protecting civil liberties and pointed out that the Court should base its decisions upon the Constitution rather than the transient winds of public

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89. As Professor Burbank has observed in discussing efforts to curtail judicial power,

[t]he verdict of history has struck removal through the impeachment process, office-stripping, court-packing, and executive defiance from the list of viable methods of control. Many other methods are in the same category because they would require a constitutional amendment. As a result, it is not surprising that Congress has time and again returned to the jurisdiction and powers of the federal courts as more promising territory for exercising control.

Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 324 (1999).

90. S. 2646, 85th Cong. (1957). As introduced in July 1957, the Jenner bill would have deprived the Court of appellate jurisdiction in cases involving the acts of congressional committees (to nullify *Watkins*); the federal employees loyalty program (*Cole*); state anti-subversion laws (*Nelson*); action by state school boards regarding subversives (*Slochower*); and state bar admissions (*Schware*). LYTLE, *supra* note 1, at 24.

91. PRITCHETT, *supra* note 1 at 32; MURPHY, *supra* note 1, at 168-69.

92. *Hearings on Limitation of Supreme Court's Appellate Jurisdiction*, *supra* note 77, at iii-iv (table of contents). The American Jewish Congress argued that "the preeminent position held by the United States today as a leader of the free world is in large part due to historic rulings of [the] Court condemning racial inequality and striking down efforts to curb freedom of speech, press, and religion." *Id.* at 684.

opinion.<sup>93</sup> The measure enjoyed considerable grassroots support among conservatives, however. Although it was tabled in the Senate on August 20, 1958 in a forty-nine to forty-one vote,<sup>94</sup> the Court's foes won a tactical victory in obtaining so many votes to move ahead with a measure to impose significant curbs on the Court. As Professor Walter F. Murphy pointed out, the opposition of forty-one senators to the tabling motion "was an impressive demonstration of anti-Court strength, especially considering that Roosevelt's Court-packing plan in 1937 never had the certain support of more than thirty senators."<sup>95</sup>

Another prominent measure was a House bill, H.R. 3, introduced in 1955, 1957, and 1959, which provided that no federal legislation preempted state legislation governing the same subject unless the federal statute explicitly provided for preemption.<sup>96</sup> Although H.R. 3 ostensibly was aimed at *Nelson*, its opponents alleged that it would virtually wipe out federal preemption over countless subjects, thereby throwing the law into chaos and substituting confederacy for union.<sup>97</sup> The bill received the

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93. For example, Senator Thomas C. Hennings, Jr. of Missouri declared in July 1957 that "[r]ather than being denounced for its decisions of recent weeks, the Court should be praised for fulfilling its function as the ultimate guardian of human rights and freedom in our society." Thomas C. Hennings, Jr., *The United States Supreme Court: The Ultimate Guardian of Our Freedom*, A.B.A. J., Mar. 1958, at 215. Similarly, ABA President Charles S. Rhyne asked in 1957 whether "it would be better to have . . . a board of nine pacifiers whose chief function is to concede some basic value here and withhold a little justice there in an effort to appease a minimum of, say, 90 percent of the public." Rhyne, *supra* note 88, at 123.

94. 104 CONG. REC. 18,687 (1958).

95. MURPHY, *supra* note 1, at 208.

96. H.R. 3, 84th Cong. (1955); H.R. 3, 85th Cong. (1957); H.R. 3, 86th Cong. (1959). The bill provided that "No act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect . . . [or] unless there is a direct and positive conflict between such Act . . . and the State law so that the two cannot be reconciled or consistently stand together." *Id.* The first bill was designed to preempt the Court's decision in *Nelson*, and the second bills were designed to overturn it. MURPHY, *supra* note 1, at 91, 95.

97. See LYTLE, *supra* note 1, at 40; MURPHY, *supra* note 1, at 93-94. For example, *The Reporter* warned that H.R. 3 "could throw into unimaginable confusion statutes already on the books concerning railroads, busses, trucks, airplanes, oil and gas pipelines, immigration, naturalization, agriculture, labor relations, pure food and drugs, health, sanitation, and - but perhaps you had already guessed it - civil rights and desegregation." *Here It Comes Again!*,

explicit endorsement of the National Conference of State Attorneys General,<sup>98</sup> and the tacit endorsement of the Governors' Conference<sup>99</sup> — further examples of state officials trying to limit the Supreme Court's powers. The National Association of Manufacturers and the Chamber of Commerce also endorsed the measure.<sup>100</sup> Although the House approved H.R. 3 in 1958 by a vote of 241 to 155<sup>101</sup> the Senate defeated this measure<sup>102</sup> a month later by a margin of only one vote.<sup>103</sup>

In other significant rebukes to the Court during 1957-58, the House approved bills to reverse *Mallory*,<sup>104</sup> to restrict habeas corpus,<sup>105</sup> to reverse *Cole* by broadening the scope of the Summary Suspension Act of 1950 to include "non-sensitive" as well as "sensitive" positions, and to reverse *Yate's* narrow definition of "organize" in the Smith Act.<sup>106</sup>

In addition to proposals for depriving the Court of

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REPORTER, July 9, 1959, at 2.

98. MURPHY, *supra* note 1, at 94. Professor Lytle found that the National Association of Attorneys General actually contributed little as a body to the anti-Court movement beyond its endorsement of H.R. 3. LYTLE, *supra* note 1, at 121 n.19.

99. MURPHY, *supra* note 1, at 95-96.

100. *Id.* at 202-03.

101. 104 CONG. REC. 14,162 (1958).

102. S. 337, 85th Cong. (1958).

103. 104 CONG. REC. 18,928 (1958). The day before its defeat, the measure appeared headed for victory when the Senate in a late-night session defeated a motion to recommit it to committee by a vote of 46 to 39. MURPHY, *supra* note 1, at 211. This rebuke to Majority Leader Johnson - and to the Court - left the Senate "in a state of near pandemonium." *Id.* After succeeding in obtaining an overnight postponement of the final vote, Johnson strenuously worked to persuade wavering senators to oppose to the measure, resulting in its defeat by a vote of 41 to 40. *Id.* at 211-17.

104. H.R. 11,477, 85th Cong. (1957). The bill provided in relevant part that "[e]vidence, including statements and confessions, otherwise admissible, shall not be otherwise inadmissible solely because of delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States." *Id.* The Senate Judiciary Committee reported it favorably after inserting the word "reasonable" in front of the word "delay." PRITCHETT, *supra* note 1, at 35. The measure died in a House-Senate conference committee. MURPHY, *supra* note 1, at 219-20.

105. MURPHY, *supra* note 1, at 176-77, 182. The habeas corpus bill would have permitted state prisoners to seek a writ of habeas corpus in federal court only when 1) a question of federal constitutional rights had not been previously "raised and determined" in the state proceedings; 2) the petitioner lacked a fair opportunity in state courts to raise the federal issue; and 3) the issue could not later be raised in state courts. *Id.* at 177.

106. *Id.* at 181-82.



jurisdiction over certain types of cases, critics of the Warren Court regularly advanced an abundance of proposals aimed at changing the Court's composition. Various proposals affecting the Court's personnel included popular election of judges;<sup>107</sup> limitation of tenure to specified terms; mandatory retirement ages; periodic re-confirmation by the Senate;<sup>108</sup> requirements of prior judicial experience;<sup>109</sup> elimination of the Department of Justice from its role in advising the President on judicial nominations;<sup>110</sup> granting the Senate sole power to select federal judges;<sup>111</sup> removal of judges from office for reasons other than the "high crimes and misdemeanors" required for impeachment;<sup>112</sup> and selection of Supreme Court Justices solely from the ranks of state supreme courts.<sup>113</sup> The most famous of the quixotic proposals directed against the Justices was the movement to impeach Earl Warren, which is still widely remembered for the ubiquitous pro-impeachment billboards that dotted the countrysides. Critics of the Court also periodically called for the impeachment of various associate Justices.<sup>114</sup> Even such radical proposals seemed tame compared with a retired Marine Corps colonel's public demand for Warren's execution by hanging.<sup>115</sup>

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107. H.R.J. Res. 476, 85th Cong. (1957); H.J. Res. 536, 85th Cong. (1957).

108. S.J. Res. 114, 85th Cong. (1957) (providing for reconfirmation of federal judges every four years). See 103 CONG. REC. 12,864-65 (1957) (remarks of Sen. Johnston).

109. See, e.g., 102 CONG. REC. 8759 (1956) (remarks of Rep. Lanham); John C. Stennis, *Federal Judiciary Selection: The Letter-But the Spirit?*, A.B.A. J., Dec. 1958, at 1179, 1180-81; S. Res. 264, 84th Cong. (1955) (requiring that at least one of each two successive nominees confirmed by the Senate have at least ten years of prior judicial service); 105 CONG. REC. 6827 (1959) (remarks of Rep. Casey discussing bill to require eight years of prior experience); S. 813, 86th Cong. (1959) (bill introduced by Sen. Thurmond to require five years of experience on a federal court or an appellate state court).

110. 104 CONG. REC. 2803-04 (1958) (Remarks of Hon. John Stennis).

111. ROSALIE GORDON, *NINE MEN AGAINST AMERICA: THE SUPREME COURT AND ITS ATTACK ON AMERICAN LIBERTIES* 151-52 (1958).

112. See, e.g., 105 CONG. REC. 7508 (1959) (remarks of Rep. Alford).

113. H.R.J. Res. 453, 86th Cong. (1960).

114. As early as February 1957, the Georgia House of Representatives adopted by a vote of 107 to 33 a resolution calling for the impeachment of Chief Justice Warren and Justices Black, Reed, Douglas, Frankfurter, and Clark. *Impeachment Pushed*, *supra* note 86, at 63.

115. Bill Becker, *Attack on Warren Boomerangs on Anti-Reds School on Coast*, N.Y. TIMES, Dec. 17, 1961, at 58. The retired colonel's remark, delivered at a Los Angeles conference sponsored by the right-wing Project Alert, was too extreme even for many devotees of the far right. Project Alert leaders censured

In addition to altering the composition of the bench, other critics sought to alter federalism by denying that the Fourteenth Amendment incorporated any of the provisions of the Bill of Rights into state law.<sup>116</sup> Some called for repeal of the Fourteenth Amendment. Advocates of the repeal included a retired federal judge from Ohio, who contended that the repeal movement was viable because it would receive the support of Southerners who resisted integration and Northerners who opposed centralization of power in Washington.<sup>117</sup> Although this proposal may seem outré, we should remember that liberals, including Felix Frankfurter, had advocated the same radical remedy earlier in the century as a means of preventing the federal courts from nullifying state economic regulatory legislation.<sup>118</sup>

F. *The Federal Government Asserts Its Authority: Bayonets and Cooper v. Aaron*

Meanwhile, rhetorical defense of states' rights turned into armed defiance of federal authority in September 1957 when Arkansas Governor Orville Faubus ordered state troops to block implementation of a federal court order for integration of Little Rock's Central High School. Although Eisenhower reluctantly sent federal troops to Little Rock to enforce the integration order, the Little Rock School Board later persuaded a federal judge to suspend the integration order for two and a half years on the ground that efforts at integration had thrown the school into chaos.<sup>119</sup> After the Court of Appeals reversed the stay, the U.S. Supreme Court convened during its summer recess and unanimously handed down its landmark decision in *Cooper v. Aaron*,<sup>120</sup> which categorically re-affirmed the Court's role as the ultimate arbiter of the Constitution. The Court declared

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the colonel, who later retracted his statement. *Id.*

116. Dan Smoot, *We Need to Curb the Court*, DAN SMOOT REP., July 3, 1967, at 107-08.

117. Robert N. Wilkin, *A Noted Jurist Says, "Repeal the Fourteenth Amendment,"* U.S. NEWS AND WORLD REP., Aug. 24, 1964, at 72-74.

118. *The Red Terror of Judicial Reform*, Editorial, NEW REPUBLIC, Oct. 1, 1924, at 113, reprinted in FELIX FRANKFURTER ON THE SUPREME COURT-EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 166-67 (Philip B. Kurland ed., 1970).

119. *Aaron v. Cooper*, 163 F. Supp. 13, 20-26 (E.D. Ark. 1958).

120. 358 U.S. 1 (1958).

that "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution," as enunciated in *Marbury v. Madison*, "has ever since been respected by this Court and Country as a permanent and indispensable feature of our constitutional system."<sup>121</sup>

Although the defeat of the Jenner-Butler Bill three weeks before the Court decided *Cooper* may have emboldened the Court, many liberals preferred to argue that the narrowness with which the measure was defeated made *Cooper's* uncompromising language all the more remarkable. *The Nation* contended that while "the Court might have concluded that now would be a good time to appease its Congressional critics," the decision instead reflected "a keen awareness that certain threats must never be appeased, regardless of the peril."<sup>122</sup> Moderates and liberals recognized, however, that the collapse of armed resistance in Little Rock and the defeat of the Court-curbing bills did not end the campaign to curb the Court or even necessarily chill its momentum. Faubus's landslide re-election victory in July 1958 provided a sharp reminder of the tenacity of grassroots hostility toward the Court's authority in the South.<sup>123</sup> *The New Republic* argued in the wake of *Cooper* that "[t]he immediate aim of the Southerners may be to undermine the Court's school desegregation order but the

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121. *Id.* at 18.

122. *The Courage of the Court*, Editorial, *NATION*, Oct. 11, 1958, at 201. Noting that the decision was handed down near the twentieth anniversary of Britain's appeasement of Nazi Germany at Munich, the editors predicted that the decision "will stand as a lasting testament to the proposition that the way to meet a challenge to the rule of law is not to whet the appetite of the lawless by appeasement, but to meet the challenge head-on, at the outset." *Id.* Some critics of the Court, however, contended that the Court's delivery of a *per curiam* opinion in *Cooper* indicated that the Court's confidence was so shaken by opposition among the judiciary, the bar, and Congress, that it had adopted a siege mentality. Hugh C. Bickford, *Did Supreme Court Justices Violate Their Oaths?*, *U.S. NEWS & WORLD REP.*, Dec. 19, 1958, at 108.

123. As *America* observed, "[i]t is not only significant that [this] defier of the Supreme Court polled substantially more than twice the combined vote by his two rivals for the gubernatorial nomination. What is far more alarming is that his very defiance of the Court made possible his bid for a third term as Governor." *Behind Southern Resistance*, *AMERICA*, Aug. 16, 1958, at 508. Hailing the vote as a rebuke to the Court, David Lawrence declared that "[t]he people of Arkansas have refused to uphold the usurped right of the nine Justices . . . to say that modern psychology or emotionalism is more important than the letter of the Constitution itself." David Lawrence, *The People Speak*, *U.S. NEWS & WORLD REP.*, Aug. 8, 1958, at 92.

target is broader than that: it is civil liberties in general."<sup>124</sup>

Opponents of integration denounced *Cooper* in blistering terms. Virginia Governor J. Lindsay Almond declared that it was the most

devastating blow ever to bludgeon the reserved powers of the States . . . It is designed to reduce the States to the status of mere puppets, slavishly manacled to the sociological and personal predilections of a judicial oligarchy negating the fundamental concept of a government of law and not of men. It tears the battered remnant of the Tenth Amendment out of the Constitution and hurls it into the face of a shocked and beleaguered people.<sup>125</sup>

Despite the Court's categorical assertion of its power in *Cooper*, segregationists vowed to continue to resist racial integration. They further devised the doctrine that a ruling of the Court challenged by a state should be suspended until the people could ratify it through a constitutional amendment. This version of interposition was summarily rejected by a federal court in Louisiana in 1960 in a decision affirmed by the Supreme Court.<sup>126</sup>

#### G. *Voices From Bench, Bar, Media, and Academia: Moderates Criticize the Court*

As the Court continued to hand down decisions that expanded federal power, particularly the power of the federal courts, the Court began to attract criticism from moderate or at least respectable voices within Congress and the legal establishment that bore no apparent taint of racism or right-wing extremism. As Professor Murphy pointed out,

[f]ar more ominous than wild-haired radical schemes was the quiet but unmistakable undertone on Capitol Hill, a fear not only among the conservatives but among moderates and some liberals that the Justices had gone too far in protecting individual rights and in so doing had moved into the legislative domain.<sup>127</sup>

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124. *Defending the Court*, NEW REPUBLIC, Dec. 15, 1958, at 3.

125. J. Lindsay Almond, Jr., *What a Southern Governor Says About the Supreme Court*, U.S. NEWS & WORLD REP., Oct. 10, 1958, at 43.

126. *Bush v. Orleans Parish Sch. Bd.*, 187 F. Supp. 42 (E.D. La. 1960), aff'd 365 U.S. 569 (1961).

127. MURPHY, *supra* note 1, at 116. As Professor Murphy explained, "[t]his

Such criticism included a remarkable number of comments from judges. In contrast to the Progressive Era, when even the most liberal judges generally refrained from public criticism of the then-conservative Court, many federal and state judges during the 1950s and 1960s were less reticent. In April 1957, for example, U.S. Court of Appeals Judge Warren E. Burger lamented "an unfortunate trend of judicial decisions . . . which strain and stretch to give the guilty . . . vastly more protection than the law-abiding citizen."<sup>128</sup> In November 1958, a U.S. district judge for the Northern District of Florida publicly castigated the Court for disregarding its own precedents in the desegregation cases.<sup>129</sup> A few weeks later, chief justice John R. Dethmers criticized the U.S. Supreme Court's activism in a widely-publicized speech before the Congress of American Industry.<sup>130</sup> Former U.S. Supreme Court Justice James F. Byrnes blasted the Court in a long and acrimonious cover article in *U.S. News* in 1956, although the impact of Byrnes' attack was limited because Byrnes had served on the Court only for one year, and because this South Carolinian's wrath was directed mostly at the Court's desegregation decisions.<sup>131</sup>

By far the most dramatic volley from the bench came in February 1958 from the eighty-five-year old U.S. Court of Appeals Judge Learned Hand, the longest serving and probably the most widely respected federal jurist. Delivering the Holmes Lectures at Harvard, Hand implicitly but unmistakably rebuked the Warren Court for its judicial activism. Hand argued that the Framers did not envision

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center group . . . seldom resorted to long speeches in the *Congressional Record*, but what they said and did was significant." *Id.*

128. J. Edgar Hoover, *supra*, note 76 at 1158.

129. Dozier A. DeVane, *Federal Judge Starts A Crusade*, U.S. NEWS & WORLD REP., Dec. 26, 1958, at 67.

130. See *What a State Chief Justice Says About the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 12, 1958, at 88.

131. See James F. Byrnes, *Former Justice Byrnes Says- "The Supreme Court Must be Curbed,"* U.S. NEWS & WORLD REP., May 18, 1956, at 50-58. Although Byrnes predicted that desegregation would have a baneful impact upon the South, he emphasized that the Court's "usurpation" of power eventually would negate the freedom of people throughout the nation. *U.S. News* adorned its cover with an old photograph of Byrnes arrayed in the judicial robes that he had not worn since his resignation from the Court fourteen years earlier, beneath a banner headline quoting Byrnes' declaration that "the Supreme Court must be curbed."

judicial review, and that judicial review corroded the political process by substituting the judgment of the Court for the will of the people.<sup>132</sup> Hand argued that judicial review "should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised."<sup>133</sup> Hand even suggested that the Court overreached in *Brown*.<sup>134</sup>

Segregationists naturally attempted to adorn their attacks on the Court with the cloak of Hand's respectability. Senator Talmadge of Georgia gleefully described Hand's speech as "one of the most stern and devastating rebukes of the Supreme Court and its arrogant arrogation of legislative power . . . ."<sup>135</sup>

Although many liberals alleged that Hand's remarks were too extreme,<sup>136</sup> criticism of the Court continued to come from other informed and respectable sources. A month after Hand's lectures, Princeton Professor Edward S. Corwin, one of the nation's leading constitutional scholars, alleged that "the Court went on a virtual binge and thrust its nose into matters beyond its competence" in its June 1957 decisions on subversion, which Corwin denounced as "irresponsible," "weird," and "vicious nonsense."<sup>137</sup> And Yale Law Professor Alexander Bickel alleged in 1957 that the Court had "shown an increasing incidence of the sweeping dogmatic state-

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132. LEARNED HAND, *THE BILL OF RIGHTS* 66-74 (1964).

133. *Id.* at 66.

134. *Id.* at 54-55.

135. 104 CONG. REC. 3198 (1958).

136. For example, Anthony Lewis complained that Hand's "negative tone" went "too far . . . for there are more positive values in judicial review than he would concede." Lewis believed that the Court served useful functions as a forum for moral protest, as a catalyst for congressional legislation, as a nonpolitical arbiter, and as an instrument of national unity. Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 314-19 (1961). Another commentator derogated Hand's deference to the legislature as "a dangerous doctrine, all the more so in view of the frequency with which legislative bodies take a cavalier attitude toward civil liberties, confident that the courts will remedy any abuses of which they may have been guilty." Maurice J. Goldbloom, *Judicial Review*, COMMENTARY, June 1958, at 548 (reviewing LEARNED HAND, *THE BILL OF RIGHTS* (1958)).

137. Edward S. Corwin, Editorial, N.Y. TIMES, March 10, 1958. But while Corwin believed that the Court should have its "nose well tweaked," Corwin opposed the Jenner bill because it would "throw the baby out with the bath." Instead, Corwin proposed congressional legislation to assert the correct meaning of the Constitution in the cases decided by the Court.

ment, of the formulation of results accompanied by little or no effort to support them in reason."<sup>138</sup> Noting the "rising consensus of dismay" even among informed and often liberal academics, one commentator in 1959 pointed out that "the Court is wholly dependent on such men for defense against critics less informed, much more numerous and infinitely more virulent."<sup>139</sup>

In milder tones, Harvard Law Dean Erwin Griswold warned that the Court was deciding some cases on grounds that were broader than were necessary for their decisions. Griswold suggested, however, that part of the reason for ill considered decisions was that the Court was overworked, despite its sparing use of *certiorari*, and that "it just does not have adequate time to do all of its work as it really should be done."<sup>140</sup> Harvard Law Professor Paul A. Freund complained that "this mounting docket of cases looms as a serious barrier to the true mission of the Supreme Court, to clarify, expound, and develop the law in its most significant national aspects, and not to act as a mere further appellate court for the correction of possible error."<sup>141</sup> Other academic critics of the Court suggested that the Court's decisions lacked coherence because they were too geared toward promoting harmony within the Court,<sup>142</sup> while other critics

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138. 105 CONG. REC. 3313, 3314 (1959).

139. C.P. Ives, *Now the American Bar Association*, BALT. SUN, Mar. 2, 1959, reprinted in 105 CONG. REC. 3313, 3314 (1959).

140. Erwin N. Griswold, Morrison Lecture Before the State Bar of California (Oct. 9, 1958), in 43 MASS. L.Q. 98, 109 (1958). Pointing out that the Court was "inevitably in a vulnerable position," Griswold averred that it could "do much to protect itself—and thus its essential function in our remarkable governmental structure—by hewing to the narrow line, by deciding only what it has to decide, and then only in precise terms limited to the particular case." *Id.* at 111. Griswold explained that the Court "should never decide anything that it does not have to decide in the constitutional field, and that what it does decide should be put on the narrowest appropriate ground. The Court's function is far too important to be subjected to attack on grounds which bear no necessary relation to the substance of its decisions." *Id.* Griswold pointed out that "to work as hard and conscientiously as they have to, and then be kicked around as they are, must be rather trying at times. Even more important . . . it cannot help but to have an impact on the quality of their work." *Id.* at 108.

141. Paul A. Freund, *The Supreme Court Crisis*, N.Y. ST. B. BULL., Feb. 1959, at 75-76.

142. Yale Law Professors Bickel and Wellington expressed concern in 1957 that the Court had responded to controversy by brokering opinions that would command the support of as many Justices as possible and fashioning language that would steer clear of controversy. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Power: The Lincoln Mills Case*,

urged the Court to write opinions that would be more comprehensible to the general public.<sup>143</sup>

Other liberals warned that the Supreme Court was a brittle vessel for civil liberties. Reminding liberals that the Court traditionally was no defender of civil liberties, the philosopher Sidney Hook argued that “a truly democratic community does not need a Supreme Court as an arbiter of its destinies,” even though a Supreme Court was needed for every system of law.<sup>144</sup> Similarly, Earl Latham cautioned liberals that:

[T]he real victories in libertarian issues must be won. . . not in the courts, but at the polls and in the legislatures. Freedom is won and maintained by self-help in democratic political actions. A victory in the legislature makes a trip to the courthouse unnecessary, but a victory in the Court may be reversed by the legislature—or by the judges themselves under pressure from the legislature. The legislature derives strength from its contact with the people, constantly renewed, and in the end, must prevail.<sup>145</sup>

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71 HARV. L. REV. 1, 3 (1957). “Hence,” they noted, “we get opinions which have the vacuity characteristic of desperately negotiated documents. Moreover, the less an opinion says, the less there may be in it for critics of the Court to seize upon for their own purposes.” *Id.* Bickel and Wellington complained that the Court had:

shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason . . . of opinions that do not opine and of per curiam opinions that . . . fail to build the bridge between the authorities they cite and the results they decree.

*Id.*

143. For example, *The New Republic* contended that some of the blame for the over-anxious reaction to the *Jencks* decision must be attributed to Brennan’s opinion, which was cloudy when it needed urgently to be clear, earthbound when it should have been eloquent in expounding our traditions of criminal procedure. *Jencks Revised*, NEW REPUBLIC, Sept. 16, 1957, at 5-6. The political scientist C. Peter Magrath, however, believed that

friendly critics are unlikely to succeed in their campaign to direct the Supreme Court onto a path labeled ‘public understanding,’ ‘unity of the Justices,’ and ‘uniformity of law.’ For one thing, the general public knows little and cares less about the Court. Its interest is of a most sporadic kind and focuses only on the actual results—not on the judicial craftsmanship that went into them.

C. Peter Magrath, *Nine Deliberative Bodies: A Profile of the Warren Court*, COMMENTARY, Nov. 1961, at 399, 405-06.

144. Sidney Hook, *Liberalism and the Law*, COMMENTARY, Jan. 1957, at 46, 47-49.

145. Earl Latham, *The Supreme Court’s Crusade For Freedom: Balancing*



Meanwhile, University of Chicago Law Professor Philip B. Kurland warned that:

[J]udicial activism should be rejected because the exercise of such naked power invites a reply in kind from those on whose domain the Court is poaching. And in a pitched battle between Congress and the Court, Congress is endowed with the stronger weapons: the jurisdiction and membership of the Court are at its mercy. Shorn of its shield of judicial objectivity, in a day when its opinions are not likely to be popular, it has no adequate defense against such potential legislative attack, the reality of which is all too patent in the Bills which have been introduced in Congress.<sup>146</sup>

Even many of the Court's most staunch defenders acknowledged the usefulness of constructive criticism. Professor Freund, for example, believed that the bar and the universities had a duty "not indeed to shield the Court from all criticism but to make sure that judgements of approval or disapproval are raised to the level of genuine understanding."<sup>147</sup> Similarly, Anthony Lewis remarked that "no institution in the country more desperately needs critics," since a Justice "lacked the freedom of other officeholders to discuss his work with experts in the field. He is alone and immune, and he may be particularly susceptible to vanity, basking in the sunshine of his friends' compliments."<sup>148</sup> As Freund pointed out, however, the Court's candor in exposing "the reasons for its decisions and even the disagreements entering into them, which is far from characteristic of courts around the world, presupposes a mature people who in the end will judge their judges rationally. Unless this maturity exists, the whole system is in danger of breaking down."<sup>149</sup>

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*the Interests of the Society and the Individual*, COMMENTARY, Aug. 1959, at 108, 117.

146. Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959). Kurland believed the Court should avoid judicial activism for three reasons. First, he believed that "judicial activism is undemocratic. To the extent that a check on democracy is necessary, its function should be confined to those areas in which it is essential." Second, he feared that judicial activism would undermine "public faith in the objectivity and detachment of the Court," and finally that it invited retribution from Congress. *Id.*

147. Paul A. Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1,3 (1963).

148. Lewis, *The Supreme Court and Its Critics*, *supra* note 136, at 331-32.

149. Freund, *The Supreme Court Under Attack*, *supra* note 147, at 7.

Immoderate attacks on the Court by states' rights advocates, particularly segregationists, may have inhibited moderates and liberals who had misgivings about the Court's activism from expressing their concerns. Defenders of the Court expressed fear that irresponsible criticism of the Court would silence constructive criticism. Freund remarked that "it would be a great disservice if it came to pass that the only alternatives open to observers of the Court were unbridled abuse or indiscriminate praise."<sup>150</sup> One lawyer was reported to express the wish that the Court's right-wing critics "would shut up so that I can take issue with some of the Court's opinions. But I don't want people thinking that I'm in agreement with the rash charges that have been made."<sup>151</sup> Accordingly, one commentary complained in 1958 that "many of those who have attacked the Court in past months have actually forestalled effective criticism."<sup>152</sup>

#### H. *State Judges Smite the Court: The Report of the Conference of Chief Justices*

By far the most dramatic and unprecedented judicial criticism was delivered in a long and remarkably astringent report issued by the Conference of Chief Justices on August 23, 1958, only two days after the Senate's defeat of the Jenner-Butler bill.<sup>153</sup> In its resolution approving the 11,000-word report, the Conference, comprised of the chief justices of each of the forty-nine states, urged the Court to exercise the "power of judicial self-restraint" by recognizing the difference between what the Constitution may prescribe or permit and what a majority of the Justices "may deem desirable" or undesirable.<sup>154</sup> The report was all the more remarkable because the vote in favor of it was so lopsided,

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150. Freund, *The Supreme Court Crisis*, *supra* note 139, at 70.

151. John E. Dunsford & Richard J. Childress, *Attacks on the Supreme Court*, 4 CATH. LAW. 57, 63 (1958).

152. *Id.*

153. PRITCHETT, *supra* note 1, at app. 2, 141-59. The Report was prepared by a committee that the Conference had appointed at its 1957 meeting to study the role of the judiciary in federalism. MURPHY, *supra* note 1, at 119. At the 1957 meeting, the Conference had expressed its profound concern for the retention and exercise of the constitutional power of state governments, but had rejected proposals to censure the Court. *Id.*

154. PRITCHETT, *supra* note 1, at app. 2, 158-59.

thirty-six to eight.<sup>155</sup> Chief justices from every region of the nation voted for the report, which received support even from chief justices of such liberal bastions as Massachusetts, Minnesota, New York, Oregon, and Wisconsin.<sup>156</sup>

Surveying the Court's decisions in many different fields, the chief justices concluded that "the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint."<sup>157</sup> The report expressed particular concern about the aggrandizement of federal power, explaining that "the overall tendency of decisions . . . over the last 25 years or more has been to press the extension of federal power and to press it rapidly."<sup>158</sup> Denying that "either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises," the report expressed regret that the Court had attained "the immense, and in many respects, dominant power which it now wields."<sup>159</sup> Decrying the frequency of closely divided decisions and the overturning of precedent, the report declared that recent decisions "will raise at least considerable doubt about whether the United States remained a government of laws rather than men." Chiding the Court for manifesting "an impatience with the slow workings of our federal system,"<sup>160</sup> the report expressed "earnest hope" that the Court would

exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise.<sup>161</sup>

The report averred that it was the "spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception."<sup>162</sup>

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155. *Id.* at 22.

156. *See id.* at 159 (listing Chief Justices who submitted the report).

157. *Id.* at 157.

158. *Id.*

159. *Id.*

160. *Id.* at 158-59.

161. *Id.* at 158.

162. *Id.* at 143.

The wide ranging and rather rambling report directly or implicitly found fault with the Court's decisions in such diverse areas as preemption of state law,<sup>163</sup> labor law,<sup>164</sup> state legislative investigations,<sup>165</sup> admission to the bar,<sup>166</sup> and state administration of criminal law.<sup>167</sup> The report also described the Court's encouragement of expansion of federal regulatory legislation and its contraction of the power of the

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163. *Id.* at 145. The report pointed out that the Court recently had given the preemption doctrine a "wide sweep, extending it beyond its traditional use in connection with commerce clause cases, most notably in *Nelson*." *Id.*

164. In a long section on labor relations cases, the report complained that "the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations." *Id.* at 146. The report alleged that the Court's decision in *Amalgamated Ass'n v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951), which nullified a state statute designed to prevent strikes and lockouts in public utilities, left the states powerless to protect their own citizens against emergencies created by the suspension of essential services. *Id.* The report also alleged that *Textile Union v. Lincoln*, 353 U.S. 448 (1957), which permitted federal courts to fashion a body of common law in suits for violation of labor agreements, created confusion about what law a state court could apply in a labor dispute. *Id.*

165. In discussing *Sweezy*, the report commented that the Court disingenuously suggested that the state's delegation of power to the Attorney General to investigate subversion was unduly vague rather than admitting that the state legislature could not delegate such power. *Id.* at 148-49.

166. In a long discussion of *Konigsberg*, the report complained that the Court had denied to a state the power to keep order in its own house. *Id.* at 149. The report quoted with apparent approval passages of Justice Harlan's dissent accusing the Court of substituting its own notions of public policy for those of the state on a subject to which the Court normally had accorded state courts a high degree of deference. *Id.* at 152. In criticizing *Konigsberg*, the chief justices expressed awareness that "adverse comment . . . lays us open to attack on the grounds that we are complaining [about] the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant." *Id.* at 149. The chief justices explained that they "accepted this prospect in preference to remaining silent on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned." *Id.*

167. In this, the longest section the report, the chief justices complained that the Supreme Court in its exercise of appellate review of state criminal law decisions "not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts." *Id.* at 152-53. The report also criticized the Court's decision in *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Eskridge v. Wash. State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958), which required states to provide indigents with a free copy of their trial transcript for use on appeal. *Id.* at 154-55. The chief justices remarked that "[t]he danger of swamping some state appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect." *Id.* at 156.

states in public employment cases such as *Slochower*, but it did not editorialize on these developments. The report actually seemed to express satisfaction with some of the Court's work, particularly the *Erie* doctrine<sup>168</sup> and the Court's expansion of the states' constitutional latitude to assert *in personam* jurisdiction over non-residents.<sup>169</sup>

The report's criticism of the Court in areas which received little media attention and its emphasis on economic issues helped to create the perception that discontent with the Court was broad-based rather than confined to racists or right-wing cranks. Although the report blamed Congress in part for eroding federalism in some areas<sup>170</sup> and creating confusion in others, the report seemed to place the blame for both largely with the Court. The final version of the report omitted perhaps the most incendiary language of the version originally adopted by a committee of ten of the justices: "If reasonable certainty and stability do not attach to a written constitution, is it a constitution or is it a sham?"<sup>171</sup>

Some of the handful of chief justices who voted in opposition to the report strenuously attempted to persuade their fellow chief justices that the report was wrong-headed and would embarrass the Conference. Urging the Conference to reject the report, Chief Justice Charles Alvin Jones of Pennsylvania alleged that

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168. Citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts in cases in which federal jurisdiction is based upon diversity of citizenship must apply the common law of the state in which the federal court sits), the report pointed out that "[n]ot all of the decisions of the Supreme Court in recent years have limited or tended to limit the power of the states or the effect of state laws." *Id.* at 147.

169. Citing *Int'l Shoe v. Wash.*, 326 U.S. 310 (1945) and *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), the report stated that the "Court has tended to relax rather than tighten restrictions under the due process clause upon state action in this field." The report seemed to express satisfaction that "[f]ormalistic doctrines or dogmas have been replaced by a more flexible and realistic approach," although the report noted that the trend had been halted in *Hanson v. Denckla*, 357 U.S. 214 (1958). *Id.* at 147.

170. For example, the report stated that "[i]n the field of taxation the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street." *Id.* at 147.

171. "Is it a Constitution or is it a Sham?," U.S. NEWS & WORLD REP., Aug. 29, 1958, at 128.

no matter how meticulously reference to the school desegregation case is avoided, it must be recognized that the *principal* cause of the present-day criticism of the Supreme Court is that decision . . . The segregation issue is . . . inextricably embedded in the background of the resolution you are asked to adopt. You might as well face that fact.<sup>172</sup>

Jones, who authored the Supreme Court of Pennsylvania decision that the Court affirmed in *Nelson*, also denied that any of the Court's decisions on subversion extended federal power at the expense of the states because "each was merely an 'application of a long-ordained federal power to a new set of circumstances.'" <sup>173</sup> Jones contended that *Nelson* would not "interfere with the detection, prosecution or conviction of a single Communist or other subversive. . . . What the *Nelson* decision did was to recognize in the Federal Government the unrestricted right to control its defense against internal subversion, unhampered by meddling or officious interference from any subordinate sovereignties."<sup>174</sup>

Moreover, Chief Justice Joseph Weintraub of New Jersey argued that the Report exceeded the proper scope of the Conference's responsibilities and that the judges should not second-guess the Supreme Court's decisions without having studied the full records in those cases.<sup>175</sup> Weintraub also warned that the Report "readily lends itself to misuse by anyone who tilts with the Federal Government."<sup>176</sup> Although some of the dissenting chief justices also may have felt that the Conference should avoid intervention in national politics, the Conference was no stranger to such forays. In 1956, the Conference urged William J. Brennan's appointment to the Supreme Court in an apparent, and ironic, belief that the appointment of this New Jersey state judge would help to balance the federal-state relationship.<sup>177</sup>

The willingness of three-quarters of the nation's state chief justices to issue so stern a rebuke to the Court is a

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172. Charles A. Jones, *Strictures on Supreme Court are Uncalled for*, U.S. NEWS & WORLD REP., Oct. 24, 1958, at 115 (address to Conference of Chief Justices).

173. *Id.* at 113

174. *Id.*

175. *Rights of a State Must Yield to Federal Needs*, U.S. NEWS & WORLD REP., Oct. 24, 1958, at 115.

176. *Id.* at 116.

177. ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 323-24 (1997).

telling index of the degree to which the Court's decisions in a broad range of areas had antagonized even informed opinion. Even so, it was strange that normally circumspect judges would deliver such a stinging and public rebuke to the nation's highest tribunal. The report itself was curiously devoid of any apology for its boldness. Implicit in the report was the theme that a venerable body such as the Conference needed to sound an alarm because the Court's alleged usurpation of power and the erosion of federalism imperiled self-government in America.

The chief justice of Illinois contended that he had voted for the Report because he believed that the state judiciary should "zealously guard its own prerogatives and areas of activity" and that such criticism afforded "a better method of shaping [the Supreme Court's] policy of future action than does legislation withdrawing from it appellate jurisdiction in given areas."<sup>178</sup> Indeed, the chief justices who joined the report do not appear to have had any particular affinity for Court-curbing, and the report itself called for internal rather than external restraint. Michigan Chief Justice John R. Dethmers, who voted for the report, warned in a public speech in December 1958 that limitations on judicial review would make constitutional rights depend upon the whims of Congress and "would mark the beginning of parliamentary, and the end of constitutional government, in the United States."<sup>179</sup> Dethmers nevertheless expressed "alarm" over decisions that aggrandized national power at the expense of state and local governments.<sup>180</sup>

Many judges from northern states were reported to have voted for the resolution because they wanted to spare embarrassment for their southern counterparts, who faced re-election.<sup>181</sup> This theory, however, is implausible because southern office holders of this era tended to glory in defending lost causes, sometimes wore their isolation from the North as badges of honor, and often won votes by defending positions such as segregation that were unpopular in other parts of the nation. Southern chief justices who voiced

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178. Charles H. Davis, *Constitutional Law: The States and the Supreme Court*, A.B.A. J., Mar. 1959, at 312.

179. John R. Dethmers, *What a State Chief Justice Says About the Supreme Court*, U.S. NEWS & WORLD REP., Dec. 12, 1958, at 91.

180. *Id.*

181. *Judicial Steamroller*, NATION, Sept. 6, 1958, at 102.

minority criticism of the Court amidst a host of their Yankee counterparts were more likely to find themselves acclaimed than embarrassed when they returned home.

One commentator suggested that the resentment among the state judges over the U. S. Supreme Court's reversal of some of their decisions may have contributed to the judges' antagonism toward the court, for "even detached judges may take pride in their work, and intellectual pride is a very tender thing."<sup>182</sup> Moreover, the apparent haste with which the Conference adopted the report may suggest that the chief justices did not devote serious attention to it, a possibility in which critics of the report took some comfort. The thirty-one page document was not made available to Conference members until the morning of the opening session and was adopted with little discussion.<sup>183</sup>

The report provoked predictable outcries of shock and dismay. Denouncing the report as "inexplicable" and "inexcusable," Bickel remarked that the issuance of non-technical manifestos by judges assembled in convention was "easily as novel a development as Sputnik I."<sup>184</sup> Bickel expressed facetious hope that "perhaps it doesn't exist. Perhaps it is a hoax or an awful dream."<sup>185</sup> Pointing out that the state supreme courts often were no models of judicial restraint, the columnist Anthony Lewis expressed the wish that "some of the critics would tend to the beam in their own eye before attacking the mote in the Court's."<sup>186</sup> Similarly, Dean William B. Lockhart of the University of Minnesota Law School stated that while "the modern Supreme Court has been extremely careful not to substitute its judgment of what is wise or sound for State legislative judgment in social and economic legislation," the "same cannot be said of a number of the State courts represented by the chief justices who voted to indict the Supreme Court for lack of proper judicial restraint."<sup>187</sup> As Philip B. Kurland pointed out, however, "the wrongs of the Supreme Court

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182. James O. Monroe, Jr., *The Supreme Court on Trial: A Perspective*, 11 HASTINGS L.J. 369, 387-88 (1960).

183. *Judicial Steamroller*, *supra* note 181, at 105.

184. Alexander M. Bickel, *An Inexplicable Document*, NEW REPUBLIC, Sept. 29, 1958, at 9, 11.

185. *Id.* at 11.

186. Anthony Lewis, *A Newspaperman's View: The Role of the Supreme Court*, A.B.A. J., Sept. 1959, at 990.

187. 105 CONG. REC. 6771, 6773 (1959) (address by William B. Lockhart).



cannot be deemed expiated by the equal or grosser errors on the part of the courts over which the Chief Justices of the States preside."<sup>188</sup>

Other critics of the resolution minimized its importance because the Conference was merely a consultative body, concerned mostly with technical legal procedures, and was not authorized to make public pronouncements in the name of the courts on which its members served.<sup>189</sup> Other critics, however, suggested that the resolution was all the more disturbing because it so far exceeded the Conference's purpose. Reporting that "some lawyers were shocked at the apparent impropriety and others were incredulous," *The New Jersey Law Journal* warned that the resolution set "a dangerous precedent" because it broke the ancient tradition that barred judges from criticizing the decisions of higher courts.<sup>190</sup>

Moreover, some critics of the report hinted that race was at its root. Even though the report did not mention the Court's desegregation decisions, those decisions seemed to provide at least a partial pretext for the report. As Bickel asked, "who in 1958 can devote any thought to the work of the Supreme Court . . . as it affects federal-state relationships and not have the school desegregation decisions prominently in mind?"<sup>191</sup> Similarly, New York attorney David L. Weissman observed that "there is something unreal about a report issued in 1958 on the work of the Supreme Court as it affects federal-state relationships which completely ignores the desegregation cases," particularly since he contended that the cases that the Report criticized did "not justify the sweep and sting of that criticism."<sup>192</sup> Along the same lines, Paul Freund pointed out that the subversion cases were "as popguns to the crack of doom" in comparison with the desegregation cases, and that "without the segregation issue, it is hardly likely that the

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188. Kurland, *The Supreme Court and Its Judicial Critics*, *supra* note 146, at 458.

189. *Judicial Steamroller*, *supra* note 181, at 102.

190. *An Unprecedented Report and Resolution*, NEW JERSEY L.J., Sept. 11, 1958, at 4.

191. Bickel, *An Inexplicable Document*, *supra* note 184, at 11.

192. David L. Weissman, *The Warren Court and Its Critics*, PROGRESSIVE, May 1959, at 21, 23.

actions of the court would have aroused so vehement a response."<sup>193</sup>

Many critics of the report took pains to point out flaws in its reasoning. Lockhart, for example, contended that any blame for the expansion of federal power during recent decades ought to have been directed toward Congress rather than the Court. Lockhart explained that "Congress is the agency that has expanded the national powers, and the Court has practiced judicial restraint in leaving these policy determinations to Congress. If the chief justices want the court to check this legislative expansion of Federal powers, the Court must exercise less judicial restraint, not more."<sup>194</sup> Lockhart also contended that the report missed its mark in accusing the Court of diminishing the power of the states. He pointed out that the Court had actually increased the power of the states over taxation and regulation of interstate commerce. Only in the area of preemption, Lockhart argued, had the Court restricted state power. He noted, however, that the Court left Congress free to overturn its decision in *Nelson*, and that the Court's labor relations decisions had stopped short of holding that Congress had preempted the entire field of labor relations affecting interstate commerce.<sup>195</sup> Similarly, Professor Freund pointed out that the Court had deferred to state power to impose economic regulation, tax businesses engaged in interstate commerce, and to tax property despite some degree of federal ownership.<sup>196</sup> Freund argued that "there has been growing acceptance of state legislation in the matters that really count for the states."<sup>197</sup> Such defenses, however, overlooked the widespread animosity toward taxation and economic regulation even at the state level that prevailed among many of the Court's critics.

Some critics of the report also pointed out that the Court was more committed to judicial restraint than was

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193. Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345, 346 (1958).

194. 105 CONG. REC. 6772 (1959). Despite his disapproval of the Report, William B. Lockhart conceded that such an august body's reminder of the need for judicial restraint might have some value, even though "all of the Justices appreciate this need for moderation and restraint." *Id.* at 6773.

195. *See id.* at 6772.

196. *See Lewis, The Supreme Court and Its Critics*, *supra* note 136, at 310 n.27.

197. Freund, *The Supreme Court Crisis*, *supra* note 141, at 78.

the pre-1937 Court, for the Court no longer scrutinized the wisdom of economic regulatory legislation.<sup>198</sup> Indeed, Lewis argued that the Court's present activism paled in comparison with its robust review of the constitutionality of state and federal economic legislation before 1937.<sup>199</sup> "How gravely, in comparison, do justices of today approach a question of constitutionality!" Lewis exclaimed. "They have been so conditioned by criticism of that earlier Court . . . that they use their great power to review legislation almost gingerly, and with frequently professed reluctance."<sup>200</sup> Of course, the Court's deference to Congress and the states in challenges to economic regulation might actually have antagonized many of the economically conservative chief justices, notwithstanding their advocacy of judicial restraint.

Despite the many attacks on the report, criticism of the Court by such distinguished jurists could not help but to exacerbate the controversy over the Court's decisions. As Professor Lytle has observed, "[t]he state Chief Justices created a fresh wind to fan the flames of criticism, and raised the temperature of the blaze which had appeared to be cooling down. In a sense they placed a mantle of legitimacy and respectability upon what was largely emotional and irrational criticism."<sup>201</sup>

The report particularly vexed contemporary observers because it seemed likely to bolster the resistance to racial integration and civil liberties for unpopular political minorities. Indeed, as *America* suggested, the justices could hardly have been oblivious that their report would stimulate opposition to the desegregation decisions.<sup>202</sup> Kurland remarked that

if there [was] any reason to challenge the action of the Chief Justices, it is on the ground that it gave aid and comfort to the enemy . . . It was the warm greetings of brotherhood from the Southern demagogues and the paeans of praise from the American witch-hunting fraternity that did the harm.<sup>203</sup>

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198. See, e.g., 105 CONG. REC. 6372-73 (1959).

199. Lewis, *A Newspaperman's View*, *supra* note 186, at 912.

200. *Id.*

201. LYTLE, *supra* note 1, at 70.

202. *The Court Criticized*, Editorial, *AMERICA*, Oct. 18, 1958, at 60.

203. Kurland, *The Supreme Court and Its Judicial Critics*, *supra* note 146,

Similarly, Harvard Law Dean Erwin Griswold declared that "considering the comfort that the Chief Justices' statement gives to our southern friends, I wish that they had not said it."<sup>204</sup>

Such fears were not unfounded. Senator Sam Erwin of North Carolina claimed that "when a majority of the chief justices of the supreme courts of our States . . . censure or condemn the decisions and the trend of decisions of the U.S. Supreme Court, certainly we are more than justified in exploring all means possible to resolve these serious conflicts."<sup>205</sup> Erwin, himself a former state supreme court justice, pointed out that "our judges are not prone to condemn other judges and therefore their action in this instance is most significant."<sup>206</sup> Indeed, Faubus immediately seized upon the report in support of legislation permitting the closing of any Arkansas public school to maintain public peace or prevent its integration under threat of force from federal authorities.<sup>207</sup> And, in a flight of fancy, conservative commentator Dan Smoot claimed that the thirty-six chief justices could testify for the prosecution at Warren's impeachment trial.<sup>208</sup>

The state chief justices were far from the only jurists who were dissatisfied with many of the U.S. Supreme Court's recent decisions.<sup>209</sup> Shortly after the Conference's report was issued, forty-six percent of the lower federal court judges who responded to a *U.S. News & World Report* survey expressed agreement with the conclusions of the report, thirty-nine percent disagreed, and fifteen percent gave no opinion.<sup>210</sup> Southern judges expressed approval by a two to one margin while judges outside the South were evenly divided.<sup>211</sup> Although only one-third of the nation's

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at 459.

204. Griswold, *supra* note 140, at 106.

205. 105 CONG. REC. 1431 (1959).

206. *Id.*

207. See *Pro and Con on Little Rock-Record of Week of Controversy: On Mixed Schools: The Key Speeches, the Court Arguments*, U.S. NEWS & WORLD REP., Sept. 5, 1958, at 96 (statement of Governor Faubus).

208. See Dan Smoot, *Impeaching Earl Warren-Part I*, DAN SMOOT REP., Jan. 30, 1961, at 36.

209. See *How U.S. Judges Feel About the Supreme Court*, U.S. NEWS & WORLD REP., Oct. 24, 1958, at 36-37.

210. *Id.* at 37.

211. *Id.* at 37. Some 55.5 percent of the Southern judges expressed approval, 28 percent registered disapproval, and 16.5 percent preferred to provide no

351 lower federal court judges responded to the survey and many of the non-participating judges publicly expressed disapproval of the survey,<sup>212</sup> the poll further underscored the controversial nature of the Court's decisions.

### I. *The Furor Subsides, 1958-1962*

Although the Conference's report, which was released only three days after the Senate's defeat of Court-curbing legislation, came too late to influence the 1958 attacks on the Court, it may have encouraged a new wave of Court-curbing efforts during the following year. In 1959, the House once again approved H.R. 3, the *Nelson* measure, the habeas corpus bill, and the bill to modify *Mallory*.<sup>213</sup> Meanwhile, in February 1959, the ABA's House of Delegates adopted a report of the ABA's Special Committee on Communist Tactics, Strategy, and Objectives accusing the Court of rendering decisions "in such a manner as to encourage an increase in Communist activities in the United States."<sup>214</sup>

The attacks on the Court during 1959 were more restrained than those of the previous year. As Professor Murphy observed, "[t]he spark was missing from the Court critics . . . . The Court foes had reached a peak of excitement during the summer of 1958, and in spite of the additional ammunition supplied by the state chief justices and the American Bar Association, they could not achieve that fever pitch again the next year."<sup>215</sup> The change in temper partly was attributable to defeat of numerous northern conservative Republicans in the 1958 congressional elections and the retirement of others, including

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view. Of judges outside the South, 42.4 percent approved, 43.5 percent disapproved, and 14.1 percent gave no opinion. *See id.* at 37.

212. *See id.* at 36-37.

213. *See* MURPHY, *supra* note 1, at 236.

214. The full text of the resolutions appear in PRITCHETT, *supra* note 1, at 137-40. The report, which averred that it was not intended "to indicate censure of the Supreme Court," expressed disapproval of the Jenner bill. It recommended, however, much of the legislation that the House passed during 1959, including legislative reversal of *Nelson*, and redefinition of the word "organize" in the Smith Act. *Id.*

215. MURPHY, *supra* note 1, at 237

Jenner.<sup>216</sup> Public opposition to Court-curbing may have accounted at least in part for the Democratic sweep.<sup>217</sup>

Notwithstanding the Court's boldness in *Cooper*, the Court handed down so few controversial decisions during the next several years that it seemed to many observers to be avoiding conflict. Whether this was prudent or craven was in the eye of the beholder. As *Commonweal* pointed out, efforts to curb the Court "were suddenly made to seem superfluous" after the "new series of conservative decisions by the Court."<sup>218</sup>

Professor Powe has observed that "[t]he Court's race cases from 1958-1962 were in a holding pattern. In the school area, the Court was missing in action."<sup>219</sup> Moreover, during 1959 the Court handed down several decisions that upheld the criminal convictions of alleged subversives. Although these decisions did not completely pacify conservatives since they were decided five-to-four,<sup>220</sup> they helped to diminish the sense of urgency among conservatives for the need to curb the Court. The decline in anxiety about the Court's decisions on subversion also was attributable to a diminution of fear of Communist subversion.<sup>221</sup>

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216. *Id.* at 237-38. See POWE, *supra* note 1, at 140.

217. Professor Powe contends that judicial issues were not a factor in the defeat of senators who had supported Court-curbing measures. POWE, *supra* note 1, at 140. Similarly, Professor Murphy could identify only one senator whose defeat might have been attributable even in part to his support of Court-curbing legislation. MURPHY, *supra* note 1, at 237. With regard to the defeat of conservative House members who supported Court-curbing legislation, Representative O'Hara of Illinois remarked that:

[t]he casualties were large among the Republicans from the North who for a political price had been parties to a coalition with Members from the South intent on punishing the Supreme Court of the United States for upholding the Constitution of the United States in the matter of desegregated public schools.

He contended that "the difference between the 103 majority of last year to swat the Supreme Court and the 32 majority of this year [on H.R. 3] tells the story." 105 CONG. REC. 11,828 (1959).

218. *A Changing Court?*, COMMONWEAL, July 17, 1959 at 363.

219. POWE, *supra* note 1, at 177.

220. See, e.g., David Lawrence, *What "Written Constitution"?*, U.S. NEWS & WORLD REP., June 29, 1959, at 104.

221. Writing shortly before hostility against the Court reached its 1958 peak, political scientist Earl Latham and sociologist Michael Harrington had foreseen that the end of the Korean War, the demise of McCarthyism, and the *détente* of the Eisenhower Administration could pave the way for public acceptance of the Court's decisions on subversion. Michael Harrington, *Civil*

By late 1961, one political scientist wrote that "the worst of the furor has obviously passed, possibly because it has, indeed, had some effect. The Warren Court, which in 1956 and 1957 seemed determined to wield a civil liberties sword at every opportunity, has since used the sword sparingly."<sup>222</sup> Criticism of the Court now began to come from the Left,<sup>223</sup> where many felt that the Court had unduly capitulated to right-wing pressures. At a National Lawyers Guild conference in 1961, UCLA Law Professor Arno Van Alstyne accused the Court's majority of appeasing "dominant public sentiment" in order to protect the Court from "destructive attack."<sup>224</sup> Van Alstyne complained that the Court was behaving like "a watchman who has voluntarily handcuffed himself just as the burglars are breaking into the warehouse."<sup>225</sup>

#### J. *The Furor Revives: Reapportionment and School Prayer*

The uneasy truce between conservatives and the Court was abruptly shattered during the spring of 1962, when the Supreme Court handed down two of the most controversial decisions in its history. In March, *Baker v. Carr*<sup>226</sup> removed the political question doctrine's long-standing obstruction to adjudication of malapportionment when the Court held that the apportionment of congressional districts was a judiciable issue. Although the ultimate implications of *Baker* were unclear, its critics correctly feared that the Court also would adjudicate apportionment of state legislatures and rule in favor of reapportionment, thereby vastly diminishing the influence of rural interests. Three months after *Baker*, the Court in *Engel v. Vitale*<sup>227</sup> shocked

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*Liberties-by Fiat*, COMMONWEAL, Mar. 28, 1958, at 654-55. Earl Latham, *Perspectives on the Warren Court*, NATION, Jan. 18, 1958, at 49.

222. C. Peter Magrath, "Nine Deliberative Bodies:" A Profile of the Warren Court, COMMENT, Nov. 1961, at 400.

223. See, e.g., *The Supreme Court Sounds Retreat*, NATION, June 20, 1959, at 545 (complaining that the Court's recent decisions on prosecution of subversives had taken back about half of what it said in the earlier, and parallel, decisions).

224. Arno Van Alstyne, *Self-Government and the Supreme Court: The Constitution in Crisis*, 22 L. IN TRANSITION 1, 17 (1962).

225. *Id.*

226. See 369 U.S. 186 (1962).

227. See 370 U.S. 421 (1962).

conservatives by ruling that the First Amendment prohibited state-sponsored prayer in public schools.

