UNIVERSITY OF ILLINOIS

14 August 1985

THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

Charles William Mull II

ENTITLED The Constitutional Imbalance

between the States and the Supreme Court

IS APPROVED BY ME AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

DEGREE OF Bachelor of Arts

in Political Science

Michael J. Supchardt
Instructor in Charge

APPROVED: Roger E. Kast
HEAD OF DEPARTMENT OF Political Science
The Constitutional Imbalance between the States and the Supreme Court

BY

Charles William Hall II

Thesis

for the

Degree of Bachelor of Arts

in

Political Science

College of Liberal Arts and Science
University of Illinois
Urbana, Illinois

1965
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Outline</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Preface and Introduction</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>a. Nature of thesis -- study of constitution</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>b. Myths dispelled</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>c. Standard of good government</td>
<td>10</td>
</tr>
<tr>
<td>II</td>
<td>The Constitutional Flaw</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>a. Supreme Court is political</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>b. States have no check on Court</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>c. Failing of the Framers</td>
<td>118</td>
</tr>
<tr>
<td>III</td>
<td>History of the Judicial Assault on the States</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>a. &quot;National supremacy&quot;</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>b. Commerce clause</td>
<td>28</td>
</tr>
<tr>
<td></td>
<td>c. &quot;Selective incorporation&quot;</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>d. Equal Protection clause</td>
<td>33</td>
</tr>
<tr>
<td>IV</td>
<td>Summary of Damage</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>a. Undermines Constitution and legitimate government</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>b. Diminishes local initiative -- demise of federalism</td>
<td>39</td>
</tr>
<tr>
<td></td>
<td>c. Inhibits self-government</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>d. Government unresponsive and simplistic</td>
<td>42</td>
</tr>
<tr>
<td>V</td>
<td>Remedy -- Reconstituting the Nation</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>a. Statutory</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>b. Amending the Constitution</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>c. Specific amendments</td>
<td>50</td>
</tr>
<tr>
<td></td>
<td>d. Doctrinal amendments</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td>e. Structural amendments</td>
<td>52</td>
</tr>
<tr>
<td>VI</td>
<td>Conclusion</td>
<td>56</td>
</tr>
</tbody>
</table>
The following is an analysis of American government. Specifically it is a treatise on the relationship between the Supreme Court of the United States and the States which make up the United States of America. It is my contention that there is an improper, perhaps even treacherous, imbalance in this one of many institutional relationships which make up the American constitution. Treacherous, in that it undermines the integrity of our written Constitution and the very concept of constitutionalism through a written constitution. Treacherous, in that under the present arrangements the courts assume sovereign prerogatives that should be reserved to the people. Treacherous, in that it stagnates the nation by insisting on a uniformity that is destructive of federalism. This relationship is depriving the nation of the diversity which is essential to a living and progressive constitution. And treacherous, in that this relationship is antithetical of the very theses on which this nation has been built—responsive government with self-government as its end.

This paper elaborates on the history and nature of the relationship between the Supreme Court and the states, and from there it will make some suggestions concerning a remedy to this current flaw in our constitution. It is therefore a treatise on political constitution, not on state government or jurisprudence, though these and other topics will figure greatly in the discussion. But before I proceed to the main thesis, let me finish prefacing my remarks by framing the discussion in terms germane to a study of political constitution and declaring the standard of good government under which I have labored.

In the United States these days the typical attitude toward the role of government or any government institution is that the end justifies the
authority based on its willingness to support our political ends. In other words, when a particular cause is unable to achieve its ends through proper Constitutional channels, it seeks extra-legal remedies. This is the very essence of anarchy. These efforts pretend to legitimacy, as officials and official institutions are the perpetrators. We have long been aware of the perniciousness of this sophistry. John Adams declared that ours was a government where laws were supreme not men. [1] Official misconduct is probably the worst form of illegal activity. In the American tradition, such a breach of faith is considered an abandonment of office and authority. "He (King George III) has abdicated government by declaring us out of his protection and waging war against us," stated the Declaration of Independence. Hence, what we seek here is not the supremacy of the institution most willing to enforce our current political desires, but the constitution of a government most able to secure our rights, through law, in the long run.

In this light, I hope to free this discussion of the shackles of tangential issues. This is not a discussion of the wisdom of any particular piece of legislation. Whenever states' rights is mentioned, images of the Southern states oppressing minorities are conjured up. In my mind, there is no question that the government should protect people from racial prejudice and oppression. I am not suggesting that any political right is a greater end than the unalienable rights of individuals, but that a government ordered on certain principles is better able to secure these rights.

There are four additional myths or prejudices which must be dispensed with here. First there is a false idea prevalent that it is somehow unpatriotic to oppose any measure that centralizes American government. Any measure that promotes local sovereignty is viewed with the same
jaundiced eye that condemns secession from the Union. Walter Dean Burnham writes in one instance, "It is not difficult to discern the thrust of these proposed changes. They were designed to break up the insistent drift toward nationalization and democratization in our political life...." (As if nationalization meant democratization.) He continues concerning these efforts to reverse Baker v. Carr, "Overturning Cohens v. Virginia <1821> and the verdict of Appomattox, it would finally demonstrate that after all the Founders had not created a nation."[2]

The national government is indisputably best able to respond to our interest in national security. And in times of crisis, national security probably outweighs all of the legitimate interests of any state, institution, or citizen. But it is absurd to suggest that any degree of local autonomy is somehow seditious.

Similarly there is a common assumption that the Supreme Court should not be held in check, lest we undermine judicial independence, hinder the work of protecting our rights, and ignore the sanctity of law. Let us deal more objectively with the role of the Court in our government. The Supreme Court is not the pristine institution, innocent of political motives, that it presents itself as. Nor is it necessarily the Great Defender of our liberties; we shall see that it is the Constitution and the constitution of our people which are the guarantors of such. Furthermore, the Court is not designed to be in the business of making laws. It is presumably subject to the "law of the land" (the constitution, Acts of Congress, and treaties of the United States of America,) as it adjudicates specific cases. And while its decisions make for judicial precedent, such precedent is inferior to law.

Just as there is no reason to view the Supreme Court with religious reverence, political analysis is not served by stereotypically portraying
the states as enclaves of medieval feudalism resisting the enlightened liberation sought by the national government. (Burnham calls it "rurally-dominated, rotten-boroughism."

The historical evidence which follows will show that states and their predecessors are as inclined to progressive or populist initiatives and conventions as the national government or any institution thereof. In fact we shall see that almost every cause for progress in human rights or toward better government in this nation has had its birth at the grassroots of American government.

When the Constitution was adopted almost all of its provisions had some precedent in the constitutions and charters of the states. Every state had provided for a separation of powers, trial by jury, election of a representative legislature, and some religious freedom. While it is true that each of the colonies had been greatly influenced by their English heritage, the significant point here is that they had adopted these measures independent of outside coercion.

The national Bill of Rights, which is now being force fed to the states, contains no novelties. One or more of the States had already provided for due process, protection against double jeopardy and self-incrimination, protection against quartering troops during peace time, the right to bear arms, freedom of the press, and freedom of speech. Here some passages from the early Declaration of Rights of the Commonwealth of Virginia are replete with these fundamental American themes. The Virginia Declaration of Rights, 12 June 1776:

1. That all men are <by nature> created equally free and independent, and have certain inherent rights,...<namely,> the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

3. That Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community;... whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an
to reform, alter, or abolish it,....

8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted by witnesses to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by law of the land, or the judgement of his peers.

9. Excessive bail ought not to be required, nor cruel and unusual punishments inflicted.

10. That general warrants, whereby any officer or messenger may be commanded to search suspected places (without evidence of a fact committed,) or to seize any person or persons (not named, or whose offense is) not particularly described (and supported by evidence,) are grievous and oppressive, and ought not to be granted.

15. That Religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence.

While these profound thoughts are familiar to us, the full enumeration of rights found in this document is even more sophisticated than that of the first eight Amendments to the Constitution. And Virginia carved these ideas into stone fifteen years before they were incorporated into the Constitution. Massachusetts, in the North, went on to adopt an almost identical set of articles into its constitution of 1780.[5] (To enumerate them would be redundant.) One further note, a fortnight after Virginia adopted the Declaration of Rights, it formed a constitution based upon those same principles and gave voice to Thomas Jefferson’s litany of complaints against the Crown of England in that document, several days before the Continental Congress approved them.[6]