The eruption of controversy over reapportionment and religion in schools revived the Court-curbing coalition of southern segregationists and northern conservatives that had waned in the wake of the defeat of the anti-Court bills in 1958 and the diminution in public alarm over domestic subversion. As the journalist Fred C. Cook observed, Southerners

had long dreamed of fusing Dixie with the Midwest farm belt and the Mountain states in a rural-oriented complex that could counterbalance the voting power of the great industrial states. . . . In *Baker*, the Southerners found a fulcrum with which to lever national political action, and . . . the more perceptive among them seized the opportunity.<sup>228</sup>

Both *Baker* and *Engel* precipitated a spate of legislation to restrict the Court's jurisdiction over apportionment and school prayer<sup>229</sup> or to alter the means for selecting and retaining Supreme Court justices. Once again, however, state officials also took the initiative to propose Court-curbing measures. By far the most prominent were proposals for three amendments to the Constitution that would have had the net effect of radically tilting sovereignty from the federal government back to the states.

## II. THE STATES' RIGHTS AMENDMENTS

### A. *A New Strategy: The Origins of the States' Rights Amendments*

The states' rights amendments had their genesis in July 1962 in Biloxi, Mississippi at a routine conference of southern state officials organized by the Council of State Governments,<sup>230</sup> an agency supported by the governments of

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228. Fred J. Cook, *The Federal Union Under Fire*, PROGRESSIVE, Sept. 1963, at 10, 11.

229. See, e.g., JOHN HERBERT LAUBACH, *SCHOOL PRAYERS: CONGRESS, THE COURTS, AND THE PUBLIC* (1969); See Michal R. Belknap, *God and the Warren Court: The Quest for a Wholesome Neutrality*, 9 SETON HALL CONST. L. J. 401, 444-50 (1999).

230. Thomas B. Morgan, *Seventeen States Vote to Destroy Democracy As We Know It*, LOOK, Dec. 3, 1963, at 76, 78.



all fifty states.<sup>231</sup> Although the conference was intended to address administrative and managerial subjects, talk among the politicians naturally turned to broader public issues, including desegregation, the Supreme Court's recent ban on school prayer, and tensions between the United States and Cuba.<sup>232</sup> It was the Court's recent decision in *Baker v. Carr*, however, that provoked the most buzz. Officials from a region that was riddled with rotten boroughs naturally feared that *Baker* could profoundly alter the political complexion of their states and perhaps consign them to political oblivion. Already riled up over the quickening pace of the civil rights movement and frustrated by the Kennedy Administration's increasingly liberal bent, these mostly Democratic officials now felt anxious that reapportionment could seal the doom of their increasingly threatened political order.<sup>233</sup> As Cook remarked, "[t]hey were possessed of a states' rights fervor which John C. Calhoun might have envied."<sup>234</sup>

Taking advantage of the sultry political and physical weather of the Biloxi meeting, a Florida delegate named William V. Chappell, Jr. urged the conference to express its discontent in action rather than mere words.<sup>235</sup> Chappell, a forty-year old Florida legislator who had championed segregationist causes, persuaded the conference to adopt resolutions urging Congress to prepare a constitutional amendment restricting the jurisdiction of federal courts in reapportionment cases. A second resolution called for strict

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231. The Council of State Governments was founded in 1933 to replace the American Legislators Association. It is a joint agency of the governments of all of the states, commonwealths, and territories. The governing board is composed of the governors of each of the fifty states and two legislators from each state. The agency's mission is to "strengthen state government by: improving administrative and managerial capability and performance; promoting intergovernmental cooperation; collecting, processing, generating, and determining information needed by states; assisting states in solving specific problems of policy formulation and operations; and serving as a catalyst and representative in issues and opportunities affecting the states." See ENCYCLOPEDIA OF ASSOCIATIONS 716, entry 5577 (30th ed. 1996). In view of the critical role that the Council played in launching the neo-confederate amendments, it is ironic that right-wing groups in the past often had attacked the council for its "socialistic tendencies." See *Silent Amendments*, NEWSWEEK May 20, 1963, at 36.

232. Morgan, *supra* note 230, at 76.

233. *Id.* at 76, 78; Cook, *supra* note 228, at 10-11.

234. Cook, *supra* note 228, at 10.

235. Morgan, *supra* note 230, at 78.

separation of state and federal powers, demanded judicial restraint, and called for legislation to curb federal judicial power.<sup>236</sup>

After returning to his home in Ocala, Chappell immediately began to plan his strategy for presenting his proposals for the upcoming annual meeting of the National Legislative Conference, an organization affiliated with the Council of State Governments that was composed of state legislators and legislative staffers.<sup>237</sup> In preparation, Chappell appointed two Florida legislative committees, one to study apportionment and the other to study "dual sovereignty."<sup>238</sup> Chappell believed that "something should be visualized that would be brought to the attention of all the fifty states, at the same time, the same hour, to awaken the country."<sup>239</sup>

The National Legislative Conference met in September in Phoenix, a hotbed of right-wing politics and the home of Senator Barry Goldwater, whom conservatives were urging to seek the 1964 Republican presidential nomination. As one person observed, the 750 delegates from forty-six states included "aggrieved men with power back home—united for 'states' rights.' They were against integration, the ban on school prayers, reapportionment or the welfare state—but most of all, against the power exercised by the Supreme Court."<sup>240</sup> The Conference included many prominent state officials, including W. Stuart Helm, the conference chairman, a Republican who was the speaker of the Pennsylvania House of Representatives and an oil company executive. Like Helm, many delegates were legislators representing rural districts who faced loss of their seats if the Supreme Court extended the logic of *Baker v. Carr* to the state-

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236. Cook, *supra* note 228, at 11.

237. Morgan, *supra* note 230, at 78. The National Legislative Conference was one of the loosely affiliated organizations of the Council of State Governments. Cook, *supra* note 228, at 10. The overlapping directorates of the Council of State Governments, the General Assembly of the States, and the National Legislative Conference enabled "an inside power complex of extreme conservatives in the National Legislative Conference also to exert influence on the General Assembly of the States and to a marked degree on the highly prestigious Council of State Government itself." *Id.* at 11.

238. Morgan, *supra* note 230, at 78.

239. *Id.*

240. *Id.*

houses.<sup>241</sup> *Baker* quickly emerged as the lightning rod for criticism of the Court.

Opposition to reapportionment—and hence to federal power—among these legislators crossed sectional lines. As Cook has remarked, “[f]rom as unlikely a state as New Jersey (heavily industrialized, in 1960 the second state in the nation in population density), came a delegation as united in purpose as any delegation from the South.”<sup>242</sup> Among the leaders of the New Jersey delegation was Wayne Dumont, a Republican state senator from rural Warren County, who fervently wished to preserve New Jersey’s legislative apportionment, which gave each of the state’s counties one senator and at least one assemblyman. Dumont feared that apportionment based upon population would permit the populous areas of the state to “dominate everything, and [smaller areas] would be lucky if [they] even got crumbs.”<sup>243</sup>

As numerous speakers denounced the Supreme Court in general and *Baker v. Carr* in particular, several specific remedies began to emerge. The most obvious was the Biloxi proposal for restricting the Court’s jurisdiction over apportionment cases.<sup>244</sup> Another idea, also appealing to state legislators, was for a constitutional amendment to permit state legislatures to amend the Constitution without congressional participation.<sup>245</sup> A third proposal, by Warren Wood, an Illinois legislator, was to establish a court composed of all fifty state chief justices to review U.S. Supreme Court decisions in cases involving rights reserved

241. See Cook, *supra* note 228, at 11-12. As Cook explained, the delegates feared that *Baker v. Carr* would “affect them personally—*things were going to be done to them.*” *Id.* at 12 (emphasis in original). Cook also observed that the delegates were “highly-placed men, jealous of their own prerogatives. The Southerners, in their segregationist fervor, were a dynamic force but they were only part of a national coalition which powerful leaders had been assembling for months.” *Id.*

242. See *id.*

243. *Id.* Dumont stated that:

[w]e have built into our [state] Constitution a system of checks and balances, and if you do not have such a system in the legislature, the smaller counties will never get any legislation passed. People who want to base everything on population may be idealists, but . . . they’ve never served in a legislature. If they had, they’d soon have found things don’t work that way. You have to have bargaining power.

*Id.*

244. Morgan, *supra* note 230, at 78.

245. See Cook, *supra* note 228, at 14.

to the states or to the people.<sup>246</sup> Wood, a fifty-two-year old longtime Republican banker who had served in the Illinois legislature for many years, including several as speaker, was widely known for his frequent lament that the Tenth Amendment had "been raped twice a day for ten years."<sup>247</sup>

Although most delegates presumably assumed that the conference would appoint a committee to study federal-state relations<sup>248</sup> or endorse the Biloxi resolutions,<sup>249</sup> Chappell advocated more specific action. He proposed that the conference's Federal-State Relations Committee draft constitutional amendments to present to the upcoming biennial meeting of the Assembly of the States, another agency of the Council on State Governments, and that it begin planning a strategy for calling a constitutional convention. The convention would be called pursuant to the never-used provision of Article V of the Constitution which provides that Congress, on application by two-thirds of the state legislatures, shall call a convention for proposing constitutional amendments. Conservatives since 1939 had attempted to use this convention route to effect a repeal of the income tax amendment.<sup>250</sup> The conference authorized this procedure, in addition to passing a resolution of its own that complained about "the increasing concentration of power in Washington."<sup>251</sup>

Helm personally appointed a nine-member committee, all but one of whom were known to favor curbs on judicial power. The committee's most active members were Chappell and Wood. Other members who favored Court curbs were committee chair Lloyd W. Lowrey, a California assemblyman and rancher; James Thurman, 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; and Frederick H. Hauser, a New Jersey assemblyman. The token defender of the Court was Frank King, an Ohio state senator. Helm said that he asked King to serve in order that the committee could receive the opinion of at least one

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246. Morgan, *supra* note 230, at 81.

247. Cook, *supra* note 228, at 13-14.

248. Morgan, *supra* note 230, at 81.

249. Cook, *supra* note 228, at 12.

250. Fred P. Graham, *The Role of the States in Proposing Constitutional Amendments*, A.B.A. J., Dec. 1963, at 1176-77.

251. Cook, *supra* note 228, at 12.

person who did not favor curbing the Court.<sup>252</sup> The committee met in Chicago two days after the 1962 general election. Working with judges, lawyers, and sundry constitutional experts, the committee in one day drafted three proposed amendments which were consistent with the ideas presented at the Phoenix conference.<sup>253</sup>

The first amendment called for alteration of the constitutional amendment process itself, introducing a procedure whereby two-thirds of the state legislatures could amend the Constitution without participation by Congress or any other agency.<sup>254</sup> Although the amendment retained the alternative provision for amendment by a two-thirds vote of both houses of Congress and three-quarters of the state legislatures, it eliminated the procedure for amendment of the Constitution by constitutional convention. The Article V proposal may have been inspired by an Oregon attorney named John B. Ebinger, who had proposed a constitutional amendment that would have permitted three-quarters of the states to amend the Constitution

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252. *Id.* at 14. As Cook noted, "[t]his passion to hear both sides did not extend to the point of setting up an even debate; Frank King was left alone to battle eight opponents." *Id.* Although King had not attended the Phoenix conference, he was well known to Helm because King served on the executive board of the National Legislative Conference. *Id.*

253. *Id.* at 15.

254. The proposed amendment provided:

Section 1. Article V of the Constitution of the United States is hereby amended to read as follows:

The Congress, whenever two-thirds of both Houses shall deem it necessary, or, on the application of the Legislatures of two-thirds of the several states, shall propose amendments to this Constitution, which 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. Whenever applications from the Legislatures of two-thirds of the total number of states of the United States shall contain identical texts of an amendment to be proposed, the President of the Senate and the Speaker of the House shall so certify, and the amendment as contained in the application shall be deemed to have been proposed, without further action by Congress. No State, without its consent, shall be deprived of its equal suffrage in the Senate.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several states within seven years from the date of its submission.

*Amending the Constitution to Strengthen the States in the Federal System*, 36 ST. GOVT. 10, 11-12 (1963).

without the consent of Congress.<sup>255</sup> Bills embodying his idea were introduced in Congress in 1954.<sup>256</sup>

The second amendment would have overturned *Baker v. Carr* by withdrawing the Court's jurisdiction to hear actions concerning apportionment of state legislatures.<sup>257</sup>

The third amendment would have created a so-called Court of the Union, composed of chief justices of all fifty states, which could overturn by majority vote any U.S. Supreme Court decision "relating to the rights reserved to the states or to the people" under the Constitution. The amendment provided that the Court of the Union could be summoned by a petition from the legislatures of five states, no two of which could share a common boundary. The requirement of non-contiguity apparently was intended to ensure that the demand for the summoning of the Court was not strictly regional. The Court would have power to adopt procedures for its internal operations, and Congress would make provisions for housing the Court and paying its expenses.<sup>258</sup>

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255. Oberst, *supra* note 4, at 657. See William Logan Martin, *The Amending Power: The Ebinger Proposal*, A.B.A. J., Sept. 1954, at 767 and Nov. 1954, at 974.

256. H.R.J. Res. 568, 83rd Cong. (1954); H.R.J. Res. 569, 83rd Cong. (1954).

257. The amendment provided:

Section 1. No provision of this Constitution, or any amendment thereto, shall restrict or limit any state in the apportionment of representation in its legislature.

Section 2. The judicial power of the United States shall not extend to any suit in law or equity, or to any controversy, relating to apportionment of representation in a state legislature.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.

*Amending the Constitution, supra* note 254, at 13.

258. The amendment read as follows:

Section 1. Upon demand of the legislatures of five states, no two of which shall share any common boundary, made within two years after the rendition of any judgment of the Supreme Court relating to the rights reserved to the states or to the people by this Constitution, such judgment shall be reviewed by a court composed of the justices of the highest courts to be known as the Court of the Union. The sole issue before the Court of the Union shall be whether the power or jurisdiction sought to be exercised on the part of the United States is a power granted to it under the Constitution.

Section 2. Three-fourths of the justices of the Court of the Union shall constitute a quorum, but it shall require concurrence of a majority of

At the committee's request, the Council of State Governments placed the proposals on the agenda of the General Assembly's upcoming Chicago convention. The committee encouraged the Council's governing body, its Board of Managers, to endorse the amendments in its meeting in Chicago on the day before the Assembly met. Although the Board, which included Helm, Lowrey, and Carpenter, did not formally endorse the proposed amendments, the Council's executive director, Brevard Cribfield, issued a report which denounced *Baker v. Carr* and tacitly endorsed the Article V and apportionment amendments.<sup>259</sup>

B. *A New Crusade: The Campaign For The States' Rights Amendments*

At its meeting on December 6, 1962, the General Assembly of the States endorsed the committee's proposals. Like the Biloxi and Phoenix meetings, the Chicago conference was a cauldron of simmering hostility toward the federal government's alleged intrusions on states' rights, particularly *Baker v. Carr*. Members who attended the conferences may have been more radical than the overall membership because activists who had some type of

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the entire Court to reverse a decision of the Supreme Court. In event of incapacity of the chief justice of the highest court of any state to sit upon the Court of the Union, his place shall be filled by another justice of such state court selected by affirmative vote of a majority of its membership.

Section 3. On the first Monday of the third calendar month following the ratification of this amendment, the chief justices of the highest courts of the several states shall convene at the national capital, at which time the Court of the Union shall be organized and shall adopt rules governing its procedure.

Section 4. Decisions of the Court of the Union upon matters within its jurisdiction shall be final and shall not thereafter be overruled by any court and may be changed only by an amendment of this Constitution.

Section 5. The Congress shall make provision for the housing of the Court of the Union and the expenses of its operation.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of three-fourths of the several States within seven years from the date of its submission.

*Id.* at 14.

259. See Cook, *supra* note 228, at 15.

agenda were more likely than moderates to incur the time and expense necessary for attendance.<sup>260</sup> One person who attended the meeting as an observer commented that the state officials evinced a “mob hysteria. There was nobody actually foaming at the mouth, but they were certainly wrought up.”<sup>261</sup> The most vocal proponent of the amendments was Millard F. Caldwell, chief justice of the Supreme Court of Florida, and a former Florida governor. Caldwell, an ardent segregationist, was known for his contempt for liberals and intellectuals.<sup>262</sup>

In a *Statement of Principles* that the committee presented to the conference along with its amendment proposals, the committee endorsed the concept of dual sovereignty.<sup>263</sup> This *Statement* also frankly admitted that the Court of the Union proposal was designed to strip the Supreme Court of its role as the ultimate arbiter of federal-state relations.<sup>264</sup> In addition to contending the Founding

260. As Cook explained:

[t]here is no formal selection of those who should attend; the only determining factors are private desire and financial means. As a result, attendance is likely to be composed principally of axe-grinders who have been supplied with either public or private resources to get to the site of the grinding.

*Id.*

Cook remarked that the antagonism toward *Baker* caused “more and angrier axe-grinders to turn out for the Assembly’s meeting in 1962.” *Id.* at 15. Cook also quoted an unnamed person who was familiar with these organizations as commenting:

Most state legislators tend to be quite conservative, and usually it is the more conservative of these conservatives who attend the meetings. It is the old story. Those who are passionate *against* something, those who are really wrought up, are the ones most likely to show. The good guys, the lofty idealists . . . tend to be less well-organized and they don’t charge into the breach until the damage has been done and the crisis is at hand.

*Id.* at 11-12 (emphasis in original).

261. *Id.* at 15.

262. *See id.* at 16.

263. *Amending the Constitution*, supra note 254, at 10.

264. According to the *Statement of Principles of the Committee on Federal-State Relations of the National Legislative Conference (“NLC”)*:

[t]he basic difficulty is that the Supreme Court’s decisions concerning the balance between federal and state power are final and can be changed in practice only if the states can muster sufficient interest in Congress, backed by a three-quarters majority of the states themselves to amend the Constitution. While the founding fathers fully expected and wished the words of the Constitution to have this degree of finality, it is impossible to believe that they envisioned such potency for



Fathers had not anticipated the Court to have this power,<sup>265</sup> they complained that the power to determine the contours of federal-state power should not reside in an agency of the federal government.<sup>266</sup> Like other antagonists of the Court, the committee expressed impatience with the constitutional amendment process as a means for overturning objectionable Supreme Court decisions.<sup>267</sup>

The amendments received scant consideration, with most delegates seeing the proposals for the first time when they arrived at the meeting. Only one day was devoted to deliberations, and most of the discussions consisted of diatribes against the Court. Ohio state Senator Frank W. King, the lone dissenter in the NLC Federal-State Relations Committee, was the only person to seriously challenge the amendments. In opposing the Article V proposal, King argued against bypassing Congress in the amendment process, and he pointed out that the amendment would exclude the people from the amendment process insofar as it would eliminate Article V's procedure for allowing Congress to permit ratification by state conventions.<sup>268</sup> King opposed an amendment process that would give state legislatures the sole power to both propose amendments and ratify them, especially since malapportionment often made such legislatures unrepresentative.<sup>269</sup> In opposing the

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the pronouncements of nine judges appointed by the President and confirmed by the Senate.

*Id.* at 10.

265. *See id.*

266. *See id.* As the Statement of Principles observed:

[t]he Supreme Court is, after all, an organ of the federal government. It is one of the three branches of the national government, and in conflicts over federal and state power, the Court is necessarily one of the parties in interest. As such, its decision should not be assigned the same finality as the words of the Constitution itself.

*Id.*

267. *See id.* The Statement of Principles declared that:

[T]o amend the Federal Constitution to correct specific decisions of the federal courts on specific points is desirable, but it will not necessarily stop the continuing drift toward more complete federal domination. The present situation has taken a long time to develop and may take a long time to remedy. Accordingly, some more fundamental and far-reaching change in the Federal Constitution is necessary to preserve and protect the states.

*Id.* at 10-11.

268. *See id.* at 12.

269. *See id.*

reapportionment amendment, King argued that the measure was hastily adopted without due consideration and that it would deny the people equal protection under the Fourteenth Amendment.<sup>270</sup> King's reasoned arguments fell on deaf ears, with the assembly approving all three amendments.

The vote on the Article V amendment was thirty-seven to four, with four delegations abstaining and five states not represented.<sup>271</sup> It is noteworthy that the proposal received nationwide support and that there were no significant geographical divisions. Although it predictably was weakest in New England, where only delegations from New Hampshire and Rhode Island supported the proposal, the measure was endorsed by delegations from such liberal strongholds as New York, New Jersey, Pennsylvania, Minnesota, and Wisconsin—hardly hothouses of neo-Confederates. A New York State Bar Association committee concluded that “the lopsided vote indicated that the proposal has a deceptive appearance of harmlessness . . . . Evidently it is hard to realize that once the lid to the amending process is lifted, other less appealing changes will fly out easily.”<sup>272</sup>

The reapportionment proposal passed by a majority of twenty-six to ten, with ten state delegations passing and another four not present. Sectional and political divisions were more pronounced on this vote than on the Article V vote, with southern states most likely to favor it and northeastern states least likely. Nevertheless, there was considerable blurring of sectional lines and traditional political allegiances.<sup>273</sup>

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270. *See id.* at 13.

271. *See id.* at 12. Voting against the proposal were the delegations of Connecticut, North Dakota, Ohio, and Vermont. The delegations of Arizona, Hawaii, Michigan, and Washington passed on the roll call. Not represented were Alaska, Maine, Massachusetts, Nevada, and Montana. *See id.*

272. *The Federal Constitution: Reports on Three Amendments Proposed by the Council of State Governments*, 35 N.Y.St.B.J. 458, 460 n.7 (1963) (hereinafter referred to as *New York State Bar Association Report*).

273. Voting for the resolution were the delegations of Alabama, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, and Wyoming. Opposing it were the delegations of Colorado, Connecticut, Delaware, New York, North Dakota, Tennessee, Utah, Vermont, Washington, and West Virginia. Abstaining were the delegations of

The Assembly originally rejected the Court of the Union by one vote, but it passed by a bare plurality of one vote after Caldwell made an impassioned plea for it.<sup>274</sup> The final vote was twenty-one to twenty, with five delegations abstaining and four not represented. Here the geographical and political divisions again were clear. The proposal was endorsed by delegations from nine of the eleven states of the Old Confederacy—all except Tennessee and Arkansas—but it received no support from any delegation in the Northeast except for Maine. Nevertheless, it drew support from a number of midwestern and western states with a strong unionist and progressive tradition, including California, Illinois, Iowa, Kansas, South Dakota, and Wisconsin.<sup>275</sup>

One observer speculated that the fact that the second proposal received fewer votes than the first and the third obtained fewer than the second may have reflected the haste of consideration insofar as “the delegates became more informed as the afternoon wore on.”<sup>276</sup> Indeed, many commentators questioned whether the Council would have adopted the resolutions if it had not acted in such haste.<sup>277</sup> “Hence”, as one observer wryly noted, “as a special order of business, on the sixth of December 1962, it was proposed completely to revamp the government of the United

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Arizona, Hawaii, Kentucky, Michigan, Minnesota, Nebraska, Ohio, Oregon, Rhode Island, and Virginia. See *Amending the Constitution*, *supra* note 254, at 13.

274. See Robert L. Riggs, *States Trying To Change Basic Law of the United States—Details of a Three-Point Drive to Curb the Highest Court*, CHI. DAILY NEWS, May 6, 1963, reprinted in 109 CONG. REG. 8762 (1963). Caldwell insisted that the measure was urgently needed because Americans were losing their liberties so rapidly as the result of the Supreme Court's usurpation of power. Cook, *supra* note 228, at 15. Wood also spoke strongly in favor of the measure, describing it as the first and only attempt to take specific action to prevent the erosion of state's rights rather than merely to complain about it. *Id.* at 14.

275. See *Amending the Constitution*, *supra* note 254, at 15. Voting for the resolution were delegations from Alabama, California, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. Opposing it were delegations from Colorado, Connecticut, Delaware, Indiana, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Washington, and West Virginia. Abstaining were the delegations from Arizona, Arkansas, Hawaii, Michigan, and Nebraska. *Id.*

276. See Albert E. Jenner, *Observations on the Proposed Alteration of the Constitutional Amendatory Procedure*, 39 NOTRE DAME LAW. 625, 626 (1964).

277. See *id.* at 626.

States.”<sup>278</sup> Similarly, King remarked that “the whole thing had caught the delegations, most of them, flatfooted. They had only the vaguest idea what it was all about, and in these circumstances . . . some of these glib-tongued birds can make you believe almost anything the first time you hear it.”<sup>279</sup>

In advocating constitutional amendments, the Council had chosen a particularly arduous method of curbing the Court. Antagonists of the Court traditionally have preferred the generally less complicated route of federal legislation. The constitutional amendment process, of course, was the only procedure available to state officials since the route of congressional legislation was not open to them. Despite the difficulties of the amendment process, proponents of Court-curbing amendments during the Warren Era often with great bravado denied that the process was too strenuous since the Constitution had been amended twenty-two times.<sup>280</sup> Pointing out that many of these amendments had been enacted quickly and arguing that many involved “questions of relatively minor importance compared with the overwhelming urgency of the one that now faces us, Representative Alford of Georgia insisted in 1959, for example, that antagonists of the Court should approach the amendment process with confidence.”<sup>281</sup> This confidence was misplaced, however, since only three constitutional amendments—the Eleventh, the Fourteenth and the Sixteenth—had overruled Supreme Court decisions. Even though conservatives recently had pushed through the Twenty-second Amendment with relative ease,<sup>282</sup> the principal proponents of the states’ rights amendments recognized

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278. *Id.*

279. Cook, *supra* note 228, at 16.

280. E.L. Forrester, *The Manifesto and the Supreme Court*, FACTS F., July 1956, reprinted in 102 CONG. REG. 12233 (1956).

281. 105 CONG. REG. 7508 (1959) (remarks of Rep. Alford).

282. See KYVIG, *supra* note 5, at 327-34. Kyvig points out that:

[S]uccess in obtaining the Twenty-second Amendment gave birth or new life to other midcentury conservative efforts to reverse the New Deal and rein in the presidency through constitutional reform. Amendments, after all, could be obtained by exclusively legislative action at the federal and state level. They therefore particularly appealed to persons politically alienated from an executive and judiciary shaped by the New Deal.

*Id.* at 336.

that the amendment route would be difficult, even though they seemed loath to admit it.

Recognizing the obstacles faced by any constitutional amendment, proponents of the measures took great care to consider the procedure and strategy for their approval by state legislatures. In making its recommendations to the Assembly, the committee emphasized that the legislatures should adopt the proposed amendments "*without change* and in a uniform manner which will leave no question as to the intent of the several States."<sup>283</sup> The committee presumably emphasized the importance of uniformity insofar as previous attempts to call a constitutional convention "invariably foundered because the texts of the proposed amendments were not uniform."<sup>284</sup> Although some scholars believed that the amendments did not need to be identical in order for Congress to call the convention,<sup>285</sup> one proponent of the amendments pointed out that "the only prudent course is for the states not to rely on doing the minimum which they might have reason to believe would suffice to meet the requirements . . . ."<sup>286</sup>

The committee also urged that, "to the fullest extent possible, all State Legislatures cause themselves to be in session on Wednesday, January 16, 1963, for the specific purpose of introducing the joint resolutions."<sup>287</sup> The goal was momentum and maximum publicity. One observer concluded that "it is apparent from the Council's releases that it hopes, should a sufficient number of states file identical amendments, that Congress will itself be induced to propose them."<sup>288</sup> Since the alternative process for amending the Constitution never had been used there were doubts about how it would work.<sup>289</sup>

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283. *Amending the Constitution*, *supra* note 254, at 11 (emphasis in original).

284. Walter Dean Burnham, *Hobbling the Constitution*, COMMONWEAL, Sept. 6, 1963, at 532.

285. See Frank E. Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A. J., Feb. 1959, at 161.

286. Frank E. Shanahan, *Proposed Constitutional Amendments: They Will Strengthen Federal-State Relations*, A.B.A. J., July 1963, at 632, 633.

287. *Id.*

288. William G. Fennell, *The States Rights Amendments-Debates of the Founding Fathers Cast Doubts on Current Proposals*, 35 N.Y. ST. B.J. 465, 467 (1963)

289. *Id.*

In order to maximize the viability of the amendments, their proponents also followed the traditional procedure for amendment of the Constitution. In February 1963, Senator Thurmond sponsored a bill for adoption of the Article V and Court of the Union proposals.<sup>290</sup> In March, Representative Sydney A. Herlong of Florida introduced the apportionment resolution in the House,<sup>291</sup> and three Alabama congressmen offered bills for a Court of the Union.<sup>292</sup>

In an effort to obtain approval of the amendments, their proponents sought the help of the National Conference of State Legislative Leaders, an organization of presidents pro tem of state senates, speakers of the lower houses of state legislatures, majority and minority leaders of statehouses, and other principal state legislative leaders that had been formed in 1960 with financial help from a conservative foundation.<sup>293</sup> Meanwhile, proponents of the amendments organized the Voluntary Committee on Dual Sovereignty, chaired by Helm and vice chaired by six men: Chappell; Wood; Hauser; Haase; J.D. McCarty, Democratic speaker of the Oklahoma house; and Lieutenant Governor Harold H. Chase of Kansas.<sup>294</sup> The sources of funding for the Committee, which issued press releases and retained the paid services of one administrator, George Prentice, and one or two stenographers, is unclear.<sup>295</sup> The Committee claimed

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290. S.J. Res. 42 (Article V); S.J. Res. 43 (Court of the Union), 88th Cong. (1963).

291. H.R.J. Res. 300, 88th Cong. (1963).

292. H.R.J. Res. 364; H.R.J. Res. 370; H.R.J. Res. 371, 88th Cong. (1963).

293. See Cook, *supra* note 228, at 16.

294. See Riggs, *supra* note 274, at 8762. Riggs remarked that “[t]o carry on the theme that this is not a Dixiecrat movement, the supporters of the amendments have placed their campaign in the hands of a committee composed largely of northerners.” *Id.*

295. See Cook, *supra* note 228, at 17. Riggs wrote that “[t]he committee’s operations are in low key and apparently on a small budget, though there seems to be little question it can get such money as it needs as the occasion arises.” Riggs, *supra* note 274, at 8762. The administrator was George R. Prentice, a thirty-seven year old native of Kansas who had worked as a news reporter in Little Rock and Birmingham. See *id.* As Riggs explained, “[h]is main efforts have been neither to publicize the movement nor hide it, but to keep in touch with legislators of the various States who are pushing one or more of the three proposed amendments.” *Id.* Prentice conducted his operations from Tallahassee and claimed that seventy-five percent of his monthly budget of \$1500 per month came from the Committee and the remainder from the office of the speaker of the Florida House of Representatives, for whom Prentice worked when the legislature was in session. See Cook, *supra* note 228, at 17. Helm, however,

that it rejected offers of funding from the White Citizens Council of Mississippi and the National Citizens Council,<sup>296</sup> and it tried to avoid association with the John Birch Society.<sup>297</sup> As Prentice explained, "[w]e have steered clear of the isms, . . . the Citizens Councils, that sort of thing . . . . We've done everything we can to get rid of the Southern stigmatism [sic]."<sup>298</sup> Even many neutral observers and opponents of the measures acknowledged that they bore no taint of blatant racism. As one commentator observed, "[t]he sponsors of the three amendments have gone to great lengths to keep their campaign clear of southern coloration, clear of any connection with racial strife."<sup>299</sup> Of course, the Committee had little need to fan anti-Court antagonism in the South since bitterness over the desegregation decisions there was already so intense.<sup>300</sup> Accordingly, one commentator explained that the Committee had "more to gain by seeking Northern support on a straight-out conservative economic argument—especially since some of its northern friends have to compete with Democrats for Negro votes."<sup>301</sup>

Indeed, the Court's decisions on economic issues may have motivated the states' rights amendments as much as did the Court's decisions on race, subversion, or reapportionment. Proponents of the amendments were reported also to be disgruntled over the Court's decisions permitting

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denied that the Committee spent any money. *See id.*

296. *See Cook, supra* note 228, at 17.

297. Riggs, *supra* note 274, at 8762. As Riggs explained,

[o]ne of Prentice's tasks is to see that the committee avoids undesirable companions. While he recognizes that anyone who wants to do so can join the cheering section, he tries to keep the working ranks cleared of members of the John Birch Society, the racist White Citizens Council or any other groups on the radical right.

*Id.* Opponents of the amendments nevertheless alleged that members of these groups tended to be the supporters of the amendments. Professor Kurland, for example, contended that "only those close to the lunatic fringe, the Birchers and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan." Kurland, *The Court of the Union or Julius Caesar Revised*, 39 NOTRE DAME L. REV. 636, 637 (1963-64). According to Kurland, "[t]he few legislatures that have voted in support of this amendment are those normally concerned with their war on Robin Hood and similarly dangerous radicals." *Id.*

298. Anthony Lewis, *10 States Ask Amendment to Gain Districting Rights*, N.Y. TIMES, Apr. 14, 1963, at 1.

299. Riggs, *supra* note 274, at 8762.

300. *Id.*

301. *Id.*

Congress to establish the social security system; set minimum wages and maximum work hours; regulate tobacco grading; and provide for collective bargaining in labor disputes.<sup>302</sup>

Other opponents of the measures, however, were less ready to remove the stigma of extremism from proponents of the amendments. Many persistently denounced them as the products of right-wing extremism and as inspired principally by opposition to racial desegregation. As a *Newsweek* columnist wrote, “[t]he moving spirits are some of the most reactionary state politicians in the country. They have kept white Citizens Councils and the John Birch Society out of sight but the movement is strongest in parts of the South and West where these organizations thrive.”<sup>303</sup>

Critics of the proposals alleged that proponents were attempting to maximize the secrecy in order to stifle opportunity on debate. As Professor Burnham alleged:

Remembering how the 22<sup>nd</sup> Amendment was ratified virtually without debate, they have consistently sought to secure adoption by state legislatures with the least possible publicity. They correctly realized that if these amendments were publicly debated, the defensive advantage inherent in our political system would work against them: the opposition from Newer-America opinion leaders and publics would be so intense that they would have no chance of adoption by the necessary two-thirds majority.<sup>304</sup>

Proponents of the measures, however, claimed that they had made futile attempts to generate media attention and correctly pointed out that the media had ignored the movement.<sup>305</sup> For example, there was virtually no press coverage of the General Assembly’s adoption of the amendments, even though the General Assembly’s meetings were open to the public and were attended by news reporters.<sup>306</sup>

Other observers, however, attributed the early success

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302. *Id.* at 8763.

303. Kenneth Crawford, *Reaction’s Refuge*, *NEWSWEEK*, June 3, 1963, at 31.

304. Burnham, *supra* note 284, at 533. Burnham remarked that “[t]he proponents of these three amendments, quite unwittingly paying a deep tribute to the common sense and intelligence of the American people, have responded to requests for public debates on the merits by proceeding doggedly with their silent campaign.” *Id.*

305. *See* Cook, *supra* note 228, at 18.

306. *Id.*



of the movement more to apathy among natural opponents of the amendments rather than to stealth tactics by the amendments' proponents.<sup>307</sup> According to Cook,

the cardinal and glaring and most unpalatable fact is that, in this stultifying age of conformity and non-dissent, few persons were awake; few gave a damn. This applies with almost equal impartiality to virtually everybody—to a soporific and superficial press, to labor leaders, to liberals, to lawyers, and to intellectuals.<sup>308</sup>

Most observers did not at first take the movement seriously, believing that it lacked political viability and was merely the latest of countless movements to amend the Constitution that had disappeared without a trace.<sup>309</sup> As King remarked “[a]t the outset . . . a lot of people tended to dismiss this business too lightly, to laugh at it as a crackpot affair.”<sup>310</sup> In January, for example, an Illinois newspaper predicted that only Alabama and Florida and perhaps Mississippi would endorse the amendments.<sup>311</sup> Accordingly, the movement attracted little media attention. A New York City newspaper strike that extended from December 1962 to March 1963 further ensured that the movement attracted little national attention.<sup>312</sup> Opponents also may have feared that public discussion would give the proposals credibility and legitimacy. In denouncing the measures on the Senator floor in May 1963, Senator Paul Douglas expressed concern that “official notice of these applications for amendments may unnecessarily and undeservedly dignify them.”<sup>313</sup>

Moreover, another reason why even sophisticated persons failed to perceive the seriousness of the movement

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307. *See id.*

308. *Id.*

309. As Robert L. Riggs observed, one reason why the amendments did not generate more attention during early 1963 was that “most legislatures are accustomed to having before them futile and offbeat proposals to amend the Constitution.” Riggs, *supra* note 274, at 8762.

310. Cook, *supra* note 228, at 18.

311. *States' Rights and Wrongs*, INTELLIGENCER, Jan. 24, 1963, reprinted in 109 CONG. REC. 11,992 (1963).

312. *See After a Three-Month Shutdown What Striking Printers Got*, U.S. NEWS & WORLD REP., Mar. 18, 1963, at 98.

313. 109 CONG. REC. 8755 (1963).

was that it generated virtually no grassroots support.<sup>314</sup> One observer remarked that the campaign for the amendments was “something of a family matter among legislators.”<sup>315</sup> As Cook explained, “there had been *no* public demand for such drastic changes, and it seemed inconceivable, to anyone who recalls how difficult the amendment process has been for even widely publicized causes, that the three-amendment package could get anywhere without a strong basis of grass-roots support.”<sup>316</sup> Cook and other opponents of the amendments were worried that the ability of proponents of the amendments to make so much headway without mass support suggested that democracy itself had grown flaccid.<sup>317</sup>

By March 21, 1963 one or more of the amendments had been introduced in the legislature of twenty-six states, and the amendments were introduced in more state legislatures during the spring.<sup>318</sup> An accurate account of legislative action in the various states may never be possible because Congress lacked any formal procedure for reporting actions by states on applications for amendments.<sup>319</sup> By mid-June, the Article V amendment was estimated to have received the approval of both houses of thirteen state legislatures and the approval of one house in four states.<sup>320</sup> Meanwhile,

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314. Cook *supra* note 228, at 18.

315. Riggs, *supra* note 274, at 8762.

316. Cook, *supra* note 228, at 18 (emphasis in original). Cook observed that the emergence of the amendment drive as a menace, even though it lacked grassroots support, “expresses something new in the American experience—the determination and ability of top-ranking, ultra-conservative elements of the Establishment to engineer and organize changes from the top downward while the people sleep.” *Id.* at 18-19. Helm admitted to Cook that the amendments germinated without any broad basis of public support. *Id.* at 19

317. *See id.* “That so much could be accomplished,” Cook wrote,

by a small cabal of strategically-placed officials, backed by wealthy and largely hidden interests, aided by the frenzied cries of racists, states righters, ruralists, and Birchites—all without any perceptible stirring or demand among the people themselves—this is a pattern that speaks of a deep and fateful schism in the American body politic.

*Id.*

318. *Constitutional Amendment Sought*, CHRISTIAN SCIENCE MONITOR, March 21, 1963, at 11. *See* William F. Swindler, *The Current Challenge to Federalism: The Confederating Proposals*, 52 GEO. L.J. 1, 11 (1963).

319. 109 CONG. REC. 8755 (1963) (remarks of Sen. Douglas).

320. *See* Shanahan, *supra* note 286, at 636 n.4. Although this count was prepared by a proponent of the amendments, it was accepted as accurate by a staunch opponent, William F. Swindler. *See* Swindler, *supra* note 318, at 11. Swindler prepared the following table:

both houses of fifteen legislatures and one house of eight others had approved the apportionment amendment.<sup>321</sup> The Court of the Union proposal had fared less well, having received the endorsement of both houses in only four states and one house in four others.<sup>322</sup>

Although approval of the measures came disproportionately from southern legislatures, a substantial number of western and midwestern legislative bodies also approved them. Conservative New Hampshire, where both houses of the legislature approved the Article V amendment, was the only northeastern state to endorse any of the amendments. The amendments were passed in at least one house of seven legislatures among the eleven states of the Old Confederacy and were approved by at least one house of thirteen legislatures of the remaining thirty-nine states. All of these states had conservative political climates, with the exception of Illinois, where both houses approved the Article V amendment and one house endorsed the apportionment amendment; Wisconsin, where the Article V and Court of the Union proposals received the approval of one house; and Washington, where both houses approved the apportionment amendment. Both houses of the Arkansas, Louisiana, and Wyoming legislatures approved all three amendments, and at least one house approved at least one amendment in Colorado, Florida, Kansas, Mississippi, Missouri, Montana, Nevada, New Mexico, New

amendment	one house approving	both houses approving	total states considering
article V	4	18	22
Apportionment	8	15	23
Court of Union	4	5	9

*Id.*

Despite many news reports to the contrary, Alabama does not appear to have adopted any of the proposals. See *Silent Amendments*, *supra* note 231, at 36 (listing Alabama as having adopted the Court of the Union proposal); *The States' Rights Amendments*, TIME, June 7, 1963, at 22 (reporting that Alabama had ratified the Court plan); Anthony Lewis, *Growing Opposition Slows Drive for States'-Rights Amendments*, N.Y. TIMES, May 19, 1963, at 1 (stating that earlier reports that Alabama had adopted the Court plan were erroneous). See generally JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF ALABAMA (1963); JOURNAL OF THE SENATE OF THE STATE OF ALABAMA (1963) (neither journal mentions the amendments).

321. See Swindler, *supra* note 318 at 11 (1963).

322. *Id.*

Hampshire, Oklahoma, South Carolina, South Dakota, Texas, and Utah.<sup>323</sup>

The contest over the amendments in Ohio was particularly hard-fought because it provided a critical test of the amendments to make headway in industrial northern states. Since Ohio was one of the more conservative industrial states, it seemed like an ideal place for proponents of the amendment to begin to make inroads into the urbanized North. The amendments seemed headed for a victory in the state senate until a Cleveland radio station called attention to the amendment campaign.<sup>324</sup> Major newspapers afterwards publicized the campaign and some editorialized against the proposals.<sup>325</sup> Meanwhile, the AFL-CIO and the League of Women Voters vigorously lobbied against the amendments in the state senate.<sup>326</sup> A Republican senator who had introduced the Article V amendment abandoned it, explaining that he had "become aware that certain groups on the ragged fringe were pushing it,"<sup>327</sup> and another key Republican senator abandoned the apportionment amendment, explaining that he could not support a proposal that would "perpetuate a miserable situation."<sup>328</sup> In Ohio, King fought what he described as the "toughest battle of my political life" to defeat the proposals.<sup>329</sup> King believed that the Ohio legislature would have endorsed the measures if the state's leading newspapers had not tirelessly editorialized against them.<sup>330</sup>

Pennsylvania, where Helm served as speaker of the house, was another important battleground. As in Ohio, the success the amendments in this highly industrialized and populous state could have produced much national momentum for the proposals. While Helm lobbied for the amendments, U.S. Senator Joseph Clark wrote a letter in

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323. *Id.*

324. Lewis, *10 States Ask Amendment to Gain Districting Rights*, *supra* note 298, at 1.

325. *See id.*

326. *Id.*

327. *Id.*

328. *States' Rights Plan is Set Back in Ohio*, N.Y. TIMES, May 24, 1963, at 63.

329. Morgan, *supra* note 230, at 87.

330. *Id.*

opposition to every member of the legislature.<sup>331</sup> The amendments had withered in the legislature by June, after national opposition had galvanized.<sup>332</sup>

The amendments were predictably less popular among legislators in more liberal states. The Massachusetts State Senate rejected the Court of the Union proposal in January by a vote of thirty-seven to zero.<sup>333</sup> The New Jersey State Senate unanimously approved the reapportionment amendment, presumably because senators feared the impact of reapportionment in a state in which each county was allocated one senator.<sup>334</sup> After the New Jersey senate approved the Article V and reapportionment amendments, Governor Richard J. Hughes and Senator Clifford P. Case urged the senate to rescind the resolutions and called upon the assembly to block them.<sup>335</sup>

In Wisconsin, where Democratic Governor John W. Reynolds denounced the Court of the Union proposal as "a last-ditch attempt on the part of frustrated Southern segregationists to avoid the consequences of Supreme Court decisions forcing them to guarantee equal rights to all citizens,"<sup>336</sup> the apportionment and Court of the Union proposals received the support of one house of the legislature. In Nebraska, the unicameral legislature approved the Article V and apportionment amendments, but the Democratic governor vetoed the proposals.<sup>337</sup>

In mid-May, Senator Douglas of Illinois expressed fear that "there is a greater danger that these amendments will

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331. *Id.*

332. *See id.*

333. Irving Dillard, *Federal System Under Attack*, CHICAGO'S AM., Jan. 31, 1963, reprinted in 109 CONG. REC. 12,829-30 (1963).

334. Lewis, *10 States Ask Amendment to Gain Districting Rights*, *supra* note 298. The Senate included eleven Republicans and ten Democrats. *Id.*

335. George Cable Wright, *Bar Amendments, Jersey is Urged*, N.Y. TIMES, May 10, 1963, at 16.

336. Lewis, *10 States Ask Amendment to Gain Districting Rights*, *supra* note 298. Reynolds also stated,

That serious consideration could have been given to this proposal in our State seems incredible to me. Its approval would bring disgrace to Wisconsin. The authors offend our intelligence if they expect us to believe that a court of 50 different men and 50 different political views could possibly produce the kind of impartial and consistent judicial decisions rendered by the U.S. Supreme Court.

Irving Dillard, *The Courage of Governor Reynolds*, CHICAGO'S AM., April 7, 1963, reprinted in 109 CONG. REC. 12,830 (1963).

337. Burnham, *supra* note 284, at 533; Riggs, *supra* note 274, at 8762-63.

finally be adopted than many of the commentators seem to believe.<sup>338</sup> Douglas believed that a number of legislatures that were dominated by segregationists or opponents of reapportionment would approve these "time bombs" during the next year, thereby creating "a bandwagon psychology which will sweep other states into the fold."<sup>339</sup> Similarly, Commager warned against complacency, reminding moderates and liberals that the Bricker Amendment came within one vote of approval by the Senate and that the Twenty-Second Amendment, limiting presidential terms, "slipped through the Congress and the state legislatures almost without notice."<sup>340</sup>

During the late winter and spring of 1963, the amendments began to encounter serious opposition even in the South. In June, all three proposals were defeated by the North Carolina legislature, where they nevertheless enjoyed substantial support. The Article V amendment was defeated in the House only after the Speaker broke a tie vote of fifty-four to fifty-four.<sup>341</sup> The House defeated the reapportionment amendment by the narrow margin of fifty-nine to fifty-six.<sup>342</sup> Although the House approved the Court of the Union proposal, the Senate defeated it by a vote of twenty-eight to twelve.<sup>343</sup> In Louisiana, the measures won approval in the House, but were defeated in the Senate, where they received support from a majority but failed to win the requisite super-majority.<sup>344</sup> Many observers were surprised that one house of the Mississippi legislature rejected all three proposals. One theory was that the legislature feared that a constitutional convention might be too liberal on civil rights issues.<sup>345</sup> Others speculated that legislators were loath to stimulate controversy in the wake of two deaths at the University of Mississippi in September 1962 during a clash over integration.<sup>346</sup> After approving all

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338. 109 CONG. REC. 8755-56 (1963).

339. *Id.* at 8755-56. Douglas warned that "[t]hese proposals are indeed time bombs under the American constitutional system." *Id.* at 8756.

340. Commager, *supra* note 2, at 5.

341. *3 Amendments Fail in North Carolina*, N.Y. TIMES, June 21, 1963, at 13.

342. *Id.*

343. *Id.*

344. *Kennedy Forces Win in Louisiana*, N.Y. TIMES, June 9, 1963, at 33.

345. Crawford, *supra* note 303, at 31.

346. Riggs, *supra* note 274, at 8762.

three amendments on a voice vote, the Tennessee Senate reversed itself.<sup>347</sup>

C. *Defenders of the Court Oppose the States' Rights Amendments*

By April, opponents of the measures were expressing frustration that natural antagonists of the amendments were so apathetic. Praising Wisconsin's governor as a voice in the wilderness, the Chicago journalist Irving Dillard lamented the failure of other state and national leaders to stop the movement in its tracks by speaking out against it.<sup>348</sup> Dillard, one of the first persons to sound the alarm about the amendments, wrote as early as January that since it was difficult to know whether to treat the proposals seriously or dismiss them as absurd, "the only safe approach is to take the movement seriously."<sup>349</sup> Similarly, a correspondent for *The Economist* warned that "[o]ne danger is that State Legislatures are so used to adopting harmless resolutions which are never heard of again that some of them may not appreciate that the present batch is a very different kettle of fish."<sup>350</sup>

During the early months of 1963, the only person other than Dillard to campaign aggressively against the amendments was a practicing attorney, Arthur Freund. In his memoirs, Warren averred that "[i]t can reasonably be said that one man, Arthur Freund, a prominent lawyer of St. Louis, was more responsible than all others combined in finally bringing the danger of the proposals into public view."<sup>351</sup> Warren wrote that:

When it looked as though either or both [sic] of the amendments might succeed in obtaining the endorsement of the requisite number of states, Freund made a one-man crusade of the issue. He wrote to legislators, lawyers, scholars, and newspapers until finally a few of the important newspapers of the country took

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347. *The States' Rights Amendments*, *supra* note 320, at 22.

348. See Dillard, *supra* note 336, at 12,830.

349. Dillard, *supra* note 333, at 12,829.

350. *States Fight Back*, *ECONOMIST*, May 11, 1963, at 540. Similarly, the *Washington Post* expressed doubt that any of the legislatures that had approved the amendments "has seriously weighed the consequences of this Union-busting device." *WASH. POST*, April 20, 1963.

351. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 311-12 (1977).

cognizance of the situation, wrote articles about it, and pointed up its dangers. Only then did the movement die aborning.<sup>352</sup>

If Warren intended to credit Freund with defeating the amendments, Warren exaggerated Freund's ultimate role since the continued progress of the amendments ensured that they sooner or later would have attracted formidable opposition. Freund, however, was indeed a lonely voice during the early months of 1963, when the amendments slipped almost unnoticed through so many state legislative chambers. Beginning in April, however, opponents of the measures began to make up for lost time. Within a period of several weeks, a wide range of prominent public officials, academics, and journalists attacked the amendments, often ferociously. Although liberals naturally were the most numerous and vocal critics, the amendments also attracted opposition from moderates and conservatives.

Shortly after Governor Reynolds's blast, the *New York Times* began to call attention to the amendments and editorialized against them.<sup>353</sup> A few other newspapers soon followed. Yale Law Professor Charles Black initiated a torrent of academic criticism when he published a biting commentary about the amendments in the April issue of the *Yale Law Journal*.<sup>354</sup> The proposals never received substantial attention in the popular news media,<sup>355</sup> aside from a long and detailed article in *Look*, a mass circulation weekly, in December 1963.<sup>356</sup> Although the *Look* article warned that the amendments "would destroy democracy here as we know it," its publication occurred after the movement had lost momentum.<sup>357</sup> The paucity of news media coverage probably reflected general public apathy about legal and constitutional issues.

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352. *Id.* at 312.

353. *Upsetting the Constitution*, Editorial, N.Y. TIMES, Apr. 15, 1963, at 28. The editorial cautioned that the "amendments would effect a states' rights counterrevolution of dismaying dimensions." *Id.*

354. Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957-66 (1963) (hereinafter *The Proposed Amendment of Article V*).

355. In June, Senator Morse expressed disappointment that so few newspapers had "taken up the cudgels" in opposition to the amendments. 109 CONG. REC. 10,037 (1963).

356. Morgan, *supra* note 230, at 76.

357. *Id.*



Frustrated that the amendments had failed to attract more scrutiny, Warren warned in a speech at Duke University on April 27 that the proposals "would make profound changes in the judiciary, the relationship between the Federal and state Governments, and even the stability of the United States Constitution."<sup>358</sup> Warren expressed regret that the proposals had received so little attention and that lawyers had failed to do more to alert the nation to the danger that the amendments posed.<sup>359</sup> Several weeks later, on May 22, Warren amplified these remarks in an address to the American Law Institute.<sup>360</sup> Warren refrained from commenting on the merits of the amendments, urging only that such sweeping measures receive thorough consideration. His remarks, however, left no doubt that he strongly opposed them—as, of course, one would expect. Calling for a "great national debate" on the amendments, Warren urged attorneys to speak out on the amendments in order to prevent the Constitution from being altered "unwittingly."<sup>361</sup> Warren's tacit disapproval of the proposals ensured that opposition to the amendments would continue to gather momentum. As Professor Murphy observed, Warren's speech "effectively blew the whistle on the proposals."<sup>362</sup>

Meanwhile, President Kennedy expressed public opposition to the amendments. Asked about the proposals at a press conference on May 8, Kennedy declared that "I would think that the efforts will come to nothing and I will be glad when they do not."<sup>363</sup> The President was bemused that persons who purported to defend the Constitution would seek "to change it in such a basic way."<sup>364</sup>

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358. *Warren Is Critical of Lawyer Silence*, N.Y. TIMES, April 28, 1963, at L44.

359. *See id.*

360. *See Warren Cautions On Amendments*, N.Y. TIMES, May 23, 1963, at 1.

361. *Id.* Warren stated that "[a]ny serious effort to amend the Constitution of the United States should provide the occasion for a great national debate." *Id.*

362. MURPHY, *supra* note 39, at 479.

363. *Transcript of the President's News Conference on Domestic and Foreign Affairs*, N.Y. TIMES, May 9, 1963, at L16. The question was one of twenty-seven put to Kennedy at a conference that primarily concerned racial strife in Birmingham.

364. *See id.* Kennedy's remark about the radicalism of avowed conservatives won praise from the *New York Times* for directing "national attention to one of the anomalies in the pressure campaign conducted by the super-patriots of the radical right." *Who's for the Constitution?*, Editorial, N.Y. TIMES, May 10, 1963,

After Kennedy and Warren had denounced the amendments, *Time* expressed confidence that “[w]ith such powerful voices sounding the alarm, it appears that [that durable old structure, the U.S. Constitution, is in no danger of burning down.]”<sup>365</sup> Similarly, the *New York Times* on May 24 remarked that the amendments “represented a danger only so long as they were advanced in relative obscurity,”<sup>366</sup> and the Jesuit journal *America* expressed confidence in June that “this move to turn the United States into a confederacy will ultimately fail.”<sup>367</sup> Numerous commentators expressed regret, however, that the personal intervention of the Chief Justice was needed to alert a slumbering bar and public to the dangers of the proposals.<sup>368</sup> Others feared that the threat still was not sufficiently recognized.<sup>369</sup> In response to Warren’s remarks, some conservatives contended that the lack of national alarm over the proposed amendments was quite natural since so many of its decisions were so unpopular. As columnist Arthur Krock wrote, when the Supreme Court’s own actions “weaken the people’s respect for it as an institution, they are less disposed to equate

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at L32.

365. *The States’ Rights Amendments*, *supra* note 320, at 22.

366. *Defending the Constitution*, N.Y. TIMES, May 24, 1963, at 30. The *Times* remarked that “[t]he possibility that they might be carried to ratification virtually disappeared once legislators were obliged to take note of the character of the proposals they were rubber-stamping in such heedless fashion.” *Id.*

367. *The Confederacy Revived*, AMERICA, June 8, 1963, at 821.

368. Although the vice president of the Pennsylvania Bar Association expressed satisfaction that Warren’s speech had sparked “a chain reaction” and that “the organized bar accepted the challenge,” he found it “disheartening to note the apathy of individual lawyers to a burning Constitutional issue upon which should long have been focused the enlightened thought of the leaders of our Bar.” C. Brewster Rhoads, *Three Proposed Amendments to the United States Constitution—A Challenge to Our Form of Government*, 35 PA. B. ASSN. Q. 8, 8-9 (1963).

369. As Cook remarked,

[m]ore than six months after the Chicago meeting, long after Professor Black and Chief Justice Warren had sounded the alarm bells, there was an amazing paucity of information in usually well-informed circles. In Washington, even in the offices of liberal Senators worried about Birchite threats in their states, the files were barren of any useful information about the amendment drive and the forces behind it. Most labor circles, stirring slowly to opposition, acknowledged that they had done virtually no spadework.

Cook, *supra* note 228, at 18.

irreparable damage to the republic with limitations of the highest tribunal's powers by fully constitutional process."<sup>370</sup>

Warren and Kennedy were naturally circumspect in their rhetoric, although the fact that either the Chief Justice or the President would comment upon an amendment process in which they had no official role was itself remarkable. Other critics were not so restrained. Numerous commentators castigated the proposals and their advocates in extravagant terms that expressed amazement that such radical proposals could have made so much headway. Cook described the amendment proposals as "a racist, ruralist, right-wing attempt at a counter-revolution."<sup>371</sup> Similarly, Senator Young of Ohio described supporters of the apportionment amendment as "lunatic rightwing fringers in the North as well as racists in other sections of our country."<sup>372</sup> And Senator Wayne Morse of Oregon called proponents of the amendments "ultrareactionaries, which have so many characteristics of the Fascist mind."<sup>373</sup> Professor Commager described the Court of the Union as "a fantastic proposal," Professor Black dismissed it as "patently absurd,"<sup>374</sup> two Duke law professors denounced it as "crackpot,"<sup>375</sup> *The New Republic* labeled it "daft,"<sup>376</sup> and *Commonweal* decried it as "simply ridiculous."<sup>377</sup> Similarly, William and Mary Law Professor Swindler denounced the Court of the Union as "frivolous" and "ludicrous," and he warned that it was "an invitation to chaos" since it "would reduce federal judicial processes and administrations to a shambles, not to mention what it would do to the business of state courts."<sup>378</sup> Walter Lippman tagged the Court of the Union as "patently foolish" and the Article V proposal as "sinister" and "shocking."<sup>379</sup> The ferocity of this rhetoric was no substitute for reasoned argument, for opponents of the

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370. Arthur Krock, *Court and Critics: Its Rulings and Divisions are Said to Prompt Demands for Amendments*, N.Y. TIMES, June 9, 1963, at E13.