The issue over which the states are most notorious is slavery. From today’s vantage point it is difficult to comprehend the complexities of the rise and fall of slavery in America. But understanding the origins and history of slavery in America will help us understand that it is an issue that transcends any political institution. When independence was declared every colony had slaves in it. When the Constitution...
adopted, it recognized slavery as an institution.[7] And when Dred Scott v. Sanford came before the Supreme Court in 1857, Chief Justice Taney declared that Negroes were outside the compact formed in 1787 (the Constitution.) And he went on to say that Congress to forbid the transportation of slaves into the Territories was to deprive citizens of their property without due process.[8] It was the Northern states which first forsook the practice of slavery. In the year 1780, Pennsylvania and Massachusetts emancipated their slaves. And eight years later, Connecticut and Rhode Island joined them as Free states.[9] The trend continued in the North, and these states were not influenced or assisted by any branch of the national government. In fact, their commitment to the Constitution required the Northern states to respect the property of the slave-holders traveling in the North, including their slaves. The Taney Court upheld these principles in its Dred Scott decision.[10]

Slavery instead of declining in the South, as had probably been hoped at the convention of 1787, became the backbone of the cotton industry. And cotton had become king of the South in the fifty years which followed the Revolutionary war. So in the final years of the 18th century, the North and South took divergent paths on this volatile social issue, mainly for economic reasons.[11]

In 1860 the great unresolved issue of 1787 tore the American nation asunder. The important theme here is the manner in which change was wrought. We witness that local institutions are capable of progressive change and even served as the testing ground for such change and the nation was reconstituted through traditional American channels—warfare and amendments to the Constitution. And when the Thirteenth Amendment was ratified, it not only affected state laws, but repealed the current Supreme Court doctrine on the subject.
Women's suffrage is another progressive development in this nation on which the local governments have had a significant, positive, and interesting impact. It was not the Congress nor the Court across the street which first afforded women the right to vote. This movement did not receive its first victories anywhere on the Eastern Seaboard or within 100 miles of Washington, but in the hinterlands of the Territories of Wyoming and Utah. In 1869 the Territory of Wyoming passed a bill granting women the right to vote, and Utah followed a few months later. Wyoming and Utah, not even possessing the sovereignty of states, were fifty years ahead of the national government, which did not propose the Nineteenth Amendment until 1919. And in doing so these fledgling societies had defied national sentiment. There had been a great deal of pressure on the government of Wyoming after it initiated suffrage for women and other feminist reforms.

But the national government of the United States reached an all-time low in centralized tyranny in its dealings with Utah. In 1887 Congress passed the Edmunds-Tucker Act, outlawing polygamy in the Territories. It must be remembered that the Northeastern plutocrats did not limit their self-righteousness to slavery. Abraham Lincoln ran on a platform calling for the end of the "twin barbarisms of slavery and polygamy." Polygamy was somewhat prevalent in Utah, where it was a religious duty of the Mormons (members of the Church of Jesus Christ of Latter-day Saints) who had settled the territory. The ruling majority in Washington proved their insincerity even quicker here than in the case of slavery. The Edmunds-Tucker Act which was passed under the pretense of liberating Utah's women, contained a clause which revoked their suffrage. The Supreme Court upheld the act in Reynolds v. United States. And once again Congress set up a carpetbag government.
Almost any cause in the history of this nation which has promoted human rights or better government has been initiated in the state arena. Individual states have been the launching ground for the labor movement, both the traditional one and the fight for the rights of migrant workers. Volumes could be written on the advances in education which have taken place in the states. The programs of Franklin Roosevelt were first implemented in the State of New York, while he was governor. The list goes on: sunset laws, popular referenda and recall, innovations in budgeting, the popular election of Presidential electors, the death penalty as cruel and unusual punishment, and etc.

In the last analysis representative institutions have great potential for good government, whatever the scope of their representation. But an institution with 532 representatives from anywhere from Hawaii to Maine and three representatives from Wyoming can hardly be responsive to the local problems of Wyoming. We see this in the Congress' dealings with the post-Bellum South and the Territories.[17] The states have provided for the governmental needs of their citizens for two to three centuries. They hardly need the Supreme Court to review all of their actions at this stage of the game.

There is one final prejudice I would like to discuss here. That is that the states are archaic institutions no longer representative of meaningful divisions. Or put another way sometimes, this nation is too homogenous now; we have most interests in common. Television satellites, and air travel have supposedly made this nation much more of a single community.

In a sense this is of course true. But I would maintain that the nation is actually much more diverse now than it has ever been. While technology has brought us together, it has also contributed to the
increased diversity of the nation. There exists in this country the
traditional interests of cotton, tobacco, wheat, mercantilism, retailers,
textiles, shoes, and other manufacturing; but now we also have soybeans,
robotics, computers, telecommunications, steel, plastics, petroleum, and
etc. Plus as can be seen from that list the relationships among our
various economic interests is even more complex today.

Which brings us to the point that the states are not perfect
representations of various interests. I readily admit this. If they
were, there would perhaps be no need for federalism. But as there is a
peculiar complexity of interests in any one of the states, they need to
be independent in designing their own constitutions. State jurisdiction
also allows for local jurisdiction and provides a means for representing
regional interests in national government. Furthermore the states do
represent very different economic, social, religious, and ethnic
cultures, at least as much as they did at the time of the revolution.
Mississippi is 35% Black, while only .2% of Montana’s population is
Black. New Mexico is a little more than 36% of Spanish origin; the same
figure for Maine is .4%.[16] Rhode Island and New Jersey have a heavy
concentration of White ethnics. The State of Utah is more than 75%
Mormon, and, with the exception of Idaho, there is not another state in
the Union with more than 10% of its population espousing this faith.[19]
A majority of the people of both Rhode Island and Massachusetts are Roman
Catholic.[20] Hawaii is the only state with a large concentration of
Bhuddist; and New York is 12% Jewish compared to the northern Mountain
states with only .1% each.[21] Obviously North Carolina does not have
the population of Eskimos and Aleutians that Alaska does. Nor are
Alaskans much concerned about tobacco subsidies. California’s economy is
dominated by high tech, entertainment, and produce, very different
concerns from those of Maine's fishermen. And the blue-collar workers of Michigan, Ohio, and Pennsylvania are not nearly as concerned about Medicare as the citizens of Florida. The need for local administration of local problems and for the representation of local interests at the national level is as real today as it has ever been. And while the states are not perfect political divisions, they are as close as they have ever been and the only thing we have.

Let us now look at the standards by which I will evaluate the Constitution of the United States and comment on how our government should be constituted. I like to think that, like Abraham Lincoln, I have no political sentiment which does not derive from the Declaration of Independence. Thomas Jefferson makes three claims in the Declaration to which I would like to recur throughout this paper. The first of these is, "That to secure [certain inalienable] Rights, Governments are instituted among men,..." Second, "That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." And thirdly, the document goes on to say, "Pruvence, indeed, will dictate that Governments long established should not be changed for light and transient causes."

The Declaration of Independence rejected the rule of the British King in Parliament because it had become destructive of the proper ends of government. But the document said nothing about what form of government was best, neither in general nor for the Americans specifically. It had defined the first duty as belonging to the particular people to be governed. And as for the American government specifically, many of the
principles and much of the organization of powers had already been set. If any more of the foundation needed to be laid, it would be left to a convention for specifically that purpose.

The one principle which has been demanded in American government in order to better secure our rights is that of republicanism. The Constitution declared that, "The United States shall guarantee to every State in this Union a Republican Form of Government,..." And the writings of the Framers treat the concept as fundamental. But republican government meant different things to the Founders of the American nation.

While different voices in the young nation saw the best form of republican government differently, there seems to be one common theme at the root of these notions. In a republic the people (the public or popular will) has a regular and significant impact on the policy process. It was the common opinion among all of the delegates and others who influenced American government that neither expertise nor especially divine right were sufficient for good government. Professors Kurland and Lerner put it the following way, "At the core of the notion of republican government appears to be the principle that the many should rule, and the body politic "should move that way whither the greater force carries it, which is the consent of the majority" (Locke). Which way the greater force moved was for the people to determine, consulting their interests and their better second thoughts."[22] The last sentence of the quotation turns on the equally important aspect of republican government that separates it from straight democracy or mob rule. Government was to be arranged so that the crass whim of the masses did not rule.

Nothing more was required of a republic. And many arrangements might serve the foregoing ends. We will do best when judging republican
government to remember the words of John Adams, who spent his life trying to define republicanism, "Of Republics, there is an inexhaustable variety, because of the possible combination of powers of society, are capable of innumerable variations."[23]

My final measure of good government is its ability or tendency to foster self-government. The uniquely American search for better government has always emphasized the belief that the perfect government would be no government at all. This idea is intimately intertwined with the self-evident truth that "all Men are created equal," returning once again to the Declaration of Independence. The great prophets of this message are of course Thomas Paine and Alexis de Toqueville in his book Democracy in America.