371. Cook, *supra* note 228, at 10.

372. 109 CONG. REC. 10,036 (1963).

373. *Id.* at 10,037.

374. Black, *The Proposed Amendment of Article V*, *supra* note 354, at 957.

375. Brainerd Currie & Lawrence G. Wallace, Editorial, N.Y. TIMES, Apr. 27, 1963, at 24.

376. *Disunited States*, NEW REPUBLIC, May 4, 1963, at 5.

377. *States' Rights?*, COMMONWEAL, May 31, 1963, at 269.

378. Swindler, *supra* note 318, at 33-34.

379. Walter Lippmann, *The Assault on the Union*, NEWSWEEK, June 10, 1963, at 25.

amendments offered many carefully reasoned critiques of each of the proposals. In contrast, proponents of the measures made few efforts to defend them in any detail.

But while the critics of the states' rights amendments correctly perceived that at least the Amendment V and the Court of the Union proposals would wreak havoc with federalism, probably to the nation's detriment, these critics often failed to appreciate the frustrations that had provoked such radical measures. Although many state legislators and judges were men and women of limited experience and vision, the chronic disparagement of these officials as racists, idiots, lunatics, and subversives was overwrought. While the remedies that they proposed were indeed subversive of federalism, even many liberal and moderate critics of the Court acknowledged that the activism of the Warren Court raised grave constitutional issues. As the chair of New York's Conservative Party argued in discussing the states' rights amendments:

The wisdom of these provisions is open to debate. But in view of the distinguished authorship (the nationwide 30-year-old Council of State Governments), criticism leveled against the expansive tendencies of the Supreme Court by the late Learned Hand, the Conference of Chief Justices of the State Supreme Courts, and many other manifestly competent observers, it is hardly proper to dismiss the proposed amendments as the handiwork of right-wing fanatics. Our nation is, after all, the United "States" of America, however bitterly our liberal brethren may resent this keynote of our political and legal system.<sup>380</sup>

The irony that such amendments were proposed during the centennial of the Civil War was not lost on opponents of the amendments, many of who alleged that the amendments would nullify the outcome of that war.<sup>381</sup> As Chicago attorney Albert E. Jenner remarked, "[t]he blood bath of the Civil War, fought in great part to accentuate the indissolubility of the Union, will have been for naught."<sup>382</sup> Similarly, a University of Delaware professor described the movement for the amendments as "the most drastic internal attack upon the security of the nation since the

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380. J. Daniel Mahoney, Editorial, N.Y. TIMES, May 18, 1963, at 26.

381. See Black, *The Proposed Amendment of Article V*, *supra* note 354, at 960.

382. Jenner, *supra* note 276, at 625.

Civil War.<sup>383</sup> Various opponents also contended that the amendments would return the nation to the government of the Articles of Confederation.<sup>384</sup> Some dubbed them the "disunity amendments."<sup>385</sup>

Critics of the proposals frequently echoed Kennedy's observation that it was ironic that such radical measures were advanced by persons who called themselves conservatives.<sup>386</sup> As Professor Black observed, "[i]t must be a matter for astonishment that these proposals should find support among those to whom the honored word conservative is often applied. The proposals are radical in the extreme."<sup>387</sup> One critic went so far as to declare that "[t]he threat to our institutions posed by this counterrevolution is as real and dangerous as the threat of Communism."<sup>388</sup> *The New York Times* sardonically suggested that congressional committees concerned with subversion should investigate the proposals and their methods of promotion.<sup>389</sup>

At least some proponents of the amendments admitted

383. Paul Dolan, Editorial, N.Y. TIMES, April 23, 1963, at 36.

384. For example, Professor Swindler argued that the proposals would "extinguish the very essence of federalism which distinguishes the Constitution from the Articles of Confederation. Swindler, *supra* note 318, at 12. Senator Douglas of Illinois remarked that the amendments "would help to make this country a confederacy instead of a nation." 109 CONG. REC. 8755 (1963). See also Jenner, *supra* note 276, at 625. Similarly, a Connecticut congressman expressed "shock" that so many states had acted on the amendments, and warned that they would "reduce our Nation to an ineffective confederation, bound by ephemeral ties and immeasurably and irreparably crippled by the forces of disunion and disagreement." 109 CONG. REC. 10,219 (remarks of Rep. Giaimo).

385. See, e.g., 109 CONG. REC. A-4537 (1963).

386. See, e.g., Burnham, *supra* note 284, at 532 ("[t]he quality of such so-called conservatism can best be appraised by reflecting on the nature of proposals such as this."); See generally Commager, *supra* note 2.

387. Black, *Proposed Constitutional Amendments: They Would Return Us to a Confederacy*, A.B.A. J., July 1963, at 637 [hereinafter *Proposed Constitutional Amendments*]. Similarly, Senator Young stated that proponents of the amendments

claim to be conservatives, but they dishonor that appellation. They are not acting to conserve the American way of life and the traditions that form the foundation of our country. These proposals aim, not at the preservation or conservation of our form of government, but at the subversion of the balance of Federal-State relations which has enabled us throughout our history to escape the evils of despotism and totalitarianism.

109 CONG. REC. 10,036 (1963).

388. Fennell, *supra* note 288, at 472.

389. *Upsetting the Constitution*, N.Y. TIMES, April 15, 1963, at L28.

that the measures were radical, but they insisted that the increasing centralization of power in the federal government required a fundamental response. As Frank E. Shanahan, a Mississippi legislator, argued in an *ABA Journal* article in July 1963, “[t]he trend toward centralization of power in the Federal Government has become so pronounced that only a solution based on reforms on the most basic level will have any probability of success.”<sup>390</sup>

Meanwhile, *National Review* columnist L. Brent Bozell expressed gratification that the scathing terms in which opponents attacked the amendments indicated that the movement had indeed alarmed the liberal establishment. Bozell found that the movement particularly scared liberals because “it wasn’t easy to dismiss the campaign as one of those Southern things,” or as “a backwoods affair.”<sup>391</sup> Proponents of the amendments claimed that they would renew and refresh federalism rather than to destroy the Union. Shanahan argued that the amendments would help “achieve a vigorous federal system in which dynamic states combine with a responsible central government for the good of the people.”<sup>392</sup>

#### D. *Arguments in Opposition to the States’ Rights Amendments*

1. *Procedural Arguments.* Although some scholars who opposed the amendments conceded that advocates of the amendments were proceeding in a perfectly constitutional manner,<sup>393</sup> many others argued that the apportionment amendment could be unconstitutional even if it were enacted pursuant to the procedures of the Constitution. As University of Minnesota Law Professor Carl A. Auerbach explained, Article V “postulates the illegitimacy of an amendment which would destroy the democratic character of our system of government—for example, an amendment, even if supported by a majority of the people, which would

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390. Shanahan, *supra* note 286, at 632.

391. L. Brent Bozell, *Watch Out for the Subverters!*, *NAT’L REV.*, May 21, 1963, at 398.

392. Shanahan, *supra* note 286, at 636.

393. Morris D. Forkosif, Editorial, *N.Y. TIMES*, Apr. 25, 1963, at 32. Professor Forkosif was chair of the Department of Public Law at Brooklyn Law School.

establish the framework for totalitarian dictatorship in the United States.<sup>394</sup>

One commentator argued, however, that the proposal would not exclude Congress because the amendment would retain as an alternative the time-tested procedure under Article V by which Congress could approve amendments and send them to the states.<sup>395</sup>

Some scholars contended that the state applications for the convention were unconstitutional because they called for a convention to approve or disapprove specific constitutional amendments, in contravention to Article V's provision for Congress to "call a Convention for *proposing* Amendments" on the "[a]pplication" of two-thirds of the legislatures.<sup>396</sup> As Professor Bonfield explained,

the resolutions in issue really call for a convention empowered solely to approve or disapprove in a mechanical way the text of specific amendments that have already been "proposed" elsewhere. In this sense, the proponents of these resolutions seek to make the "Convention" part of the *ratifying* process, rather than part of the deliberative process for proposing constitutional amendments.<sup>397</sup>

Similarly, Professor Black asked whether the resolutions constituted an application for a convention or "an application for something quite different—for a 'Convention' to consider whether an amendment already

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394. Carl A. Auerbach, *Proposal II and the National Interest in State Legislative Apportionment*, 39 NOTRE DAME LAW. 625, 631-32 (1964). Professor Auerbach explained that

such an amendment would upset the basic system of government envisaged in the Constitution at least as much as an amendment depriving the states, without their consent, of their equal representation in the Senate—which Article V prohibits expressly. That the federal government will remain republican in form is a postulate on which the whole Constitution is based; there was no need to make it explicit.

*Id.* at 632

395. See Stanley Meisler, *Silent Amendments: Thorny Path Lies Ahead for Constitutional Changes*, NEW HAVEN REG., May 28, 1963, reprinted in 109 CONG. REC. 10,225 (1963).

396. Arthur Earl Bonfield, *Proposing Constitutional Amendments by Convention: Some Problems*, 39 NOTRE DAME LAW. 659, 662-63 (1964). See also Black, *Proposed Amendment of Article V*, *supra* note 354, at 962-63.

397. Bonfield, *supra* note 396, at 662-63.

proposed shall be voted up or down.”<sup>398</sup> Black explained that this was important, because

[t]he issue is whether it is contemplated that measures dominantly of national interest should be malleable under debate and deliberation at a national level, before going out to the several states. Such a conception of the ‘convention’ contemplated by article V makes the second route to amendment symmetrical with the first, in the vital respect that, under both, the national problem must be considered as a *problem*, with a wide range of possible solutions and an opportunity to raise and discuss them all in a body with national responsibility and adequately flexible power.<sup>399</sup>

Other opponents of the amendments expressed confidence that Congress could stymie the amendments even if the requisite number of states made application for a convention since Congress presumably could heavily influence the outcome of the convention by establishing rules for its composition and procedure. As *The New Republic* explained in August 1963,

[i]f Congress is hostile to the proposals, its control of Convention procedure can easily be used to scuttle the whole business. The Convention could reject the original proposal, water it down, or propose an amendment with an entirely different effect. Congress would then determine whether the proposal would be ratified by state legislatures or state ratifying conventions.<sup>400</sup>

Similarly, another commentator pointed out that “Congress has the sole power to determine when a constitutional convention has been validly called for, how the

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398. Black, *The Proposed Amendment of Article V*, *supra* note 354, at 962.

399. *Id.* at 963. In response to Black’s argument, one commentator pointed out that at least one scholarly commentary published before the states’ rights amendments controversy assumed that the state applications could dictate the terms of the proposed amendment. Paul L. Hanes, *The Proposed Constitutional Amendments: A New Definition of Federalism*, 12 J. PUB. L. 448, 452 (1963) (citing Note, *Proposing Amendments to the United States Constitution by Convention*, 70 HARV. L. REV. 1067, 1074 (1957)). The author therefore concluded that “an application containing the text of an amendment is not so diabolical or unique” as Black contended. Hanes, *supra*, at 451.

400. *Stalled at Sixteen*, NEW REPUBLIC, Aug. 31, 1963, at 7. Accordingly, *The New Republic* contended that “sponsors of the so-called states’ rights amendments pulled off the grandest political spoof of the year—they fooled the legislatures of 16 states into thinking that they had discovered a back door means of changing the US Constitution.” *Id.*



convention should be selected and operated, and by what means any proposed amendment would be ratified."<sup>401</sup> *The New Republic* believed that "no proposal could move through this series of amending steps (thirty-four state applications, Congress, Constitutional Convention, thirty-eight state ratifications) unless there was a deep national consensus favoring it. Thus far, there is not."<sup>402</sup>

Moreover, Black contended that Congress would not be bound to call the convention if its format failed to "safeguard . . . vital national interests"<sup>403</sup> and that the President would have power to veto it.<sup>404</sup> In concluding that Congress was not bound to call a convention even if the requisite number of states requested one, another scholar stated that "Congress can ignore or block an amendment campaign unless the proposal is so popular that the voters would be aroused to retaliate at the polls."<sup>405</sup> According to this commentator, "a state application under Article V has no more effect than a simple memorial petition to Congress—both are judged by the political force behind them." The author warned that "[i]f the state legislatures fail to appreciate this reality, they may tarnish their own prestige by allowing themselves to be drawn into highly publicized campaigns to obtain applications which do not have popular support and which are certain to be ignored by Congress."<sup>406</sup>

## 2. *Arguments Against the Article V Amendment.*

Critics of the Article V amendment argued that any exclusion of Congress from the amendment process would subvert federalism and permit malapportioned legislatures

401. Graham, *supra* note 250, at 1177.

402. *Stalled at Sixteen*, *supra* note 400, at 7.

403. Black, *The Proposed Amendment of Article V*, *supra* note 354, at 964.

404. *See id.* at 965. Black found this power in Article I, section 7, clause 3, which provides that

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives.

*Id.* Black stated that "[i]f the President believed the structure and mandate of the convention significantly wrong, and dangerous to the national well-being, then he would surely be justified in vetoing the Resolution." *Id.*

405. Graham, *supra* note 250, at 1177.

406. *Id.*

to approve amendments that could imperil basic civil liberties.

Opponents of the amendment emphasized that amendments that affected the entire nation should receive consideration in a national forum. As Professor Black argued, the "amendment proposal would subvert the deepest principle of our political life—that we are a whole nation, and that resolution of national questions calls for debate and action in a national forum."<sup>407</sup> Similarly, St. Louis attorney Arthur Freund argued that "[t]he entire sum of discussions by 50 state legislatures does not arise to the point of nationwide knowledge or deliberation."<sup>408</sup> Likewise, Solicitor General Archibald Cox warned that it was unsound to eliminate "the national voice and the popular voice from the amending process and put it entirely in the hands of the states."<sup>409</sup> Although Cox acknowledged that the "states are terribly important" because they allow for self-rule and diffusion of power, he pointed out that "the genius of our system is its balance" and he contended that "the proposed amendment would place this balance in jeopardy."<sup>410</sup>

Similarly, the New York State Bar Association's Committee on Federal Constitution concluded that the proposal "would destroy the present balance in amending the Constitution, and permit revising the national charter by a series of local actions."<sup>411</sup> Critics pointed out the Constitutional Convention in 1787 had rejected the original proposal of the Virginia plan to amend the Constitution without participation by Congress.<sup>412</sup> Likewise, Senator George McGovern of South Dakota observed in a law review article that "[n]ational questions ought surely at some stage to be deliberated upon in a national forum. Only thus can they

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407. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 638.

408. Arthur Freund, *A Clear and Present Danger*, WASH. U. ST. LOUIS MAG., Fall 1963, reprinted in 109 CONG. REC. 20,799 (1963).

409. *Amendment Plan Is Assailed by Solicitor General*, N.Y. TIMES, Sept. 7, 1963, at 48. Cox stated that the amendment "ignores the most profound lessons of our national history by proposing to revert to state rule only on the basis of a state-by-state count through state institutions only." *Id.*

410. *Id.*

411. *New York State Bar Association Report*, *supra* note 272, at 460.

412. As Fennell pointed out, "it is clear that the Constitutional Convention covered the ground which the Council of State Governments' proposal now raises for national debate and ended by rejecting what the Council now proposes." Fennell, *supra* note 288, at 469.

receive the consideration of representatives whose responsibility in office is the welfare of the country as a whole.<sup>413</sup> As McGovern explained:

State legislatures, by the very nature of their purpose and function, have relatively small acquaintance with problems of a national character. They have little or no experience in dealing with problems in such perspective. Even given the best of intent on the part of any state legislature there would be great difficulty in acquainting the members with the attitudes, views, and needs of sections of the country other than their own. The Congress with its nationwide views is best designed to generate the kind of national debate and public scrutiny that is needed to prevent hasty or ill-advised changes in our Constitution.<sup>414</sup>

Black pointed out that the proposal also could permit a relatively small minority of Americans to force a constitutional amendment upon the entire nation. Black calculated that the thirty-eight least populous states, which could form the three-quarters majority necessary for the enactment of an amendment and could include the two-thirds of the legislatures forcing submission of an amendment, had only forty percent of the nation's population. Furthermore, Black posited that an amendment could obtain ratification with the support of far less than even forty percent of the voting population insofar as malapportionment meant that a majority of legislators in both houses of most state legislatures were composed of "constituencies containing a distinct minority of the state's population."<sup>415</sup> Since thirty-eight percent of the people of the

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413. George McGovern, *Confederation vs. Union*, 9 S.D. L. REV. 1, 5 (1964). McGovern wrote that "[t]he political philosophy behind this proposal mistakenly considers that the United States exists only as fifty and separate political groups and that a national interest, if it does exist, can and ought to find expression only through the separate action of a qualified majority of fifty geographical political units." *Id.*

414. *Id.* McGovern concluded that "[t]he issue, in short, is whether or not measures of national interest should be subjected to debate, deliberation and publicity at a national level before going out to the several states for their adoption. Do we favor a union of states or a return to the Articles of Confederation?" *Id.*

415. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 638. Black declared that

[t]his want of popular representation in the proposed amending process is made the more dangerous by the fact that many of our state legislatures are grossly unrepresentative of the people within their

thirty-eight least populous states formed constituencies of the more representative house of the state legislature, Black concluded that a mere fifteen percent of the voters could freely amend the Constitution under this proposal. Although Black acknowledged that it was statistically unlikely that such a small minority could form a coalition to ratify a constitutional amendment, he pointed out that even an amendment that represented, say, thirty or thirty-five percent of the voters would thwart the principle of majority rule.<sup>416</sup> Moreover, Black argued that relatively small minorities could easily coalesce in favor of an amendment since “the skewing of the state legislatures is virtually all in favor of nonurban interests.”<sup>417</sup> The desire of proponents of the amendment to favor rural interests was underscored, Black alleged, by their exclusion of state governors from any role in the amending process.<sup>418</sup> Similarly, Albert Jenner pointed out that “this process would not be a mere transference of power to the states as *states*, but to the state legislatures.”<sup>419</sup>

In response to these arguments, Caldwell insisted that domination of the nation by fifteen percent of the population was preferable to domination by five members of the U.S. Supreme Court.<sup>420</sup> Moreover, Jesse Helms, then a

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states. Whether we approve of *Baker v. Carr* . . . and whatever may be the appropriate federal constitutional standards for representation in state legislatures considered strictly in their local character, how could we wish to commit the process of federal constitutional amendment to the uncontrolled action of legislatures that (as published statistics irrefutably show) are very far from reflecting with accuracy the composition even of their own state citizenry?

*Id.*

416. *Id.*; Black, *The Proposed Amendment of Article V*, *supra* note 354, at 960.

417. Professor Black observed that

[w]e are used to negative minority power in the United States, and most of us think it well that there will be *checks* on majority will. What is here proposed is not that. It is the very opposite thing—it would confer on the minority uncontrolled power to override the majority with respect to the most fundamental innovations.

Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639 (emphasis in original).

418. *Id.* at 638.

419. Jenner, *supra* note 276, at 625 (emphasis in original).

420. *Transcript of proceedings at taping of TV program, June 26, 1963, taken at studios of KMOX-TV, St. Louis, Mo., reprinted in 110 CONG. REC. A4835 (1964) [hereinafter Transcript]*

Raleigh television commentator, argued that representatives from the nation's five most populous states presently had the power to block any constitutional amendment.<sup>421</sup>

Opponents of the amendment warned that it would provide benighted state legislatures with virtually unfettered power to amend the Constitution in any ludicrous manner that suited their fancies, even if such an amendment trampled on the most basic civil liberties. Black warned that "[t]hree-fourths of the state legislatures, without the consent of any other body, could change the presidency to a committee of three, hobble the treaty power, make the federal judiciary elective, repeal the fourth amendment, make Catholics ineligible for public office, and move the national capital to Topeka."<sup>422</sup> Similarly, Albert Jenner argued that the combined effect of the three amendments could "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."<sup>423</sup>

Opponents of the amendment were particularly fearful that it would permit the states to subvert the Supreme Court's desegregation decisions. Arthur Freund alleged that

[t]his proposal opens the flood gates to those who would eliminate desegregation in the public schools and other public facilities; to those who would pack the Supreme Court or provide different methods for selection of Federal judges; to those who would abolish the Federal graduated income tax, or social security taxes, . . . or aid to any education whatever; [and] to those who would prohibit U.S. participation in the United Nations.<sup>424</sup>

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421. Jesse Helms, *Curb the Supreme Court*, HUM. EVENTS, July 13, 1963, at 15. Actually, it would have taken the votes of the seven most populous states to provide the one-third of votes in the House needed to block a constitutional amendment.

422. Black, *The Proposed Amendment of Article V*, *supra* note 354, at 959.

423. Jenner, *supra* note 276, at 627.

424. Freund, *A Clear and Present Danger*, *supra* note 408, at 20,799. Freund wrote that

[a]s bizarre as these doleful speculations may appear, it is implicit that should the bow of this first proposal be placed within the effective hands of the State legislatures, the first shafts from a taut string will be aimed at the Supreme Court, the commerce clause of the Constitution, the due process clause and equal protections clauses of the 14<sup>th</sup> amendment, and the blessings of liberty protected and

Freund warned that “[t]he possibilities for special groups to work quietly and beneath the surface for any fundamental change are without limitation.”<sup>425</sup> Similarly, Cox warned that the measure would cause “endless delay and frustration in civil rights cases.”<sup>426</sup>

Dean Joseph O’ Meara of the Notre Dame Law School feared that the new amendment process even would permit a minority of state legislatures “to abolish the Federal Union itself and substitute for it a loose confederation, which appears to be the real goal of some of the advocates of the proposed amendments.”<sup>427</sup> O’ Meara warned that “[t]his would leave us virtually defenseless in a hectic and aggressive world, for a confederation of 50 independent states, each free to go its own way, would be so weak that it could not possibly resist the might of Communism.”<sup>428</sup>

Although Walter Lippmann acknowledged that three-quarters of the state legislatures presently had no desire to destroy civil liberties, he warned that “nobody can tell what could happen in some terrible period of storm and stress. A constitution should be made to stand up in the worst weather, and it should not be possible, not even theoretically, for the 38 smallest states to lay down the law to the rest.”<sup>429</sup>

### E. *Arguments Against the Apportionment Amendment*

Opponents of the apportionment amendment warned that it could perpetuate malapportionment in state legislatures that would enable legislators to enact legislation that would subvert civil liberties. They found the apportionment amendment particularly menacing insofar as permanently malapportioned legislatures also could enact pernicious constitutional amendments if the Article V amendment

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entrenched in the Bill of Rights.

*Id.*

425. *Id.*

426. *Amendment Plan Is Assailed by Solicitor General*, *supra* note 409, at 48.

427. Joseph O’Meara, *Introduction*, 39 NOTRE DAME LAW. 623, 623-24 (1964) (Introduction to Symposium on The Proposed Alteration of the Constitutional Amendatory Procedure).

428. *Id.* at 624.

429. Walter Lippmann, *The Assault on the Union*, NEWSWEEK, June 10, 1963, at 25.

were approved. As the New York State Bar Association's Committee on Federal Constitution pointed out, the apportionment amendment would forbid judicial review of apportionment "for all time, and no matter how egregious or willful the malapportionment might be."<sup>430</sup> Professor Burnham remarked that the reapportionment amendment "would ensure that rurally-dominated rotten-boroughism at the state level could be done away with, if at all, only by revolution."<sup>431</sup> Similarly, Arthur Freund predicted that the amendment's adoption "would not only solidify the extreme abuses now prevailing; it would make it unlikely that such abuses could be corrected, and it would be a powerful impetus to initiate even more glaring discriminations."<sup>432</sup> Professor Black declared that "[t]his proposal would constitute the first diminution since our history began of any federal constitutional guaranty of liberty, justice or equality."<sup>433</sup>

Indeed, opponents of the proposal argued that it would nullify the Constitution's Guarantee Clause.<sup>434</sup> As Professor Auerbach warned, "[i]t is not inconceivable that in a time of strife, districting and apportionment of representation in a state legislature might become the instruments of totalitarian rule in a particular state."<sup>435</sup> Auerbach also questioned whether the apportionment amendment actually served the interests of states' rights since denial of legislative power to large blocs of urban citizens could cause

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430. *The Federal Constitution*, *supra* note 272, at 460. The Committee explained that

[w]hile many of us are concerned by the possibility of extreme applications of *Baker v. Carr* and believe that the development of decisions under it should be watched with care, we do not believe that this is the time for an amendment or that the proper method is complete reversal of the decision, resulting in perpetual exemption of malapportionment, no matter how flagrant, from constitutional limitations designed to protect our rights.

*Id.*

431. Burnham, *supra* note 284, at 532.

432. Freund, *A Clear and Present Danger*, *supra* note 408, at 20,800.

433. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639. Black remarked that "[t]o begin cutting down our constitutional guarantees, to begin introducing exceptions here and there into the concept of equality under law, are solemn steps indeed." *Id.*

434. See Fennell, *supra* note 288, at 471; Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639; Auerbach, *supra* note 394, at 630.

435. Auerbach, *supra* note 394, at 630.

urban municipalities to seek direct assistance from the federal government.<sup>436</sup>

Opponents contended that the amendment would cut the states entirely free from the moorings of the Equal Protection Clause in apportionment, permitting them to exclude disfavored groups altogether from representation in the legislature. In particular, critics of the amendment alleged that denial of federal amelioration of malapportionment would permit states to use apportionment as a means of disenfranchising African Americans or other minorities, as the state of Alabama had attempted in the gerrymander that the Supreme Court had invalidated in *Gomillion v. Lightfoot*.<sup>437</sup> As New York attorney William G. Fennell argued,

[t]his could mean that a state might redistrict its legislature so that only real property owners might vote, or so that Negroes could not vote, or to deny, or curtail, the voting rights of Catholics or other religious groups . . . . If the Council of State Governments has its way, the Supreme Court will no longer have the power to protect minorities from the tyranny of the majority.<sup>438</sup>

Similarly, Professor Auerbach warned that the amendment “would abridge the national guarantees of equality embedded in the Thirteenth, Fourteenth and Fifteenth Amendments. . . .”<sup>439</sup> Likewise, Black alleged that the amendment “would reach beyond the Fourteenth Amendment ‘equal protection’ and sanction the states in using ‘apportionment’ as a guise for rank racial discrimination, in contravention of at least the purpose and spirit of the Fifteenth Amendment.”<sup>440</sup>

Defenders of the amendment, however, argued that the

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436. See *id.* at 630-31. Auerbach quoted the Advisory Commission on Intergovernmental Relations' 1955 warning that state governments would be eclipsed “if minority interests are permitted to control the legislative branch of State Government” insofar as “the people will turn to a more broadly responsive National Government to obtain their needs.” *Id.* (quoting ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT TO THE PRESIDENT 39-40 (1955)).

437. 364 U.S. 339 (1960). See Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639; Auerbach, *supra* note 394, at 629.

438. Fennell, *supra* note 288, at 471.

439. Auerbach, *supra* note 394, at 329. Auerbach wrote that “surely we should not permit the long, historic, and increasingly successful struggle of the Negro citizen for the right to vote to culminate in districting and apportioning schemes which deprive him of the fruits of victory.” *Id.*

440. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639.



Fifteenth Amendment would prevent any apportionment that would disenfranchise African-Americans. Bozell pointed out that *Gomillion* predated *Baker* and that "thus presumably stands as good law quite apart from the controversy provoked by *Baker*."<sup>441</sup> Bozell pointed out that "if there is any doubt about this, it would be no problem to qualify the proposed new amendment by making clear that the Fifteenth Amendment is not meant to be superceded."<sup>442</sup>

#### F. Arguments Against the Court of the Union Amendment

Critics of the Court of the Union expressed fear that it, like the other two amendments, would return the nation to a confederacy that would permit subversion of fundamental personal liberties. Denouncing the Court of the Union proposal as "grotesque," Professor Burnham alleged that it would overturn "the verdict of Appomattox" and "would finally demonstrate that after all the Founders had *not* created a nation."<sup>443</sup> Similarly, Professor Black averred that the proposal negated "the powerful and life-giving idea that our Constitution is law and that its character as national law can only be upheld by giving its final interpretation into the hands of a national judiciary."<sup>444</sup> The New York State Bar Association's Committee alleged that the amendment "would subjugate our Federal judiciary to the states, and turn the supremacy clause of our Constitution upside down."<sup>445</sup> Commager predicted that "[i]n all likelihood such a court would strip the Supreme Court of that crucial function of harmonizing the Federal system which is quintessential to the survival of the nation."<sup>446</sup> And an Illinois state judge remarked that "[i]t's the first proposal I

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441. Bozell, *Watch Out for the Subverters!*, *supra* note 391, at 398.

442. *Id.*

443. Burnham, *supra* note 284, at 532.

444. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639.

Black declared that

[t]he destruction of this idea and the substitution of the idea that final judgment on constitutional questions is to be made by judicial representatives of the states, taken one by one, again can rest only on the theory, denied by the best thought and the best blood of our history, that we are not a nation but a league.

*Id.*

445. *New York State Bar Association Report*, *supra* note 272, at 461.

446. Commager, *supra* note 2, at 5.

have seen where a lower court judge goes up above the court that is above it, and it is too fantastic to contemplate."<sup>447</sup>

Critics of the proposal also contended that the function of the so-called Court would be legislative rather than judicial.<sup>448</sup> Just as critics of the Article V proposal complained that it would eliminate the people from the amendment process, opponents of the Court of the Union argued that it was anti-democratic because the Court would act in the name of the states rather than in the interest of the people.<sup>449</sup> Opponents quoted Alexander Hamilton's contention in *The Federalist* that "[s]tate judges, holding their office during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws."<sup>450</sup> Critics also pointed out that it would permit the chief justices of the smallest twenty-six states, which contained only one-sixth of the nation's population, to establish constitutional law for the whole nation.<sup>451</sup>

Some commentators pointed out, however, that the Court of the Union would not have plenary power over constitutional issues insofar as it would have no jurisdiction over subjects on which the Constitution conferred exclusive power in the federal government, including military affairs, foreign commerce, or the minting of money.<sup>452</sup> As a

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447. *Transcript, supra* note 420, at A4836 (remarks of James O. Monroe, circuit judge of the Third Judicial Court of Illinois).

448. As the New York State Bar Association's committee observed, [t]he proposed Court of the Union would be a court in little more than name. Its fifty judges would be selected, paid and removed by their respective states. From the very nature of the revisionary duty thrown upon them, their functioning would be legislative rather than judicial. This machinery for sectional and non-judicial determination of all constitutional issues contrasts sadly with what it would replace—an independent Federal judiciary.

*New York State Bar Association Report, supra* note 272, at 461.

449. The New York State Bar Association's committee remarked that "[t]he duty of the 'Court of the Union' to decide issues as the representative of the several states is not only frankly admitted, but claimed on behalf of this proposal as a merit." *New York State Bar Association Report, supra* note 272, at 461.

450. See, e.g., Fennell, *supra*, note 288, at 470 (quoting THE FEDERALIST No. 81 (Alexander Hamilton)).

451. *Transcript, supra* note 420, at 4836 (remarks of James O. Monroe, circuit judge of the Third Judicial Court of Illinois).

452. See Stanley Meisler, *Silent Amendments: Warren Charges Bar*

Mississippi lawyer argued, the court would have "extremely limited, albeit important jurisdiction."<sup>453</sup> Echoing the arguments of other states' rights advocates, he contended that

in the limited field of reserved powers, it is entirely proper that a decision of the United States Supreme Court should be overruled and held for naught if at least twenty-six of the fifty states, speaking through their judicial branches of government, determine the decision to be in violation of the terms of the Constitution.<sup>454</sup>

Critics also identified practical problems. As a New York lawyer pointed out, these included

the cumbersomeness of a court of 50 judges, the fact that a judge of that court would have a part time job on that court and a full time job on his own state bench, the burden on litigants required to wait two years before knowing whether a Supreme Court decision was final as to their rights, the likelihood of a losing litigant "shopping around" to prevail upon the legislatures of five states to make the demand necessary to convene the Court of the Union to reconsider the Supreme Court decision in question, [and] the inability of the litigants to terminate the litigation, since it would be open to the states to bring the issue to the Court of the Union.<sup>455</sup>

Similarly, Senator McGovern warned that "[s]uch a court, required to sit with a quorum of 38, would be inefficient. Deliberations would be cumbersome, and compromise to minimize dissenting and separate concurring opinions would be difficult. If it sat frequently and mutual confidence among the justices thrived, it would paralyze the judicial process; if it sat infrequently, its decisions would not be reliably judicious in the field of Constitutional law."<sup>456</sup> McGovern believed that the Court of the Union was "destructive of the entire concept of a national government."<sup>457</sup> Likewise, Black warned that "[t]his

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*Abdicates Role by Silence on Constitutional Changes*, NEW HAVEN REG., May 29, 1963, reprinted in 109 CONG. REC. 10,226 (1963).

453. Shanahan, *supra* note 286, at 635.

454. *Id.* at 635.

455. Fennell, *supra* note 288, at 470.

456. McGovern, *supra* note 413, at 7.

457. *Id.* at 8. McGovern declared that

the Court of the Union amendment would deprive the national

court would lack two prime characteristics of courts in our legal tradition: it would be, beyond argument, too large for effective judicial deliberation, and, meeting sporadically, it would never form any institutional tradition.<sup>458</sup> Similarly, an Illinois state judge complained that the court would be too big for any rational consensus or decision, and would meet too seldom to form any tradition or establish a set of jurisprudence.<sup>459</sup> Black also pointed out that “[i]ts members would be judges chosen for their attainments and promise in other fields than constitutional law.”<sup>460</sup>

Even proponents of the Court of the Union acknowledged the practical difficulties of judicial body composed of fifty judges from fifty states, but they contended that the benefits outweighed the disadvantages. Representative George Grant of Alabama, who sponsored resolutions for the Article V and Court of the Union amendments, frankly admitted that “fifty judges would be unwieldy”, but he believed that their “discussions would be interesting.”<sup>461</sup> Conceding that the Court of the Union could constitute a cumbersome judiciary, another proponent argued that “it would make the Supreme Court answerable to someone—and who would be better equipped to combine both judicial wisdom and the political feeling of the people of the whole Nation than the Supreme Court justices (mostly elected by popular vote) of the 50 states?”<sup>462</sup>

Critics also warned of what Fennell termed “Constitutional paralysis.”<sup>463</sup> As Fennell explained,

[t]he Supreme Court can reverse its own decisions and often does so. The Court of the Union apparently would be without power to

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government of ability to function through its own institutions independent of reliance upon state concurrence, and subvert the principle of national supremacy as designated in the Constitution. Upon its adoption, the United States would cease to remain a sovereign in its own house. There would arise a league of states as weak and as ineffectual as the Confederation which preceded adoption of the present Constitution.

*Id.*, at 7-8.

458. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639.

459. *Transcript*, *supra* note 420, at 4836 (remarks of James O. Monroe, circuit judge of the Third Judicial Circuit of Illinois).

460. *Id.*

461. Morgan, *supra* note 230, at 84.

462. Malcolm B. Johnson, *State Governments Propose States' Rights Amendments*, HUM. EVENTS, Feb. 16, 1963, at 133.

463. Fennell, *supra* note 288, at 470.

reconsider and reverse its own decisions, giving them a greater finality than decisions of the Supreme Court, since the only way a decision of the Court of the Union would be reversed would be by an amendment of the Constitution—the process for effecting which . . . the Council of State Governments proposes to entrench in the states.<sup>464</sup>

Fennell warned that this would in all probability stifle constitutional growth.

Critics were particularly fearful that the Court of the Union would subvert many of the Warren Court's civil liberties decisions. According to Arthur Freund,

[t]he problems presented in the school desegregation cases, the school prayer cases, and the right to vote cases are only a few of the types of cases which would make of the Supreme Court a mere whistle stop on the way to the final terminus of the Court of the Union.<sup>465</sup>

Freund alleged that the proposal was “a direct attempt to relegate the Supreme Court to a position far less than supreme.”<sup>466</sup>

Critics also pointed out that the Court of the Union ultimately would need to grapple with the same constitutional ambiguities that the Supreme Court regularly encountered. As Senator McGovern asked,

[h]ow does this new superior court decide any more judiciously the policy issue involved in, say, the *Brown* case? They might come to a different conclusion than the Supreme Court did, but the difficult policy decision there appears to have been whether the issue presented was one of civil rights, and therefore clearly within the concern of the 14<sup>th</sup> Amendment, or public education, an area in the tradition left essentially to state concern. Clearly, both were involved. Both found sources for decision in the Constitution. The choice had to be made. The “Court of the Union” would be no better equipped, likely far less equipped, to make judicial sense out of its resolution of the conflict.<sup>467</sup>

Critics of the Court of the Union further warned that it would be vulnerable to political pressure from voters

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464. *Id.*

465. Freund, *A Clear and Present Danger*, *supra* note 408, at 20,800.

466. *Id.*

467. McGovern, *supra* note 413, at 7-8.

because many state supreme court justices were elected to their offices<sup>468</sup> and that its members also might be subject to pressure from state legislatures.<sup>469</sup> Opponents pointed out that federal judges in the South had been far more courageous in enforcing civil rights statutes and case law than had their state counterparts.<sup>470</sup> Proponents, however, contended that the Court would be less susceptible to political influences than the Supreme Court, which they claimed had been sorely compromised by politics.<sup>471</sup>

Proponents of the measure also contended that its very purpose was to make the law more responsive to the will of the people. Far from disturbing the constitutional balance, Jesse Helms argued, the amendments would “restore balance, and return control of government to the people.”<sup>472</sup> Helms explained that a proposal to place a moderating authority upon the actions of the U.S. Supreme Court would never have arisen had it not been for the widespread belief that the Court had exceeded its authority in cases involving racial discrimination, religion, and sensitive political matters.<sup>473</sup> And even though many moderates and conservatives opposed the Court of the Union proposal, many of them continued to warn about the dangers of excessive judicial activism. In rejoicing over the defeat of the Court of the Union proposal and dismissing its proponents as extremists, Professor Kurland nevertheless

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468. Freund, *A Clear and Present Danger*, *supra* note 408, at 20,800.

469. Black, *Proposed Constitutional Amendments*, *supra* note 387, at 639. Commenting on the dangers of parochial pressures on the Court of the Union, Black declared that

[t]he mind staggers at the notion that the wisdom of Article III of the Constitution and of Section 25 of the Judiciary Act of 1789, repeatedly re-enacted in material substance, should come down to this—that the masterwork of Marshall and Story, of Taney, of Taft and Hughes and Holmes, should be turned over to a court so constituted.

*Id.*

470. *Transcript*, *supra* note 420, at 4836 (remarks of James O. Monroe, circuit judge of the Third Judicial Court of Illinois).

471. *See, e.g.*, Helms, *supra* note 421. Helms argued that the Court of the Union “would be free of the political manipulation which is apparent in many of the Supreme Court’s pronouncements.” *Id.*

472. *Id.*

473. *Id.* Helms’s reference to the Court’s decisions on race was one of the relatively rare references to these decisions by proponents of the amendments, who preferred to hide any racial motivations for the amendments. *Id.* *See also supra* notes 296-299 and accompanying text.

averred that one could reasonably ask whether the Court had "been unduly ambitious and grasping of power."<sup>474</sup>

### G. *The Collapse of the States' Rights Amendments*

Support for the amendments continued to wither as numerous organizations joined the opposition. In July 1963, the proposed amendments were firmly denounced by the Advisory Committee on Intergovernmental Relations, a bipartisan body commissioned by Congress in 1959 to study relationships between federal, state, and local governments.<sup>475</sup> The Commission alleged that the amendments would "disrupt our present constitutional balances so as to put in jeopardy our fundamental civil liberties."<sup>476</sup> Meanwhile, the ACLU contended that the three proposals "seriously endanger the civil liberties" which our Constitution guarantees all citizens, and it disparaged the Court of the Union proposal as "an attempt to overcome recent Supreme Court decisions against racial discrimination, unfair methods in criminal trials, and unequal legislative districts."<sup>477</sup>

New York's Liberal Party denounced the amendments as "a desperate attempt by the forces of reaction to halt the social and economic progress of our nation."<sup>478</sup> The NAACP,

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474. Kurland, *The Court of the Union or Julius Caesar Revisited*, *supra* note 297, at 636. Kurland quoted from various recent Supreme Court decisions on such controversial subjects as reapportionment, race, and criminal procedure in which dissenting justices had warned that the Court was engaging in undue activism. *Id.* at 638-42.

475. *Disunity Amendments Branded Subversive*, MACHINIST, July 11, 1963, reprinted in 109 CONG. REC. A4514-A4515 (1963). Members of the Commission in 1963 included U.S. Senators Sam Erwin, Karl E. Mundt, and Edmund S. Muskie; three members of the U.S. House of Representatives; Secretary of the Treasury C. Douglas Dillon; Secretary of Health, Education, and Welfare Anthony Celebrezze; Robert C. Weaver, the administrator of the Housing and Home Finance Agency; the governors of Kansas, Colorado, Georgia, and North Carolina; three state legislators; three county officials; the mayors of Honolulu, Minneapolis, and St. Louis; and three private citizens. *Id.* See also *U.S. Panel Opposes Curb On The Courts*, N.Y. TIMES, July 8, 1963, at 26.

476. *Disunity Amendments*, *supra* note 475, at A4514.

477. *A.C.L.U. Opposes Amendment Plan*, N.Y. TIMES, May 2, 1963, at B.

478. *Liberals Attack Amendment Plan*, N.Y. TIMES, May 6, 1963, at 29. The Liberal Party argued that the proposals "aim to nullify such decisions of the Supreme Court as those on desegregation and legislative apportionment. Negroes could thus be effectively disenfranchised. Their effect would be the replacement of our Federal union with a confederacy." *Id.*

the American Jewish Congress, and the American Jewish Committee also opposed the amendments.<sup>479</sup> Prominent Roman Catholic journals, including *Commonweal* and *America*, editorialized against the proposals.<sup>480</sup> Like so many other opponents of the amendments, *America* pointed out that they would transform the nation into a Confederacy.<sup>481</sup> New York Governor Nelson Rockefeller and Secretary of Agriculture Orville Freeman also were outspoken in opposing the amendments.<sup>482</sup> The National Conference of Mayors formally denounced the amendments,<sup>483</sup> and a mildly negative discussion reaching countless secondary school students appeared in *Senior Scholastic*.<sup>484</sup> In September 1963, representatives of thirty national liberal, labor, and religious groups organized a central clearing house in Washington to direct opposition to the amendments, with subsidiaries in each of the states where legislatures were scheduled to meet during 1964.<sup>485</sup>

The amendments also suffered a major setback from ABA opposition. With 114,000 members, nearly half of the nation's attorneys, the ABA's opinion on any legal issue carried great weight. Antagonists of the amendments originally were pessimistic that the ABA would oppose the amendments since the ABA had actively supported the Bricker Amendment and the Twenty-Second Amendment, and had not opposed a proposed amendment that would have capped the federal income tax at a twenty-five percent rate.<sup>486</sup> On May 21, 1963, however, one day before Warren's ALI speech, the ABA's Board of Governors unanimously voted to oppose the Article V and Court of the Union amendments.<sup>487</sup> Although this did not represent official ABA

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479. Lewis, *supra* note 298, at 1.

480. See generally *States' Rights?*, *supra* note 377; *The Confederacy Revived*, AMERICA, June 8, 1963, at 821.

481. *Id.*

482. Douglas Dales, *Governor Fights State Rights Bid*, N.Y. TIMES, July 9, 1963, at 20; *Freeman Attacks High Court Critics*, N.Y. TIMES, June 15, 1963, at 5.

483. Oberst, *supra* note 4, at 655.

484. See *State Government: A Case of Disappearing Power?*, SENIOR SCHOLASTIC, Feb. 14, 1964.

485. Oberst, *supra* note 4, at 655.

486. See 109 CONG. REC. 8756 (1963) (remarks of Sen. Douglas).

487. *Bar Fights Push On States' Rights*, N.Y. TIMES, May 22, 1963, at 23. ABA President Sylvester C. Smith Jr. explained that the board opposed the Article V amendment because it would have excluded Congress from the



policy insofar as it lacked ratification by the House of Delegates, which was not scheduled to meet until August, the Board of Governors' opposition was influential. As the *New York Times* explained, "[t]he association is considered politically conservative, and its opposition was expected to undercut such support as the constitutional changes had gained in responsible circles."<sup>488</sup> The board of governors' action was particularly significant since the board normally did not act on such matters between meetings, but met in this instance because its leaders believed that an emergency existed since so many legislatures were considering the amendments.<sup>489</sup>

At the ABA's annual meeting in August, the Board of Governors rejected the apportionment amendment by a vote of ten to seven.<sup>490</sup> Although an ABA committee endorsed the apportionment amendment by a vote of six to one, the ABA's House of Delegates voted 136 to 74 to oppose the amendment.<sup>491</sup> By voice vote, members of the House of Delegates overwhelmingly voted down the other two proposed amendments.<sup>492</sup> Although Warren was disappointed that the ABA was not even more forceful in its opposition,<sup>493</sup> Justice Harlan, the Court's most conservative member, commended the ABA for rejecting "with an unequivocal voice a proposal which in the name of preserving our federal system would actually destroy it."<sup>494</sup>

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amendment process, and that it rejected the Court of the Union as "inconsistent with the constitutional concept of our court system." *Id.*

488. *Id.*

489. *Id.*

490. *Lawyers in Fight Over Court Curb*, N.Y. TIMES, Aug. 12, 1963, at 16.

491. *Bar Blocks Plea For States' Rights*, N.Y. TIMES, Aug. 13, 1963, at 19.

492. *Id.*

493. Warren complained in his memoirs that the ABA "was inert, thereby giving aid and comfort to the supporters of the proposals. In spite of the ABA's plethora of sections and committees, not one of them undertook discussion of the legal issues with which the proposals were infected." WARREN, *supra* note 351, at 311. While Warren's allegation that the ABA was "inert" was unfair, the ABA could have done more through its committees to alert the nation to the perils of the amendments. Since, however, the amendments appeared doomed by the time that the ABA met in August, there was little reason, at least by then, for the ABA to risk tension within its membership by taking a more activist stance in opposition to the amendments.

494. John M. Harlan, *Judicial Usurpation: A Denigration of the Legislative Process*, 29 VITAL SPEECHES OF THE DAY 706, 707 (1963) (speech given at ABA conference in Chicago, Aug. 13, 1963). Although Harlan praised states' rights and judicial restraint, he called on lawyers to continue to defend the courts

Many state and local bar associations also opposed the measure, including the city bar associations of New York, Philadelphia, and Chicago.<sup>495</sup> Although relatively few attorneys followed Warren's admonition for a "great national debate on the amendments," the Madison County Bar Association in Illinois voted forty to thirteen to oppose the first two amendments and forty-three to ten to oppose the Court of the Union proposal after hearing a debate between Caldwell and Arthur Freund in July 1963.<sup>496</sup>

Meanwhile, many conservative voices were added to the growing chorus of opposition, including even many proponents of government decentralization. Governor George Romney of Michigan, who was widely regarded as a possible 1964 Republican presidential nominee, declared on the same day that Warren spoke to the ALI that "[m]utilation of the Federal government is not the answer to growing problems of centralization."<sup>497</sup> In September, Goldwater, another prospective GOP candidate, said that he opposed the amendments as impractical.<sup>498</sup> Although Goldwater later was an outspoken critic of the Supreme Court's decisions throughout his 1964 presidential campaign and ran on a platform that called for a constitutional amendment to allow states to apportion one house of their legislatures on a basis other than population, he never endorsed the states' rights amendments.<sup>499</sup>

Meanwhile, the *Wall Street Journal*, a resolute but always responsible critic of the Warren Court, editorialized against the amendments.<sup>500</sup> Although the *Journal* assured its readers that "none of these proposals . . . are as horrendous as their opponents claim," it cautioned against making the "political frustration of the moment an excuse for tinkering with the forms of government that have

against "ill-informed or intemperate criticism." *Id.*

495. See Rhoads, *supra* note 368, at 9.

496. B.J. Wander, *First Constitutional Amendments Debate in Nation is Held—Lawyers at Meeting Vote Down All the Amendments*, EDWARDSVILLE INTELLIGENCER, July 27, 1963, reprinted in 109 CONG. REC. A4538 (1963).

497. Crawford, *supra* note 303, at 31.

498. *Goldwater Alters Integration Stand*, N.Y. TIMES, Sept. 20, 1963, at 22.

499. *Id.* For a discussion of Goldwater's criticisms of the Supreme Court during the 1964 presidential campaign, see William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 138-44 (2002).

500. *Tampering With the Form of Government*, WALL ST. J., June 25, 1963, at 14.

served us so long so well."<sup>501</sup> Pointing out that the existing amendment process already provided the people with an adequate means of altering the Constitution to resist encroachments upon their liberties, the *Journal* argued that the real problem was not the absence of a constitutional procedure to curtail centralized government but rather the apparent lack of sufficient political support for restraining federal power.<sup>502</sup> As the *Journal* pointed out, "the failings of the Supreme Court are the failings of men. And the judges of any new 'Court of the Union' would be no less men, no less politically chosen."<sup>503</sup>

Although the Conference of Chief Justices officially ignored the amendment proposals at its 1963 meeting, many of the chief justices appeared at least as perturbed with the Supreme Court as they had been at the 1958 meeting that urged self-restraint by the Court. The Conference without dissent adopted a resolution calling for restrictions on the power granted by the Supreme Court to lower federal courts to release state prisoners on habeas corpus writs because of constitutional infirmities in their trials.<sup>504</sup> At the close of the session, outgoing chairman J. Edwin Livingston, the chief justice of Alabama, castigated the Supreme Court for its decisions on school prayer and reapportionment. He alleged that "[t]he Constitution is being remade by judicial fiat without following the lawful processes of amendment and without the consent of the governed."<sup>505</sup> Even though the Conference was officially

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501. *Id.*

502. *Id.* The *Journal* expressed regret that the nation has passed through a generation in which the people as a whole have acquiesced in, and often encouraged, this enlargement of the central government beyond any true need. The fault, if that it be, lies not with the form of our government institutions but rather with the political impulses given to those institutions.

*Id.*

503. *Id.*

504. *Alabama Justice Hits High Court*, N.Y. TIMES, Aug. 11, 1963, at 49. Calling for state judgments to be reviewed only in the Supreme Court, the Conference declared that procedures established by the Court for review in the lower federal courts permitted "repetitive and successive readjudications and imperil the sound administration of justice." *Id.*

505. *Id.* Livingston contended that these decisions revealed "a great need for public realization of the alarming extent to which our form of government as originally conceived . . . is being changed and altered." *Id.*

silent about the Court of the Union, many chief justices were reported to favor it.<sup>506</sup>

It is ironic but revealing that the Court of the Union proposal failed to receive the official support of the very group whose power it was intended to aggrandize, the state chief justices. The failure of the chief justices to endorse the proposal is yet another measure of its radicalism. While the chief justices delivered stinging criticism of the Court in their 1958 report and regretted what they regarded as the Court's intrusion on state prerogatives, they were unwilling to publicly support a measure that would radically alter the institutional balance of power between the Supreme Court and the state courts. Even though their 1958 resolution may have given encouragement and momentum to the Court of the Union proposal, there is no evidence that any state chief justice promoted the Court of the Union, whatever personal opinions some may have harbored. Moreover, opponents of the plan generally did not blame the chief justices for it. As Professor Kurland remarked,

[t]he conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high state courts . . . It should be made clear that the chief justices of the states would be the instruments of the crime and not its perpetrators.<sup>507</sup>

Although the states' rights amendments eventually stirred considerable interest in elite circles, they received relatively little notice among the general population. Public apathy was revealed by a Gallup poll conducted late in May 1963, which indicated that only fourteen percent of the respondents had heard or read about the Court of the Union proposal. Of these, fifty-five percent expressed disapproval, twenty-nine percent said that they approved, and sixteen percent had no opinion. Outside the South, the plan was

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506. LEO KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 452 (1967). Leo Katcher, a journalist, quoted an unnamed former ABA official as saying that "[y]ou have no idea how many state chief justices favored the Court of the Union plan." *Id.*

507. Kurland, *The Court of the Union or Julius Caesar Revisited*, *supra* note 297, at 636. Kurland pointed out that the Conference had affirmed that the Supreme Court was the ultimate arbiter of federalism and that "[a]ny other allocation of such power would seem to lead to chaos." *Id.* at 636 (quoting REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS).

opposed by sixty-seven percent and favored by only twenty-one percent of those who had heard of it, while in the South some forty-five percent favored it and only thirty-two percent opposed it.<sup>508</sup>

By the autumn of 1963, the movement for the Article V and Court of the Union amendments was virtually dead.<sup>509</sup> The movement was the victim of defeats in key state legislatures, the blistering opposition of elite opinion, the failure of conservatives to rally to the cause, and the absence of grassroots support. Even though moribund, the movement straggled on for more than another year. Still mindful of the progress that the movement had made during its early months in the face of ignorance and apathy, its opponents remained vigilant for any signs of its revival and continued to caution against complacency. As late as February 1964, McGovern warned that the amendments were viable<sup>510</sup> and a symposium on the amendments at Notre Dame Law School early in 1964 treated them as if they remained very much alive.<sup>511</sup>

Even after the threat subsided, critics of the amendments expressed shock that they had made such headway, if only briefly. As the *New York Times* mused, "[t]he disturbing question that remains, however, is how such proposals could have swept through so easily in the first place, especially in a state like New Jersey. How many other harmful bills slip into law before anyone bothers to consider their implications?"<sup>512</sup>

By August 1964, momentum against these two amendments was so strong that opponents hoped to persuade the annual meeting of the National Legislative Conference in Honolulu to recommend rejection of the amendments.<sup>513</sup> After the Conference Resolutions Committee tabled the proposed amendments, opponents failed

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508. 3 GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 1830 (1972).

509. See *Little Hope Seen For Amendments*, N.Y. TIMES, Dec. 8, 1963, at 57. In late 1963, Warren Wood told a reporter that "[w]e died, we bled, to get this thing off the ground. Now, I'm not going to do another thing." Morgan, *supra* note 230, at 89.

510. McGovern, *supra* note 413.

511. See 39 NOTRE DAME LAW. 623 (1964).

512. *Defending the Constitution*, *supra* note 366, at 30.

513. *Hawaii Leads Fight on States' Rights*, N.Y. TIMES, Aug. 24, 1963, at 78.

to force a floor vote.<sup>514</sup> The Conference adopted a resolution declaring that individual state legislators should decide for themselves whether to adopt the amendments.<sup>515</sup> The movement finally died with a whimper late in 1964, with the landslide election victory for liberal Democrats.<sup>516</sup>

The movement for the apportionment amendment remained vital at least until 1965. After flagging during late 1963 and early 1964, it was revived by the Supreme Court's decision in *Reynolds v. Sims*<sup>517</sup> in June 1964, which confirmed the worst fears of states' rights advocates about reapportionment insofar as it required both houses of the state legislatures to be apportioned strictly on the basis of population.<sup>518</sup> William F. Buckley, Jr. spoke for conservatives throughout the nation in lamenting that *Reynolds* "cut deeply into the fabric of our federalism."<sup>519</sup>

Ironically, however, the intensification of opposition to reapportionment in the wake of *Reynolds* helped to obscure the amendment proposed by the General Assembly of the States insofar as the high salience of the apportionment controversy ensured that Congress became the principal forum for anti-reapportionment measures. Following *Reynolds*, conservatives in Congress at first rallied around a so-called "court ripper" bill sponsored by Representative Tuck of Virginia that would have deprived the Court of any jurisdiction over state legislative apportionment litigation.<sup>520</sup> The House passed the bill by a vote of 218 to 175.<sup>521</sup> A more moderate alternative sponsored by Senators Everett Dirksen and Mike Mansfield would have placed a moratorium on federal court action on reapportionment until 1966.<sup>522</sup>

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514. *Id.*

515. *Id.*

516. Even after the election, opponents of the measures were not certain that advocates of the amendments would not re-introduce them in the next Congress. See Paul A. Freund, *To Amend—or Not to Amend—the Constitution*, N.Y. TIMES, Dec. 13, 1964, at 33.

517. 377 U.S. 533 (1964).

518. *Id.*

519. William F. Buckley, Jr., *The Warren Court's New Constitution*, 110 CONG. REC. A3479 (1964).

520. 110 CONG. REC. 11,625 (1964). See ROBERT G. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 385 (1968).