Let us hence embark on an analysis of the relationship between the States and the Supreme Court, judging it benefit ion and affectiveness on the three criteria already outlined. I hold these principles to be self-evident[24], that government should be instituted by the people to better secure their rights, that when it becomes destructive of these ends it is their right to replace it; that republican government is best suited to secure these rights in the American nation; and that a further end of state power should be to promote self-government.
While the Constitution of 1787 has required some fine tuning over the past two hundred years, only once have amendments challenged the very tenets on which it was structured—when the 13th, 14th, and 15th amendments redefined citizenship. Yet in this paper I am impressed that I have isolated a most pernicious imbalance of power within our constitutional system. The relationship between the Supreme Court and the States has historically been and continues to be one of master and vassals. I will endeavor to show that this imbalance has ravaged our federal system; and is consequently undemocratic and anti-republican. It should therefore be altered. And the challenge before us is to determine such an alteration which can be facilitated in an overall beneficial way, keeping in mind the objectives of government outlined in the introduction.

The quintessence of this thesis is that the relationship between the Federal courts, especially the Supreme Court, and the States is constitutionally unhealthy, but that this relationship may still be appropriately altered by the States in a legal and Constitutional fashion.

Consistent with this thesis, we will first look at our constitutional checks and balances and the historical imbalance of power between the states and the national government, due to a lack of any check on the judiciary within the local arsenal. Then I will point up the treachery that has been wrought and is potential under the current arrangement. Finally we will turn to a discussion of remedy. This section of the paper will be very much concerned with the prospects of amending the Constitution with the aid of a constitutional convention.
national government, the Supreme Court has gained an appetite for policy making. We all know that our system of government is based on checks and balances. Yet we hope that the Supreme Bench of the nation renders its findings independent of political considerations. But if the wisdom of the Constitution is based on the creations of it being influenced in their behavior by the powers of the other players in the political drama, then logic insists that the Supreme Court's actions are influenced by its struggle for power with the executive and the legislature. We shall be able to conclude from the forthcoming evidence that the Supreme Court is especially influenced by a preoccupation with maintaining its own power and integrity.

Practice supports our logic. The history of the nation is littered with examples of judicial politics (more commonly labeled "judicial statecraft."). While it is difficult to prove motive, the preponderance of the evidence leaves us no room but to conclude that many decisions were politically motivated. And historians have so concluded. Alan Westin has described the Court's "unwritten rules when reviewing politically charged" cases:

a. When the political situation is too dangerous for the Supreme Court, the Court should find a way to defuse the issue or to deflect it, leaving its immediate resolution to the larger political process.

b. But if the political situation is favorable then the Court is free to do the two things most beloved by American judges—uphold the 'rule of law' against claims of prerogative or privilege..., and expand still further the discretionary power of the judiciary in the American constitutional system.

Here Mr. Westin is speaking specifically of the Court's approach to the executive branch. But it is obvious that the Court would adapt similar measures for any politically charged situation.

The curtain rises on the Supreme Court's role in our political drama in the year 1801. Thomas Jefferson has won the Presidency, and his Republicans have forever banished the Federalists from control of
the political branches of the government. The Federalists have already filled the judiciary with their own appointments, but this is not enough. In the final hours of their tenure, a Federalist congress grossly expands the federal judiciary and President John Adams makes the appointments. Thus setting the stage for the most dramatic constitutional struggle in the history of the nation. The Federalist judiciary is pitted against the Republicans in the executive and legislative branches.

The partisan character of the struggle has constitutional implications, as it shapes forever the character of the Supreme Court. Today we applaud the great "judicial statesman," Chief Justice John Marshall for having saved the integrity of the courts and for establishing judicial review. But let us not be deceived as to how these feats were accomplished and are maintained. In 1803, Marshall handed down Marbury v. Madison, the cornerstone of judicial review and the gateway toward judicial supremacy. This case was from inception a focal point of national politics. The Republicans had threatened to impeach Marshall if he ordered the President to deliver Marbury his certification as a federal judge. On March 24, Marshall pulled off the greatest coup in the history of American politics the day he handed down Marbury. He avoided confrontation with his politically powerful Republicans "and expanded still further the discretionary power of the judiciary," in one fell swoop. The political intensity of the day is pointed up by a letter the Chief Justice sent to Supreme Court Justice Samuel Chase in which he indicated that he would be willing to surrender the doctrine of judicial supremacy in exchange for immunity from impeachment, and by the fact that Justice Chase was later impeached for his "unanimously partisan manipulation of his office." Today we applaud the great "judicial statesman," Chief Justice John Marshall for having saved the integrity of the courts and for establishing judicial review. But let us not be deceived as to how these feats were accomplished and are maintained. In 1803, Marshall handed down Marbury v. Madison, the cornerstone of judicial review and the gateway toward judicial supremacy. This case was from inception a focal point of national politics. The Republicans had threatened to impeach Marshall if he ordered the President to deliver Marbury his certification as a federal judge. On March 24, Marshall pulled off the greatest coup in the history of American politics the day he handed down Marbury. He avoided confrontation with his politically powerful Republicans "and expanded still further the discretionary power of the judiciary," in one fell swoop. The political intensity of the day is pointed up by a letter the Chief Justice sent to Supreme Court Justice Samuel Chase in which he indicated that he would be willing to surrender the doctrine of judicial supremacy in exchange for immunity from impeachment, and by the fact that Justice Chase was later impeached for his "unanimously partisan manipulation of his office."
members of the Court. And while as a legalistic institution the
Court is often slow to discern popular currents, once they have been
forced on its attention, the Court has responded according to Mr.
Westin's rules. The most dramatic turn-around in the Court's
history has come to be known as the "Revolution of 1937." Previous
to the Revolution, the Supreme Court struck down New Deal laws, one
after another, maintaining a strict constructionist view of the commerce
clause. Following his second election, President Franklin Roosevelt
tried to pack the Court. Congress refused to pass legislation that
would have allowed the President to appoint one new justice to the
High Court for every one that failed to retire by a certain age.
But themovement apparently gained enough support to scare the
"nine old men." For in NLRB v. Jones & Laughlin Steel Corporation, the
Courtopened the door to greater national regulation of commerce by, as
dissenting Justice McReynolds wrote, "departing from well-established
principles followed in A.L.A. Schecter Poultry Corp. v. United States
...," decided only two years earlier. Other examples of the Court's
statecraft include the Steel Seizure Cases and United States v. Nixon.
In both cases the Court used a favorable political climate to answer
constitutional questions in its own favor.