521. LYTLE, *supra* note 1, at 46.

522. DIXON, *supra* note 520, at 386.

Meanwhile, the 1964 Republican platform on which Goldwater ran for president called for a constitutional amendment to permit one house of state legislatures to be apportioned on a basis other than population.<sup>523</sup> The Democratic landslide in 1964 crippled but by no means ended efforts to override *Reynolds* by constitutional amendment. In August 1965, a proposed amendment to permit states to use factors other than population in apportioning one house won the support of a substantial majority of senators, falling only seven votes short of the requisite two-thirds margin in a fifty-seven to thirty-nine vote.<sup>524</sup> A year later, a similar amendment<sup>525</sup> failed, with the Senate voting fifty-five to thirty-eight in support.<sup>526</sup> The 1965 amendment received the ABA's endorsement.<sup>527</sup>

At the same time, the states continued to petition Congress for a constitutional convention to reverse the apportionment decisions, and by March 1965, twenty-one states had done so.<sup>528</sup> Even though there was little chance that the movement for a convention would muster the requisite support of thirty-four states, this state pressure gave needed support to the more viable congressional proposals for an amendment.<sup>529</sup> It seems clear, moreover, that state officials recognized that any viable amendment would need to originate with Congress. Numerous state legislators, particularly in California, endorsed the congressional measures and lobbied for their approval.<sup>530</sup> Similarly, Caldwell urged Congress to approve the amendment.<sup>531</sup>

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523. Johnson, *supra* note 32, at 686. The platform expressed support for "a Constitutional amendment, as well as legislation, enabling States having bicameral legislatures to apportion one House on bases of their choosing, including factors other than population." *Id.*

524. 111 CONG. REC. 19,373 (1965).

525. S.J. Res. 103, 89th Cong. (1966).

526. 112 Cong. Rec. 8579.

527. DIXON, *supra* note 520, at 402.

528. LYTLE, *supra* note 1, at 47.

529. *Id.*

530. See DIXON, *supra* note 520, at 372-73, 399.

531. *Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary, U. S. Senate on S.J. Res. 2, S.J. Res. 37, S.J. Res. 38, S.J. Res. 44, 89th Cong. (1965)* [hereinafter referred to as *Hearings on Reapportionment Amendments*], at 369-72 (testimony of Millard F. Caldwell). Caldwell advanced the novel constitutional argument that Congress had a duty to submit the amendments to the state legislatures for their consideration because public support for the amendments was so strong. *Id.* at 370. According to Caldwell, the constitutional requirement that Congress find an amendment

After the Senate's second defeat of the reapportionment amendment in 1966,<sup>532</sup> organized federal opposition to *Reynolds* quickly withered away along with the state movement for a constitutional convention.

### III. REASONS FOR THE FAILURE OF COURT-CURBING EFFORTS BY STATE OFFICIALS

#### A. *Court-Curbing Efforts Were Largely Tactical Rather Than Practical or Principled*

Like most other Court-curbing efforts, the states' rights movement was motivated largely by hostility toward the Court's opinions rather than by any principled or consistent opposition to federal judicial power or judicial power in general.<sup>533</sup> Moreover, few antagonists of the Warren Court appear to have had an abiding philosophical commitment to the principle of states' rights. These neo-Confederates were hostile toward a strong federal judiciary primarily for pragmatic reasons: the federal courts opposed practices and policies that served their social and economic interests. As Professor Oberst observed in opposing the states' rights amendments in 1963, "[s]tates' rights has been a shabby cloak for a variety of unsupportable causes over the years . . . It seldom involves dispassionate disinterested concern for the proper structure of the Union."<sup>534</sup> Similarly,

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to be "necessary" does not mean that Congress must find it to be "indispensably requisite." *Id.* at 371. Caldwell explained that

[t]o say that two-thirds of each House of the Congress must, before submission, be convinced of the wisdom of the proposal, is to say that one more than one-third of the Members of either House can effectively prevent the States or the people from returning to the condition of the law as it existed in application for a century and a half before the recent decisions were written. Any such view is not compatible with the principles of representative government.

*Id.*

532. See DIXON, *supra* note 520, at 410.

533. For example, many of the antagonists of the Warren Court's activism on behalf of civil liberties complained that the Court was excessively deferential to congressional economic regulations. See Cook, *supra* note 228. Although support for stricter judicial scrutiny of economic regulation reflected in part an opposition to federal power, it is doubtful that antagonists of the Court would have complained if the Court had more strictly reviewed state economic legislation.

534. Oberst, *supra* note 4, at 647 (quoting Paul Oberst, *The Supreme Court*



Professor Commager remarked in his denunciation of these amendments that "[n]o political doctrine in American history has been more consistently invoked on behalf of privilege."<sup>535</sup> Conversely, embattled minorities whose rights the federal government was protecting more than the states normally had no objection to states' rights *per se*. As civil rights activist Clarence Mitchell explained in 1958, African-Americans were in favor of states' rights as long as blacks were given rights in the states.<sup>536</sup>

The states' rights movements also were expressions and harbingers of a libertarianism which began to burgeon during the 1960s. Although critics of the Court purported to favor states' rights, many were opposed to any form of governmental activism. Since the states were less likely to interfere with private activity than was the federal government, states' rights did not severely threaten the principles of libertarians and provided an alternative to anarchy that was more familiar, publicly respectable, economically prudent, and politically viable. As Commager pointed out, the proposed states' rights amendments represented "not merely a recrudescence of states' rights" but rather was "an expression of something deeper—of a philosophy of antigovernment and of no government."<sup>537</sup> Commager aptly perceived that states' rights advocates "do not want to see state governments invigorated, carrying through broad legislative programs; they want to see the national Government frustrated, incompetent to carry through legislative programs" involving such subjects as race, education, taxation, and conservation.<sup>538</sup> Even though

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*and States Rights*, 48 KY. L.J. 63, 88 (1959)).

535. Commager, *supra* note 2, at 40. Commager also alleged that "none has had a more egregious record of error and calumny." *Id.*

536. *Hearings on Limitation of Supreme Court's Appellate Jurisdiction*, *supra* note 77, at 488.

537. Commager, *supra* note 2, at 5. Decrying this philosophy "of constitutional anarchy," Commager alleged that proponents of the amendments were animated not by an ambition "to strengthen the states" but rather by a desire "to paralyze the nation." *Id.* According to Commager, "the proponents of these amendments are not genuinely concerned with the powers of the states. They are concerned with non-powers in the nation." *Id.*

538. *Id.* "Does anyone really suppose," Commager asked, that if the amendment permitting the states to bypass the Congress . . . became law, the states would proceed to set their domestic houses in order to end the scandal of racial discrimination themselves, to reform antiquated tax structures, to deal vigorously with the problems of

Goldwater shied away from the states' rights amendments and the 1964 Republican platform ignored them (although it endorsed the congressional equivalent of the Assembly's apportionment amendment), the movement for the amendments was close kin to the new libertarianism that found expression in the Goldwater insurgency and reached its apogee during the Reagan Administration of the 1980s.

This combination of antagonism toward both the federal judiciary and the federal government provided the states' rights movement with a virulence that congressional Court-curbing movements often have lacked. State officials naturally may have had more reasons than members of Congress to want to curb the Court because the Court tended to aggrandize federal power at the expense of the states. As Professor Black observed in 1960, "nothing arouses greater occasional resentment, than the fact that the states must be subjected, as a last resort, to the requirement of the national Constitution and laws."<sup>539</sup>

This resentment may have been particularly intense when state officials believed that they were providing their citizens with ample constitutional protections. For example, Georgia State Supreme Court Chief Justice William Duckworth complained bitterly to Justice Harlan in 1967 that the U.S. Supreme Court displayed arrogant contempt for the ability of state judges to enforce the constitutional rights of criminal defendants.<sup>540</sup> Similarly, a Pennsylvania state legislator who testified in favor of an apportionment amendment insisted that there was "plenty of due process"

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conservation and of public lands, to take care of the needs of public education and public health through a series of constitutional amendments?

*Id.* "Clearly," Commager argued, "the new authority would be used not to carry through programs of public welfare but to repeal existing programs of public welfare." *Id.*

539. CHARLES L. BLACK, *THE PEOPLE AND THE COURT* 120-21 (1960).

540. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 307 (1986). Chief Justice Duckworth told Harlan that

[i]f your court would recognize that State courts are capable of honestly and intelligently enforcing criminal laws—and by experience know more than most of you about how to do it within the Constitution, the flood-tide of crime would abate. No honest judge can or will deny that the Constitution is the Supreme Law. But Justices of the Supreme Court, although given the final word, are not superior in qualification, dedication and honor in deciding cases.

*Id.*

at the State level and that "our State courts are just as effective as our Federal courts in remedying apportionment inequities."<sup>541</sup>

Despite the intense controversy engendered by the Warren Court on such sensitive subjects as race, subversion, criminal justice, apportionment, and religion, many realistic states' rights critics of the Court at both the state and federal levels must have understood that the imposition of serious institutional restraints on the Court could be little more than a daydream. History taught that most past movements to curb the Court had quickly fizzled out, and dictated recognition that the present movement lacked the broad public support and strong leadership that was critical for success.

Accordingly, Court-curbing proposals were mostly tactical, designed to call attention to grievances against the Court, scare the Court into more conservative decisions,<sup>542</sup> or at least help to persuade the President and the Senate to appoint more conservative jurists. Indeed, most of the states' rights nostrums were so quixotic that it is difficult to believe that their proponents seriously regarded them as practicable. Some of the proposed remedies even could have exacerbated the conditions that states' rights advocates decried. For example, the Court of the Union would have returned power to the states, but it did not respond to the concern of many conservatives that the judiciary had acquired too much power at the expense of the other branches of government. As Krock remarked, the Court of the Union proposal would create a new and much more nationally disunifying form of judicial supremacy.<sup>543</sup>

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541. *Hearings on Reapportionment Amendments*, *supra* note 531, at 214-15 (testimony of E. Elmer Hawbaker).

542. For example, a Mississippi congressman in 1959 predicted that the ABA's criticism of the Court

will not go unnoticed by the high Justices. Though they sit on the highest court in the land . . . they as human beings are sensitive to public opinion and more particularly to that of the American Bar Association. Some of the Justices may get peeved. Some may even withdraw membership from the bar association as the Chief Justice did recently. But this of itself is clear evidence of the fact that the Court is impressed with the current wave of criticism. It may, as a result, take a second look before it again destroys a long line of stable decisions or again resolves itself into a legislative body.

105 CONG. REC. 3052 (1959) (remarks of Rep. Abernethy).

543. Krock, *Court and Critics*, *supra* note 370, at E15.

Accordingly, Senator Brooks admitted that his 1960 bill for requiring selection of U.S. Supreme Court justices from among state supreme court justices was tactical rather than practical insofar as submission of the proposed amendment would itself have a salutary effect, and help to restore confidence to the people.<sup>544</sup> In April 1963, the *Washington Post* expressed confidence that the legislatures and the sponsors of the states' rights amendments "are airing grievances, which apparently have no widespread appeal."<sup>545</sup> In arguing in favor of the Court of the Union proposal at the General Assembly of the States, one delegate expressed hope that it would let the Supreme Court know it was being watched.<sup>546</sup>

Moreover, some critics of the Courts, particularly members of Congress, may have criticized the Court as a means of appealing to conservative voters. Comparing the Court's critics to baseball fans who shout at the umpire, the *Christian Science Monitor* observed in 1958 that the authors of the numerous Court-curbing proposals "know that they have no chance of becoming law; they are taking this way of letting off steam or satisfying constituents."<sup>547</sup> Aware of the inherent difficulties of Court-curbing, many conservatives had more incentive to apply their energies to electing libertarians to Congress and Goldwater to the presidency than to curb the Court. The expenditure of effort and financial resources on partisan politics surely seemed more practical, for even Goldwater's doomed presidential campaign was hopeful compared with the colossal obstacles that impeded any effort to diminish the Court's powers or to reverse the outcome of the Civil War by reviving dual federalism. Perhaps it is no accident that the states' rights amendment movement germinated in the immediate

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544. 106 CONG. REC. 3532 (1960). Brooks's bill, H.J. Res. 453, also would have increased Southern representation on the Court by providing for the appointment of one Justice from each of the seventeen judicial districts into which the bill would have divided the nation.

545. WASH. POST, April 20, 1963.

546. *Amending the Constitution*, *supra* note 254, at 15.

547. *Don't Shoot the Umpire*, Editorial, CHRISTIAN SCIENCE MONITOR, Sept. 28, 1958, reprinted in 104 CONG. REC. 1817 (1958). Similarly, Gerald W. Johnson remarked in 1957 that "any tub-thumping congressman who had milked the Red Scare for all it was worth" should give the Court "a vote of thanks," for "he can cuss the Court with impunity, but if he is caught in the campaign with a worn-out issue, he is a gone gosling." Gerald W. Johnson, *Cussing the Court*, NEW REPUBLIC, July 15, 1957, at 11-12.

aftermath of the 1962 congressional election, when the Court's antagonists were not engaged in campaigns to elect legislators or a president.

The tactical nature of hostility toward the Warren Court may have diminished public support for states' rights measures. As Professor McDowell has pointed out, no court-curbing plan can succeed unless it is perceived as principled rather than partisan.<sup>548</sup> Like so many critics of the courts throughout American history, many of the states' rights advocates were motivated more by hostility toward individual decisions than by any principled theory of judicial power. As Professor Oberst observed, the General Assembly of the States' proposed apportionment amendment was "a blood brother, surely, to other proposals of disappointed litigants to counter particular decisions of the Supreme Court by taking away its jurisdiction in particular class of cases."<sup>549</sup> More pungently, a Roman Catholic periodical observed in 1957 that advocates of Court-curbing were reminiscent of "children who want to quit the game because they can't have their own way,"<sup>550</sup> and the *New Republic* remarked in 1959 that segregationists were "ready to swat the Supreme Court with any bat that comes to hand."<sup>551</sup> Other commentators likewise remarked that the principal complaint of the Court's critics was "not that there is a Supreme Court but that the present Court does not reflect their views."<sup>552</sup>

Some critics of the Warren Court, however, may genuinely have believed that their Court-curbing proposals could succeed. Although the memory of Roosevelt's failure to pack the Court may have been fresh in the minds of all but the younger antagonists of the courts, many critics of the Courts, knowing little history, probably did not understand that even FDR's unsuccessful plan received far

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548. GARY L. MCDOWELL, *CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER* 11 (1988).

549. Oberst, *supra* note 4, at 656.

550. *Comments on the Court*, COMMONWEAL, July 26, 1957, at 426, (quoting AVE MARIA).

551. *One Part Politic—Two Parts Emotion*, NEW REPUBLIC, Aug. 24, 1959, at 7.

552. Dunsford & Childress, *supra* note 151, at 63. Similarly, as Lewis pointed out in 1960, criticism of the Court "is usually based on the court's results rather than its reasons. The critics care much more about who won than why." Anthony Lewis, *High Court and Its Critics*, N.Y. TIMES, June 2, 1960, at 25.

more support than any of the myriad of other Court-curbing proposals dating back almost to the beginning of the Republic. Moreover, many critics of the Warren Court were stubborn and sometimes self-righteous men and women who had resolute faith in their ability to transform American society. This conviction manifested itself in the widespread belief among Goldwater supporters in 1964 that a vast silent majority of conservatives would rise up on election day and send Johnson home to his ranch. The careful efforts of the authors of the states' rights amendments to ensure that each legislature approved the measures in exactly the same form indicates that they were making a serious effort to call a constitutional convention, for any states' rights language would have sufficed if the sole point was to register a protest against the Court.<sup>553</sup> *The New Republic* may have correctly assessed at least some of the proponents of the amendments when it declared in May 1963 that "[t]he backers of these amendments mean business."<sup>554</sup>

Moreover, state officials who advocated Court-curbing measures probably were more optimistic of their success than were congressional critics. State legislators and jurists who sought to curb the Court often had little exposure to public opinion beyond their hometowns and their state capitals, whose inhabitants, at least the elite ones, typically shared the conservative opinions of these officials. Immersed in such an environment, state officials easily could believe that hostility toward the Warren Court was greater than it actually was. In contrast, members of Congress regularly were exposed to a greater range of opinion, both in the Capitol and in the District of Columbia. Moreover, they were more likely to represent larger and more diverse constituencies than were state legislators. A Mississippi legislator from a rotten borough could go through life without discussing politics with anyone who did not detest the Warren Court. In contrast, Mississippi Senators John Stennis and James Eastland, though fierce critics of the Court, worked closely and socialized with such staunch admirers of the Court as their fellow Democrats,

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553. Of course, the proponents of the states' rights amendments also may have considered that the appearance of a real threat of a convention might shake up the Court and the nation even if the threat was not so real.

554. *Disunited States*, *supra* note 376, at 5.

Minnesota Senators Hubert Humphrey and Eugene McCarthy.

B. *State Officials Had Reasons to Wish to Preserve the Court's Power*

The efforts to curb the Warren Court, like earlier Court-curbing movements,<sup>555</sup> also may have failed because even the Court's critics recognized the legitimacy of the Court's role and had reasons to wish to preserve its powers. On at least some level, for example, most state judges and many state legislators must have understood the character of modern federalism and respected the Court's traditional role as ultimate arbiter of the Constitution, even if many of the Warren Court's rulings expanded federal power. Members of the Court tried to facilitate such understanding. In a 1964 address to the Conference of State Chief Justices, Brennan, a former Supreme Court of New Jersey justice, reminded the judges that state supreme courts and the U.S. Supreme Court play necessarily different roles in the judicial system and that the national perspective demanded of a federal Supreme Court Justice may lead him to different conclusions than a state judge would reach.<sup>556</sup>

Although some critics of the courts may have hoped that their criticisms were laying the foundations for judicial reform measures that might succeed if continued judicial activism brought hostility to the Court to a boiling point, they may have understood that the diminution of the Court's powers would prove a pyrrhic victory. In particular, both libertarian and traditional conservatives also may have muted their efforts to curb the Court's power because they recognized that the Court was the traditional bulwark

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555. See generally ROSS, *supra* note 9. During the Progressive Era, for example, many progressives and labor leaders who criticized the Court nevertheless perceived that a powerful judiciary could serve their interests by offering protection against the hostility of legislative and executive officials. *Id.*

556. William J. Brennan, Jr., *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945, 945-46, 948 (1964). Recalling that he experienced "considerable astonishment" when he moved from Trenton to Washington and learned "how different" was the work of the U.S. Supreme Court from that of the New Jersey Supreme Court, Brennan explained that "[t]he work of each has a character, a difficulty, and a complexity of its own, and none of these has its exact counterpart in the other." *Id.* at 946. Brennan told the state chief justices that "each tribunal is supreme in its own field, and in the final analysis neither can do the other's job." *Id.*

of property rights. Indeed, the Court from the time of Chief Justice Marshall until 1937 had protected private property more effectively and reliably than had state courts. Although the Court since 1937 had not carefully scrutinized the constitutionality of state and federal economic legislation, the Court retained its power to nullify arbitrary or confiscatory statutes or executive actions. Many critics of the Court may have understood that the same power that enabled the Court to protect racial and political minorities could be used to protect private property and that the ebb and flow of history might eventually return the Court to the conservative fold. As Hand reminded liberals and conservatives alike in his Holmes Lectures, property rights and personal rights are inextricably linked.<sup>557</sup>

Moreover, the anti-government biases of the libertarian conservatives may have muted their efforts to curb the Court insofar as they correctly perceived that Congress and the Presidency were far more active agents of an increasingly powerful federal government. Many conservatives recognized that the amendments ultimately would not serve their ends. For example, segregationist Senator Erwin, a fierce critic of the Court, warned that "impatient officials" who supported the Court of the Union "would sacrifice their supreme values in their zeal to accomplish in haste temporary ends which they desire."<sup>558</sup>

If conservatives had forgotten in twenty years that the Court traditionally had displayed more solicitude for property than for personal liberties, liberals were not hesitant to recall this history. Dismissing as "sheer rationalization" the contention that the Court was "necessary to prevent the tyranny of the majority," Hook pointed out that "it was property, not freedom, that the Supreme Court safeguarded throughout most of its history." Hook cautioned that "to make one's philosophy of judicial review dependent upon the composition of the Court at any definite time is cynical. Worse than cynical, it is foolish, for death and the pendulum of history are sure to place on the bench not merely conservatives but illiberals."<sup>559</sup> Similarly, Harrington pointed out that many liberals who had rejoiced over the Court's civil liberties decisions had forgotten that

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557. See HAND, *supra* note 132, at 50-53.

558. 110 CONG. REC. 18,796 (1964).

559. Hook, *supra* note 144, at 47-48.



judicial activism could also produce reactionary decisions and that "the Supreme Court has a built-in tendency toward conservatism."<sup>560</sup>

Conservatives also may have tempered their attacks on the Court because they could not necessarily trust the states to carry out their agenda. Indeed, state and local courts did not entirely escape criticism by antagonists of the federal judiciary. In 1967, for example, Smoot alleged that "[m]any local and state courts refuse to mete out proper punishment to rioters and other law breakers because the magistrates of those courts are liberals of the type that J. Edgar Hoover calls 'sob sisters' and 'bleeding hearts'."<sup>561</sup> Smoot urged "decent people of all races [to] do whatever is necessary at the local and state level to get rid of such court officials, whether by impeachment or by action at the polls if the officials are elected. Politicians who appoint such court officials should be voted out of office."<sup>562</sup>

Moreover, some state officials may have been loath to curb the Court because their resentment toward it was mixed with a curious and dubious gratitude. Both state and federal officials and the coordinate branches of the federal government have reason to favor a strong Court because the Court so often has enabled Congress and the President, as well as governors, state legislatures, and state judges to escape the consequences of actions they have taken in the crucible of political pressure. By nullifying such legislation, the Court sometimes actually performs a favor for these officials, many of whom are grateful even though some may grumble or rattle Court-curbing threats in order to please constituents.<sup>563</sup> After the Court's 1961 decision in *Mapp v.*

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560. Harrington, *supra* note 221, at 656.

561. Dan Smoot, *Race Wars, U.S.A.-Part X*, DAN SMOOT REP., Oct. 9, 1967, at 163.

562. *Id.*

563. Discussing the Court's review of state court decisions, Professor Hartnett recently has observed that "[f]aced with a choice between insulating their judgments from Supreme Court review or partially insulating themselves from internal political pressure, it is hardly surprising that most of the time state judges opt for the latter." Edward Hartnett, *Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 983 (1997). Discussing the Court's review of federal legislation, Professor Menez observed in 1959 that "[o]ften under pressure from some strong minority, Congress passes 'hot' legislation hoping that the Court will negate it and 'bail it out' . . . At the same time that Congress virtually compels the Court to correct its errors, it censures it for doing so." Joseph F. Menez, *A*

*Ohio*,<sup>564</sup> for example, California Attorney General Stanley Mosk told Justice Douglas that while a bare majority of justices of the California Supreme Court had interpreted the state constitution to incorporate the exclusionary rule, this state decision was politically so unpopular that there was great pressure on trial judges to ignore or circumvent it in order to help win re-election.<sup>565</sup> *Mapp*, Mosk informed Douglas, took “the pressure off the local judges to create exceptions and to follow the exclusionary rule and all its ramifications.”<sup>566</sup>

### C. *Organizational Obstacles Impeded Court-Curbing*

Like earlier efforts to curb the Court, proposals advanced during the Warren Era were thwarted by organizational problems. In particular, grassroots opposition to the Warren Court was weak since, as Harvard sociologist David Reisman pointed out in 1957, the mass of proponents of Court-curbing were “not a lobby or a party, being inactive save in occasional elections; they are too fundamentally unpolitical [sic] to constitute a serious danger to the Court (outside the South).”<sup>567</sup> Opposition to the Court, however, extended far beyond the rustics who helped to pay for “Impeach Earl Warren” billboards on the back roads of America. It attracted the support of many prominent state and federal officials who succeeded in pushing such measures as H.R. 3, the Jenner-Butler bill, the states’ rights amendments, and the congressional version of the reapportionment amendments much farther than anti-Court measures have gone before or since. As

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*Brief In Support of the Supreme Court*, 54 N.W. L. REV. 30, 36 (1959).

564. 367 U.S. 643 (1961) (holding that the Fourth Amendment’s guarantee against unconstitutional searches and seizures applies to the states through the Fourteenth Amendment).

565. O’BRIEN, *supra* note 540, at 308.

566. *Id.*

567. David Reisman, *New Critics of the Court*, NEW REPUBLIC, July 29, 1957, at 12. Reisman explained that

[i]t is important to realize this, lest the Court itself conceivably be intimidated by the current wave of attack to the point of failing to carry further the implication of its recent decisions, or even to stick by them unequivocally in the face of attempts by Congress and state legislatures to get around them.

*Id.*

Professor Freund warned in 1958, "opponents of the Court enjoyed a tactical advantage insofar as they were well organized," while "the interests served by the Court are relatively less vocal and cohesive."<sup>568</sup>

Although the Warren Court's antagonists may have been more vocal than cohesive, they probably were more united in their grievances against the Court and in the remedies that they proposed than were earlier critics of the Court. In contrast to the five decades before 1937, when antagonists of the Court often had substantially different personal and political agendas and proposed a bewildering array of different measures to curb the Court,<sup>569</sup> the critics of the Warren Court tended to share common political philosophies and focused their energies on a relatively limited number of Court-curbing measures.

State officials who attacked the Warren Court were particularly cohesive because there was considerable overlap among the types of persons who opposed the Court's decisions on desegregation, criminal justice, school prayer, and reapportionment. Although state officials outside the South who objected to the Court's criminal justice and reapportionment decisions may not have been segregationists, most do not appear to have had any special sympathy with the civil rights movement and many may have felt antagonistic toward it. Since most of these officials represented rural districts or lived in states with few African-Americans, they had little reason to avoid cooperation with segregationists. Similarly, most southern state officials whose principal grievance with the Court was desegregation tended to have scant sympathy with the Court's decisions protecting the rights of political radicals and criminals. Moreover, most southern state officials had at least as much reason as their northern counterparts to

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568. Freund, *The Supreme Court Under Attack*, *supra* note 147, at 3. Freund stated that

the attacks on the Court come from a coalition of groups, and the countervailing interests are not nearly so distinct and organized. There is the sectional opposition arising from the desegregation case; the opposition of officialdom of many states, deriving from decisions in the field of criminal law enforcement; opposition from rural interests growing out of the reapportionment decision; and from church groups, as a result of the school prayer cases.

*Id.*

569. See ROSS, *supra* note 9, at 318.

oppose the reapportionment decisions. Rather than squandering their efforts on pet Court-curbing proposals, most of these officials rallied around such viable proposals as H.R. 3 and the Jenner-Butler bill during the 1950s. During the 1960s, the states' rights amendments represented a sophisticated effort by state officials to concentrate support behind a single set of measures. When these failed, these officials transferred support to congressional bills to overturn the apportionment decisions. Even when state officials did not actually endorse Court-curbing measures, they tended to try to speak with one voice. The 1957 resolution of the Conference of Chief Justices is the classic example.

In some instances, however, divisions afflicted and may have weakened the forces that were arrayed against the Court. In particular, attitudes toward the Court's civil liberties decisions may have divided libertarian and traditional conservatives and made it more difficult for them to cooperate on a common Court-curbing strategy. The split between statist conservatives and libertarian conservatives was illustrated by reactions to the Court's 1958 decision that the State Department could not deny passports to Communists.<sup>570</sup> David Lawrence declared that "if the Supreme Court had ruled that treason now is lawful, it could not have dealt a more devastating blow to the safety of the people of America," and he accused the Court of taking over the conduct of foreign relations.<sup>571</sup> More libertarian conservatives, however, applauded the decision. Disparaging "government by bureaucratic whim," *The Wall Street Journal* contended that Communists who had broken no law were entitled to travel abroad unless Congress specifically determined that such travel threatened the national security.<sup>572</sup> Similarly, the conservative commentator William Henry Chamberlin argued that

there is no proved or visible advantage in dealing with Communist conspiracy that warrants giving bureaucrats more power to regulate the coming and going of ordinary citizens or justifies the

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570. *Kent v. Dulles*, 357 U.S. 116 (1958).

571. David Lawrence, Editorial, *Legalizing Treason?*, U.S. NEWS & WORLD REP., July 18, 1958, at 100.

572. *The Passport Decision*, Editorial, WALL ST. J., June 18, 1958, at 12.

denial to Americans of their historic right to leave their country . . . After all, this is a free country, isn't it?<sup>573</sup>

Support by libertarian conservatives for the Court's civil liberties decisions may have eroded their support for Court-curbing measures insofar as they perceived the Court as more libertarian than state courts or legislatures.