We have found this acceptable not because the Supreme Court is
blatantly arbitrary in its renderings, but because as the system is
balanced, the court has been able to maintain some degree of
judicial independence. A sense of comity among the three branches of
the national government has allowed each of them to maintain their
own integrity. There have been several historical struggles, and
the living system is in constant flux. But in the long run the
pendulum swings back, and we remain impressed that this form of
governing is fulfilling its promise.
But there are a group of political institutions—intergal parts of American government—which have little influence on any of the national institutions and effectively none on the Supreme Court. The state governments have no check on the Supreme Court. The people do elect the Congress and the President based on state jurisdictions, but role of the states proves to be insufficient to protect the states from national encroachment, particularly that perpetrated by the Court. This is so for two reasons: the governments of the states are not at all involved in the selection of the national government any more, since the institution of popular election of Senators; and even if the states could check the Congress, any resulting influence over the Court is considerably deluted by the tenuous connection through the Congress. We shall see that history supports this.

The product of all this is that as the three branches of the national government struggle to make policy the states are brushed aside. The states are powerless to resist any national encroachment. And if the national institutions do not aid and abet one another in plundering the localities, they at least permit it. There have been individual justices and individual courts which have seen protection of states' rights as a fundamental mission of the Court. And when such an attitude has prevailed on the Bench, the cause of federalism has been progressed. But for the most part quite the opposite has been the trend. The Supreme Court's role in this is particularly odious, since it takes the form of judicial supremacy unchecked by popular restraints. The Supreme Court is also the ultimate culprit in that it has taken upon itself the responsibility of arbitrating federal-state controversies.
Much of this paper is couched in terms of the Supreme Court's responsibility and culpability. This language is in a sense misleading, as the Court is not a creature entirely of its own design. The fact is that the Framers of the Constitution did not provide a bulwark capable of managing the coming exigencies of federalism. The subject of the viability of state sovereignty was probably the foremost issue in the minds of those who debated the ratification of the Constitution. But on several issues which have come to create the present situation the Framers were less than prescient.

The first fact that points up the Founders' failure is their general inattention to the the Supreme Court. The language of Article II of the Constitution is wide open. And in the Federalist papers, the authors recognize the Court's jurisdiction over the states, but summarily dismiss it, without discussion, as necessary. A more appropriate approach would have been to consider the ramifications of this necessary jurisdiction and to design the government so to soften its harsher consequences.

These otherwise astute men misread the potential of judicial review. Alexander Hamilton said, in effect, that the Court would have neither the Will nor the Force to prove tyrannical. The activities of Warren Court of alone are enough to disprove the "Will" part of that contention. And it seems that the Court ever-increasingly has the "Force" of expedience and tradition with it. We feel compelled to abide by its findings, in order to preserve the rule of law. Actually the opponents of the Constitution proved more prescient than Hamilton and company. Mr. Hamilton quoted their contention in his Federalist #81:

The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior
to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable the Court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous.

The Federalist response to this was as follows:

It may be observed that the supposed danger of judiciary encroachment on the legislative authority which has upon many occasions reiterated in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to affect the order of the political system.

Hamilton's last statement has proved incorrect. He based this contention on the Constitutional provision allowing the Congress to impeach justices. And elsewhere in the Federalist Papers, Congress' power to define the judiciary was pointed out as a potent check against judicial encroachments. Even if these did constitute effective checks against judicial mischief, neither provision is at the disposal of the state legislatures. And it is here where our concerns lie and where the greatest alterations to "the order of the political system" has occurred. Furthermore, both of these measures are much too unwieldy to exercise on a regular basis, particularly impeachment. And Congress apparently cannot strip the Court of jurisdiction without depriving the nation of some due process.

All of these misreadings come to a head in the fact that the Constitution provides no definitive vehicle for resolving federal-state controversies, short of dissolution of the Union. In Federalist #33 Alexander Hamilton recognizes that national usurpations may occur. And he indicates that any extra-Constitutional act of the national government would fail to be the "supreme law of the land." He says,

But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.
This statement provides only one possible remedy to national encroachment, nullification.

We are familiar with the fate of the doctrine of nullification. It of course cannot work. If the states are allowed to determine which laws are Constitutional and which are not, federal law fails to be supreme in any meaningful sense. A government whose laws are subject to the caprice of the governed for their legitimacy is no government at all. In the 1830s, President Andrew Jackson settled the matter for good by threatening to use force against South Carolina over nullification.

But the idea of nullification did not originate with John Calhoun. In addition to the intimations of Alexander Hamilton, the doctrine of nullification was promulgated in the Kentucky resolutions of 1799 and the Virginia resolutions of 1800. The respective authors of these were none other than Thomas Jefferson and James Madison.34 Andrew McGlaughlin says concerning their purpose:35

In any attempt to evaluate or understand the protests that came from these two men, we must bear in mind not only their desire to defend individual liberty, but (perhaps chiefly) their antagonism to a Federalist system of constitutional interpretation which they feared would make of the Constitution nothing but a scrap of paper. They determined to call the attention of the country to the fact that, on proper constitutional principles, the government was a limited government, not to be magnified into omnipotence by cunning construction.

With the author of the Declaration of Independence and the Father of the Constitution struggling to find a means to limit the federal government and arriving at the implausible doctrine of nullification (at a time when considerable effort was being made to follow the intent of the Constitution,) can there be any doubt but that the Constitution was defective on this point.

In the Federalist Papers, Madison went further to suggest armed resistance to federal encroachment into state affairs. He believed
that the state or states would prevail. Our one and decisive experience on this matter has proven him decisively wrong. He and Alexander Hamilton misread the nature of such a conflict on several points. Their first error was in thinking that the states would unite in such a struggle against the central government. Madison put it this way:

But ambitious encroachments of the federal government on the authority of the State governments would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate the whole.

Hamilton adds to this that while the central government was putting down one part of the nation in rebellion, another would rise against it. The central government would be unable to subdue all of the states. We have learned from the Civil War that the central government would not necessarily have to subdue all of the states. The Federalists should have reasoned that many issues would divide the states. Right in Federalist #46 James Madison drew the proper analogy to our differences with Great Britain. He said, "In the contest with Great Britain, one part of the empire was employed against the other. The more numerous part invaded the rights of the less numerous part." But then he abandoned this line of reasoning, "but what would be the contest in the case we are supposing? who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives against thirteen sets of representatives,..." This has never been the case.

They also believed that the people would remain loyal to the states over the central government. The end of the last quote is, "with the whole body of their common constituents on the side of the latter," (the States). Thus not foreseeing the force of nationalism which
would come to dominate the world. Hamilton claimed that States would have the financial wherewithal to provide for their defense. One of the great fears of the Anti-federalists was that the national government would impose so great a tax burden as to dry up the states' revenues. In Federalist #32, Hamilton dismisses such a possibility as impossible, due to its unpopularity among the people. In an era when the national government blackmails the states into submission with the threat of withholding funds, we can easily conclude that it was the Constitution’s detractors who were right about this issue. (At least since the unfortunate advent of the 16th Amendment.) And finally the Federalists tell us that the central government will not be willing to pay the enormous price that subduing a state states will cost. Madison’s words in Federalist #46 are:

On the other hand should an unwarrantable measure of the federal government be unpopular in particular states, which would seldom fail to be the case, the means of opposition are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to cooperate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose in any State, difficulties not to be despised; would form, in a large State very serious impediments; and where the sentiments of several adjoining States happen to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

Madison was absolutely right about how high the price would be, but fortunately Abraham Lincoln was willing to “encounter” it, when the occasion arose.