The movements to curb the Warren Court also were hindered by the lack of leadership. Although the Court was severely criticized by a remarkable number of persons who occupied leadership positions, including prominent state judges and legislators, no one of national stature emerged to lead the anti-Court forces. Of course, even the leadership of a national figure might not have enabled critics of the Court to succeed with any significant Court-curbing measures. During the Progressive Era, even such titans as Theodore Roosevelt and Robert M. LaFollette, Sr. were thwarted in their proposals to curb the Court, and Franklin D. Roosevelt's Court-packing plan was defeated when FDR was at the height of his power.

#### D. *Campaigns by Elites To Protect the Court*

Just as the anti-Court movement was hobbled by lack of leadership, efforts to thwart Court-curbing were greatly helped by the many prominent political and legal figures who defended the Court's institutional powers. As in previous times when critics besieged the Court, elite opinion rallied behind the Justices, sounding alarms about the dangers of Court-curbing measures.<sup>574</sup> As the movement for the states' rights amendments were petering out early in 1964, Professor Kurland expressed gratification that "the warnings of lions in the streets—instead of under the throne—were timely heeded as well as sounded."<sup>575</sup> Kurland was only partially correct, for the most vocal opponents of the amendments were closer to the throne than to the streets—closer to the centers of power than to the grassroots of America. Warren's veiled but unmistakable criticism of the Court of the Union was consistent with efforts by Chief Justices Hughes, Taft, and Marshall to ward off attacks on the Court. Despite the misgivings of

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573. William Henry Chamberlin, *The Right to Tour*, WALL ST. J., June 30, 1958, at 8.

many of its conservative members, even the ABA helped to defeat the Court-curbing movements, just as the ABA had helped to protect the Court during the 1920s and in 1937<sup>576</sup>.

Celler, who at first believed that the 1958 efforts to curb the Court's jurisdiction would succeed, concluded that the campaign failed largely because "an articulate minority in both Houses . . . cracked the solid wall of assumptions surrounding the Court-curbing proposals" by pointing out the threat to judicial independence.<sup>577</sup>

### *E. Institutional Obstacles Impeded Court-Curbing*

Efforts to curb the Court also were hindered by significant institutional obstacles. As Professor Choper once observed,

[a]ll the dominant forces of inertia—of maintenance of status quo, of inaction due to the frequent absence of cohesive majorities and to the fragmentation of power—that are present in the national political process work to safeguard the Court, and indeed are magnified in the case of an attack on the Court's historic independence.<sup>578</sup>

Recognition of these institutional obstacles may have influenced choices of strategies, for the proposals of the Court's antagonists during the 1950s and 1960s differed from those of earlier critics of the Court. In contrast to populists, progressives, and labor leaders who often advocated curtailment or abolition of judicial review during the half century before 1937,<sup>579</sup> critics of the Warren Court rarely tried to diminish the Court's essential institutional powers. Instead, they most frequently advocated denial of

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574. See e.g., ROSS, *supra* note 9, at 202-04, 206-07, 223-25, 238-39, 241-46, 260-66, 274, 276 (discussing elite opposition to Court-curbing proposals during the 1920s).

575. Kurland, *supra* note 297, at 636.

576. See ROSS, *supra* note 9, at 239-40, 242-44, 302.

577. Emanuel Celler, *The Supreme Court Survives a Barrage*, REPORTER, Nov. 27, 1958, at 33. Celler believed that "[b]y raising the[se] issues articulately and persistently," the minority "gained time for a cooler and more deliberate consideration of these problems." *Id.*

578. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 55 (1980).

579. See generally, ROSS, *supra* note 9.

jurisdiction over discrete subjects or alteration of the balance of state and federal relations in a manner that would only indirectly (albeit radically) diminish the Court's role in reviewing state legislation. Although measures such as interposition or the states' rights amendments that would have revolutionized federalism were probably more tactical than practical, efforts to curb the Court's jurisdiction nearly succeeded during 1958. Avoidance of direct assaults on the Court's powers may have reflected an understanding that previous such efforts always had failed.

Recognition of the difficulties of curbing the Court's fundamental powers or effecting a revolution in federalism also may have channeled the energies of many states' rights advocates into efforts to elect a President and a Senate that would assure the appointment of more conservative justices. Although earlier critics of the Court had recognized that changing the Court from within was more practicable than changing it from without, the Judicial Revolution of 1937 may have made antagonists of the Warren Court particularly aware that altering the Court's personnel was easier than curbing the Court's power. Reflecting this recognition, Goldwater became the first presidential candidate to make judicial appointments a persistent campaign issue. In contrast to earlier presidential candidates such as Theodore Roosevelt in 1912 and Robert M. LaFollette in 1924, whose antagonism toward the Court had inspired them to call for institutional reform,<sup>580</sup> Goldwater merely pledged to nominate justices who would reject the Warren Court's activism.<sup>581</sup> Indeed, the scrutiny applied to Supreme Court nominees, although paltry by present standards, increased markedly during the 1950s and early 1960s as conservatives of various stripes began to interrogate nominees. For the first time, formal hearings on judicial nominations became routine. Harlan, questioned by isolationists during his 1955 confirmation hearings about his views on national sovereignty, became the first nominee ever queried about his views on substantive legal issues.<sup>582</sup> In 1959, Potter Stewart became the first Supreme Court

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580. *See id.* at 130-54, 254-84.

581. *See Ross, supra* note 499, at 143.

582. *Hearings on the Nomination of John Marshall Harlan of N. Y. to be an Assoc. Justice of the Supreme Court of the U. S. before the Senate Comm. on the Judiciary*, 84th Cong. (1955).

nominee ever questioned in detail about his political and social views when conservatives interrogated him about his opinions on desegregation and national security.<sup>583</sup>

Timing also adversely affected the impact of much of the criticism of state officials. As Professor Murphy points out, “[t]he governors indorsed states’ rights legislation in 1956, almost two years before the peak of the congressional attack, and the Chief Justices’ criticism of the Court came a few days too late to affect the fate of the bills in the Eighty-fifth Congress.”<sup>584</sup> Celler observed that “[c]ongressional concern with the economic recession and defense matters, as well as the late introduction of some of these bills, also played a substantial part in their defeat.”<sup>585</sup>

Ultimately, even the relative degree of unity among the Court’s critics could not overcome the inherent difficulty of overcoming the taboo against Court-curbing legislation, much less the formidable obstacles of the constitutional amendment process. As Professor Menez remarked,

[i]n its saner moments Congress knows there is not much point in having a Constitution if there is not a Supreme Court to say when it has been violated. Judicial review . . . is too embedded in our national life to be kicked around now. The Court is a terminal point and serves the real need of bringing issues to a conclusion, however it may gall us at times.<sup>586</sup>

Similarly, Krock predicted in 1957 that critics of the Court would have to content themselves with grumbling because Congress consistently had recoiled from curbing the Court in fear that the remedy will be worse than the cause of the complaint.<sup>587</sup>

#### F. *Economic Reasons for Frustration of the Court-Curbing Campaigns*

Economic factors also may help to account for the

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583. See *Hearings on the Nomination of Potter Stewart to be an Assoc. Justice of the Supreme Court of the U. S. Before the Senate Comm. on the Judiciary*, 86th Cong., 124-39 (1959).

584. MURPHY, *supra* note 1, at 253.

585. Celler, *supra* note 577, at 33.

586. Menez, *supra* note 563, at 59.

587. Arthur Krock, *High Court’s Critics Grumble But Conform*, N.Y. TIMES, June 30, 1957, at E3.



failure of the Court-curbing movements of the Warren Era. The unprecedented prosperity of this period may have produced a self-confidence that inspired innovation and experimentation, but the widespread economic contentment that characterized the 1950s naturally diminished incentives to radically transform institutions. Prosperity also discouraged any type of radical change that could have an adverse economic impact. During the 1950s, opponents of interposition predicted that economic reality would cool southern passions since political unrest could adversely affect business interests. Pointing out that southern business was now closely intertwined with national business, *The Nation* in the wake of the 1957 Little Rock crisis expressed hope that Faubus's lawlessness had facilitated desegregation because "the Southern moderates are not going to be lured into the suicidal position of open defiance of the Constitution" insofar as "too much is at stake."<sup>588</sup> Pleased for once that the Eisenhower Administration maintained close ties with business leaders, *The Nation* observed that the Administration was "in a position to accelerate this process by appealing directly to the heads of corporate enterprise."<sup>589</sup> Similarly, Professor Freund noted that "[a]ny cloud of disorder hovering over the area would darken the business scene."<sup>590</sup>

#### G. *Ability of the Courts and the Court's Defenders to Respond to Criticism*

In contrast to previous Court-curbing periods, when attacks on the Court may have influenced judicial decisions that helped to mute the fury of the Court's assailants,<sup>591</sup> the impact of the states' rights movement on the Warren Court's behavior is difficult to assess. Scholars generally agree that the congressional firestorm of 1958 helped to

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588. *If It Takes All Winter*, Editorial, *NATION*, Oct. 12, 1957, at 233-34. "Does anyone believe," *The Nation* asked, "that American corporate enterprise, which commands a vast army of Southern manpower—salesmen, clerks, factory workers, executives—will look with favor on the participation of this personnel in conspiracies to defy the authority of the federal courts?" *Id.* at 134.

589. *Id.*

590. Freund, *Storm Over the American Supreme Court*, *supra* note 193, at 355.

591. See Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 *VAND. L. REV.* 925, 943 (1965); ROSS, *supra* note 9, at 316-17.

moderate the Court's opinions during the next few years.<sup>592</sup> Moreover, the intense criticism of the middle 1960s, culminating in widespread attacks on the Court's 1966 *Miranda* decision,<sup>593</sup> may have helped to tone down the Warren Court's activism during its final years.<sup>594</sup> As James Bryce observed in 1891,

[t]he Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible, even by elderly lawyers.<sup>595</sup>

The relation between public criticism and judicial behavior, however, is highly subtle. As Barry Friedman has observed, "public comfort or discomfort will, ultimately, have some impact on Supreme Court review and institutional change . . . . [H]istory suggests law and politics are inextricably intertwined, but at a distance, not in a close fashion of political retribution for unpopular decisions."<sup>596</sup>

But while congressional criticism of the Court may have affected judicial behavior during at least some periods of the Warren Court, there are no indications that the criticism of state officials had any significant impact on the Court. In particular, the interposition movement does not appear to have shaken the Court's dedication to racial equality, and the states' rights amendment movement of 1964 did not prevent the Court from extending the one person-one vote principle in *Reynolds*. Since the institutional obstacles that prevent Court-curbing within the states are even greater than those that hinder Congress, the Court had little incentive to respond to pressure from the states. As Professor Cross has pointed out, "[t]he Court assumes few institutional risks when striking down state legislation. State governments cannot

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592. See *infra* Part I-I.

593. *Miranda v. Arizona*, 377 U.S. 201 (1966) (holding that criminal defendants have a right to counsel during custodial interrogation and that interrogators must inform suspects of their constitutional rights).

594. See *POWE*, *supra* note 1, at 498.

595. 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 267 (2d ed. 1891).

596. See Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, *supra* note 6, at 1064.

directly punish or reward the Court."<sup>597</sup> Although many members of Congress professed antagonism toward the Warren Court's alleged intrusions on states' rights, the Court's general support for expansion of national power may have satisfied more members of Congress than it displeased. Since the Court is heavily dependent upon Congress and the President for the maintenance of its power, the Court is naturally far more loath to offend coordinate branches of the federal government than to antagonize the states.<sup>598</sup>

The Court's apparent failure to react to the criticism of state officials may have been the most significant defeat of the states' rights movement since this movement was motivated largely by an effort to intimidate the Court rather than change the Constitution. For example, while one proponent of the amendments acknowledged as early as February 1963 that "[i]t is almost impossible to hope" that the amendments would succeed, he explained that "the lineup of state legislative political power behind them can't be ignored. If nothing else, they might be a psychological restraint to the federal judiciary's reckless encroachment on traditional state prerogatives."<sup>599</sup>

#### H. *Harmony of the Court With Public Opinion*

Many liberals who feared for the Court's power while it was besieged during the Warren Era may have underestimated the extent to which the values espoused by the Court already reflected a broad political consensus. Perhaps more than any other factor, the essential harmony between the Court's judicial opinions and the socio-political opinions of Americans may account for the failure of the attacks on the Warren Court. As in previous eras,<sup>600</sup> the Court remained roughly consonant with the temper of the times, even though many of its decisions offended significant segments of the population. As Michael J. Klarman has demon-

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597. Frank B. Cross, *Realism About Federalism*, 74 TEX. L. REV. 1304, 1319 (1999).

598. *Id.* at 1317-19. Indeed, as Cross points out, "[a]cquiescing to the demands of states' rights may aggravate Congress and limit the future authority of the Court itself." *Id.* at 1319.

599. Johnson, *supra* note 462, at 133-34.

600. See e.g., ROSS, *supra* note 9, at 317.

strated, the predicate for many of the Warren Court's decisions was established by profound demographic and cultural changes in American society during the early twentieth century.<sup>601</sup> The failure of the states' rights movement demonstrates the veracity of C. Herman Pritchett's observation that public support for judicial power has remained firm because "the Court has generally told the country what it wanted to hear, and provided a constitutional case for what the dominant interests in the nation wanted to do."<sup>602</sup> As Krock pointed out in 1957, Court-curbing movements always have failed because "the Court will never take very long to catch up with the political philosophy of a large popular majority."<sup>603</sup>

During the 1950s, the Court's desegregation decisions were well received, largely because of significant changes in social attitudes toward African-Americans.<sup>604</sup> Meanwhile, the Court's decisions protecting subversives were rendered at a time when fear of domestic subversion was waning.<sup>605</sup> Rather than following the election returns, the Court in Gerald W. Johnson's opinion was "a step and a half ahead of the election returns" in anticipating a likely diminution of fear of domestic subversion.<sup>606</sup> As Professor Latham argued, the Justices for the first time in twenty years "feel

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601. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Revolution*, 80 VA. L. REV. 7 (1994).

602. C. Herman Pritchett, *Judicial Supremacy from Marshall to Burger*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 108 (M. Judd Harmon, ed. 1978).

603. Krock, *High Court's Critics Grumble But Conform*, *supra* note 587, at E3.

604. See Klarman, *Brown, Racial Change, and the Civil Rights Revolution*, *supra* note 601, at 10-11.

605. Writing in the wake of Red Monday, one commentator observed that "[t]he panic atmosphere of a decade ago no longer prevails in anything like the same degree." Alan Barth, *The Supreme Court's June 17th Opinions*, *NEW REPUBLIC*, July 1, 1957, at 9-11. Similarly, another commentary contended that it was "not entirely a coincidence" that the Court made these rulings "at the very moment that representatives of the United States and the Soviet Union were getting into very serious negotiations" and that "the Court almost certainly would not have turned against these practices if the sense of danger to the state were in fact as great today as it was over most of the past two decades." Joseph C. Harsch, *Day of Decision*, *CHRISTIAN SCIENCE MONITOR*, June 19, 1957, *reprinted in* 103 CONG. REC. 10,296 (1957). The demise of McCarthyism also presumably contributed to the diminution of public anxiety over domestic subversion.

606. Johnson, *supra* note 547, at 11-12.

themselves standing on a stable social base.<sup>607</sup>

Public opinion polls during the 1950s consistently indicated that a large majority of Americans outside the South approved of *Brown*.<sup>608</sup> During the 1960s, the Court's decisions on religion in the schools received critical support from major religious denominations,<sup>609</sup> and reflected the increased level of religious pluralism in America.<sup>610</sup> The Court's early decisions on criminal procedure, particularly its decision on right to counsel in *Gideon v. Wainwright*,<sup>611</sup> were broadly hailed for their fundamental fairness, an attitude that in part reflected changing public attitudes toward poverty.<sup>612</sup> Similarly, opinion polls indicated that the Court's decision in *Reynolds*, the most sweeping of its reapportionment decisions, received far more approval than disapproval.<sup>613</sup>

The support for the Court's decisions is all the more remarkable since so many Americans continued to express a strong commitment to states' rights. There was, however, a substantial variation between the public's theoretical solicitude toward states' rights and its practical support for a powerful federal government. Although Americans tend to express preference for states' rights over federal power, Americans at least since the New Deal have overwhelmingly been willing to accept the benefits provided by a powerful federal government. The gap between theory and practice during the Warren Era was revealed in a 1957 Gallup poll in which a large majority of persons polled in every section of the nation described themselves as more sympathetic toward persons who believed in states' rights

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607. Latham, *supra* note 221, at 47.

608. 2 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-1971, at 1332-33, 1507 (1972). Gallup polls in both 1955 and 1957 indicated that 56 percent of Americans polled favored the decision and 38 percent opposed it. *Id.* Much larger majorities of persons outside the South favored it, while the large majority of Southerners opposed it. *Id.*

609. See LAUBACH, *supra* note 229, at 147.

610. See Klarman, *supra* note 601, at 46-62.

611. 372 U.S. 335 (1963).

612. See Klarman, *supra* note 601, at 64-66.

613. 3 GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1959-1971, at 1897-98. A poll conducted a month after *Reynolds* indicated that 47 percent approved of the decision, 30 percent disapproved, and 23 percent had no opinion. Moreover, persons approving the decision outnumbered those disapproving in every region of the nation and among Republicans, Democrats, and Independents. *Id.*

rather than those who believed that the federal government should solve more problems.<sup>614</sup> Although Americans continued to profess a devotion to states' rights during the 1960s, the injustices done to African-Americans under the guise of states' rights may have diminished public support for Court-curbing measures that cloaked themselves under a states' rights mantle. It may not be entirely fortuitous that the states' rights amendment was forever stalled during the spring of 1963, when public opinion sharply turned in favor of federal civil rights legislation in the wake of violence against civil rights demonstrators by city officials in Birmingham. George Wallace's declaration of states' rights when he stood in the doorway of the University of Alabama to block integration in June 1963 also may have eroded support for constitutional measures to enhance the rights of the states.

Similarly, Professor Dixon has concluded that the Assembly's proposal for an apportionment amendment helped to "poison the well" for more moderate measures to permit one house of state legislatures to be apportioned on a basis other than population, the so-called "federal plan."<sup>615</sup> According to Dixon, the Assembly's categorical opposition to any judicial requirement of reapportionment encouraged the news media and hence voters to regard the "federal plan" as a ruse to eradicate the "one person, one vote principle."<sup>616</sup>

Of course, the intensity of public opposition to the Court was indicative of deep misgivings about the Court's decisions that have continued to create hostility toward the Court among many conservatives down to the present day. Although the Court's opinions, at least in time, may have

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614. 2 GALLUP, PUBLIC OPINION, *supra* note 608, at 1504-05. The results of this poll, however, might have been at least somewhat skewed by the form of the question, which asked whether a respondent tended to agree more with "people who believe in states' rights or those who believe that more problems should be turned over to the Government in Washington to try to solve." *Id.* The phrase "turned over to the Government in Washington" suggests an abnegation of local responsibility that might have encouraged answers more favorable to states' rights. *Id.*

615. DIXON, *supra* note 520, at 398. Professor Dixon concluded that two other proposals likewise helped to stigmatize the "federal plan"—Representative Tuck's bill to strip the federal courts of all jurisdiction over apportionment, and a proposal for a moratorium on court-ordered reapportionment. *See id.* at 394-98.

616. *Id.*

helped change the thinking of some Americans about such issues as race, school prayer, criminal justice, and reapportionment, many Americans never were reconciled to the Court's opinions on these subjects. As one commentator remarked in 1957, "it is a pity that the American public is so misinformed as to the proper role of the Court in civil liberties matters. If they were not, the cries for the scalp of the Court which are now heard never would have arisen."<sup>617</sup> Indeed, many liberals worried that the Supreme Court's civil liberties decisions were precarious because they were not supported by comparable changes in attitudes among the citizenry. Michael Harrington, for example, warned in 1958 that "our jubilation" about the Court's decisions "should be somewhat tempered" because "we have not achieved a mass consciousness of the importance of civil liberties . . . Instead there has been a victory almost by fiat."<sup>618</sup> Many liberals were fond of quoting Frankfurter's observation that "'the real battles of liberalism are not won in the Supreme Court,' but through 'a persistent, positive translation of the liberal faith into the thoughts and acts of the community.'"<sup>619</sup>

### I. *Resilience of Public Respect for the Court*

Court-curbing efforts also were stymied by the intense and abiding public respect for the Court that has consistently manifested itself throughout American history. Even many who expressed misgivings about the Court's ventures into areas traditionally reserved to state discretion acknowledged, if often grudgingly, the justice of the Court's decisions. Although *Life Magazine* lamented that *Reynolds* "penetrated deep into the precincts of states' rights" and diminished "individuality and national heterogeneity," the editors nevertheless acknowledged that

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617. Alfred L. Scanlon, *Keepers of the Constitution*, NEW REPUBLIC, Sept. 23, 1957, at 20 (book review).

618. Harrington, *supra* note 221, at 655-56. Harrington particularly feared that the growth of concentration of power in modern society would ensure continuing threats to personal freedom. He warned that "we have yet to develop in our society a general awareness of the significance of civil liberties and a tradition of their defense. And this is what we must do if we wish to make sure that the worse excesses of our recent history do not return." *Id.*

619. Horsky, *supra* note 87, at 1110 (quoting FELIX FRANKFURTER, LAW AND POLITICS 197 (1925)).

“existing inequalities were so flagrant and so apparently impervious to change by those living under them that one must admit that the Supreme Court may indeed have been the only body capable of rectifying them.”<sup>620</sup> As Weissman pointed out in 1959, “there is little doubt that, despite the shrillness of the Court’s critics, the people as a whole are grateful for what Weissman described as the Court’s delivery of a “rebirth of freedom.”<sup>621</sup> Weissman pointed out that the “hostility of the critics is in its own way a tribute.”<sup>622</sup>

Even those who were dissatisfied with the Court may have recognized the perils of tampering with the Constitution. As Professor Freund pointed out in 1964, “another reason for hesitation over the use of the amending process is the risk of substituting new dissatisfactions for old, new uncertainties for old perplexities.”<sup>623</sup> Accordingly, even many advocates of measures to overturn the Court’s decisions did not question the process by which the Court had rendered such decisions. In urging Congress to approve a reapportionment amendment, for example, the speaker of the Missouri House in 1965 emphasized that he was not questioning the constitutional correctness of the Supreme Court’s decision in *Reynolds* even though he wanted to overturn *Reynolds* through an amendment.<sup>624</sup> Although many Americans shared the misgivings of the Court’s antagonists about individual judicial decisions, public opinion polls indicated that a solid majority of Americans

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620. *Landmark I; Equal Votes*, LIFE, June 26, 1964, at 4. *Life* also predicted that “outraged proponents of states’ rights may well find that, with urban areas more honestly represented and therefore less tempted to seek help in Washington, the state governments will in fact become more independent within a better balanced federalism.” *Id.*

621. Weissman, *supra* note 192, at 21.

622. *Id.*

623. Freund, *To Amend—or Not to Amend—the Constitution*, *supra* note 516, at 118.

624. *Hearings on Reapportionment Amendments*, *supra* note 531, at 175 (testimony of Thomas D. Graham). Graham stated that

I wish to make it clear that I have no desire to contend that the U.S. Supreme Court has invaded an area which has been reserved, under our Constitution, to the States. Nor do I wish to contend that the Court has not properly interpreted the intent of the Constitution . . . I therefore also contend . . . that the Congress . . . has a duty . . . to give the citizens . . . an opportunity to express their views on this issue at the ballot box.

*Id.*



opposed Court-curbing, just as a large majority of citizens had opposed Roosevelt's Court-packing plan despite widespread misgivings about the Hughes Court's nullification of economic regulatory legislation.<sup>625</sup> As Professor Murphy observed in 1959, "it was the current Court's performance that citizens rated low, not the body nor even its functioning or operation."<sup>626</sup> Writing in 1959, New York University Law Professor Robert B. McKay observed that "a probable reason for the almost surprising acquiescence in [unpopular] judicial decisions" was the "enormous reservoir of public respect for the Court as an institution."<sup>627</sup> As *Life* Magazine observed in May 1964:

[d]espite all the controversy over the Court and the Impeach Earl Warren billboards, the Supreme Court as an institution still commands a unique respect among the great majority of Americans. Tourists in Washington often trip lightheartedly through the halls of the capitol, where Congress sits, and chatter unabashedly in front of the White House; the sight of the chaste, white Supreme Court building, however, invariably fills them with silence and awe.<sup>628</sup>

McKay believed that this respect for the Court was based upon "an intuitive understanding" that the Court is not undemocratic since "the judiciary also represents the people."<sup>629</sup> Or, as Yale Law Professor Eugene Rostow observed, democracy is more than a commitment to popular sovereignty, it is also a commitment to popular sovereignty under the law.<sup>630</sup>

### CONCLUSION

The history of attacks on the Warren Court by state officials provides abundant insights into the reasons why Court-curbing movements have failed throughout American history. The genesis and development of these neo-

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625. See ROSS, *supra* note 9, at 302.

626. MURPHY, *supra* note 39, at 483.

627. Robert B. McKay, *The Supreme Court and Its Lawyer Critics*, 28 FORDHAM L. REV. 615 (1959).

628. Ernest Havemann, *Storm Center of Justice*, LIFE, May 22, 1964, at 123.

629. McKay, *supra* note 627, at 615 (quoting Charles E. Wyzanski, Jr. 57 HARV. L. REV. 389, 392 (1944) (book review)).

630. Eugene V. Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 580 (1958).

Confederate measures were fairly typical of other anti-Court movements even though they were organized by state officials rather than by members of Congress. Although unique in some ways, the political forces that thwarted efforts by states' rights advocates to curb the Warren Court were the same forces that had defeated earlier anti-Court movements.

In particular, the Court-curbing schemes of both state officials and members of Congress failed because there was a broad harmony between the Court's decisions and public opinion on such controversial issues as desegregation, freedom of association, criminal justice, and reapportionment, even though the Court's opinions on these subjects provoked intense antagonism from vocal minorities of Americans. Moreover, even many persons who opposed the Court's decisions were loath to support Court-curbing because they retained a pervasive and profound respect for the judiciary as a guardian of personal liberties and property. Indeed, many conservative critics of the Warren Court may have worried that a profound alteration of federalism could create political discord and uncertainty that would disrupt the thumping prosperity of the period.

Like other Court-curbing campaigns, the states' rights movement of the Warren Era faced immense organizational obstacles. Although southern segregationists were able to forge a coalition with many northerners who were hostile toward the Court's decisions on criminal justice, reapportionment, and other non-racial issues, the prominence of segregationists among proponents of Court-curbing helped to stigmatize efforts to curb the Court even among many advocates of states' rights. Antagonists of the Warren Court never were able to command a majority in most state legislatures or in Congress. Moreover, the movement was divided between traditional conservatives and libertarians since the latter welcomed some of the Court's civil liberties decisions.

The strong defense of the Court by elites among judges, lawyers, journalists, and academics also helped to frustrate Court-curbing efforts by proponents of states' rights, many of whom lacked the articulateness of the Court's defenders. State officials also lacked the national political and media connections that would have facilitated the enactment of constitutional amendments.

Although states' rights advocates were much more

united in the Court-curbing proposals that they advocated than were most earlier antagonists of the Court, any major diminution of the Court's powers still faced the daunting obstacles of the constitutional amendment process. State officials were at a particular disadvantage in their efforts to initiate a constitutional amendment from statehouses rather than from Congress, where every successful amendment had originated. Accordingly, states' rights advocates of the Warren Era became increasingly interested in the more realistic option of influencing the judicial confirmation process, thereby presaging the focus on judicial selection by more recent critics of the Court.

Recognizing the difficulties of reducing the Court's powers, many of the Court's antagonists proposed Court-curbing measures more as a way to ventilate grievances or to try to intimidate the Court rather than as a serious effort to diminish judicial power. Although conservative state officials who criticized the Court helped to call attention to the Court's activism, their radical proposals to curb the Court's powers may have inhibited moderates and liberals from expressing their own reservations about the Court's growing activism. In contrast to many earlier Court-curbing movements, particularly those of the Progressive Era, the states' rights movement does not appear to have significantly affected the Court's decisions.

Although the collapse of efforts by state officials to diminish the Court's power provides a case study of why Court-curbing movements have failed throughout American history, such failure is not inevitable. Congress nearly imposed several significant limitations on the Court's jurisdiction during 1958, and the states' rights amendments were approved by many state legislatures during a very short period in 1963. These measures would have crippled federalism and could have resulted in the nullification of many Warren Court decisions that brought greater justice to countless Americans. The intensity of opposition to the Warren Court by states' rights advocates is a potent reminder that the Court's power is not invincible and that the Court must use its power responsibly—as did the Warren Court—in order to continue to maintain the public respect that is a necessary predicate of its institutional prerogatives.