Neither nullification, armed resistance, nor the natural combination of the two are appropriate means of protecting the states from national encroachment, if this nation was to long survive. But the Federalists did foresee how some federal-state conflicts would be settled. They admitted that the Supreme Court would have jurisdiction over the states when a federal question was at hand. They could not
say that the Court would protect the states; the Anti-federalists
would never have fallen for this. But this is what was in effect
created. Over anguished cries from the states, the Court began handing
down decisions on the federal questions, and in response declared
itself perfectly capable of protecting the states from central
manipulation.

At least since John Marshall sat the bench, the Supreme Court has
maintained itself as the "final authority" concerning the extent of state
powers. Mr. McGlaughlin writes of Marshall, "The greatest task of all
had been the establishment of the Court as the recognized authority in
determining the extent of the state's power; he had not failed;..."40
And he goes on to report that Marshall's successor, Chief Justice Roger
Brooke Taney continued the fight to solidify the Court's authority
over the states. The thrust of this thesis is that the Court is not
capable of protecting the states from central usurpation. The states
realized early on that their destiny did not look bright tied to the
star of the Supreme Court. McGlaughlin continues, "(B)ut almost to
the very end of his (John Marshall's) life he found one state after
another denying the Court's authority or even, as in the case of
Georgia, flouting it."41

Before we get lost in peripheral history, the point here is that
the Framers of the Constitution, though their rhetoric declaims any
attempt to do so, set the stage for the downfall of the states, at
the hand of the Supreme Court. Mr. Walter Berns summarizes it so well:42

The authors of the Federalist might seek to discount it by
arguing that the more likely danger was state usurpation of
national authority, but their arguments, whatever their effect on
the issue then at stake—the ratification of the new
Constitution—are not convincing to us who read them with the
advantage of a knowledge of subsequent events.

Though I freely admit that there have been a far unforeseeable
subsequent events which may have quickened the demise of the states. (Though under a more balanced system these events would probably be only eddies overrun by the general current.) One in particular is the ascendancy of John Marshall as the individual most responsible for the American jurisprudence. His ideology was extremely nationalistic, and with good cause. He had seen the travesty of an impotent national government, as a soldier at Valley Forge. The Sixteenth Amendment was also an unfortunate development. And it would be unreasonable to expect the delegates of 1787 to foresee the technological developments of the 1980s or even the 1940s which have made the national military arsenal so formidable.
While John Marshall's personal philosophy may be understandable, we should not condone its being foisted upon the American people as the standing constitutional doctrine for centuries to come. I am committed to the idea that the nature of government is best defined by the governed, not by one person or a small group of persons exclusively. Besides being improperly implemented, Marshall's philosophy is inconsistent with the tenets of federalism, a practice which I will indicate is essential to good government. The Supreme Court to this day continues a systematic erosion of local power. In 1959 in response to what he considered an attempt by Virginia to circumvent the Court's will, Justice William O. Douglas declared, "In this context there is no longer any basis for being polite to Virginia; this is war!" His candor, if not his attitude, is refreshing. Perhaps if John Marshall had been so forthright 150 years earlier, the states would have had a fighting chance in the struggle. An historical review of the Supreme Court's development of several Constitutional doctrines will point up its arrogance and inconsistency, and it will introduce us to the oligarchical nature of this arrangement and the perils it presents.

As alluded to earlier, the assault on the states began very early in the history of the Constitution. When John Marshall decided McCulloch v. Maryland in 1819 he enunciated the doctrine of "national supremacy." That some idea of national supremacy is indicated in the Constitution is irrefutable. But Marshall's dictum in this case opened a floodgate of national encroachment. The problem here is that the Court's approach to these has been to view national rights as unmitigable, but to see the states' rights as dispensable. Except for during a short period of time, the Court has allowed any legitimate
national power to deprive the states of any of their powers. Any federal interest, no matter how minor or tenuous, is viewed as having greater weight than all of the legitimate interests of the states, no matter how fundamental or essential to order they are. With the coupling of this with the "necessary and proper" clause, as Marshall did in McCulloch, the national government can deprive the states of any and all privileges.

A more reasoned reading of the Constitution could have produced a more balanced government. In his decision, Marshall suggests that the power to tax is the power to destroy and/or to alter. He of course wants to prevent the states from destroying the national government, but finds it perfectly acceptable for the national government to have such power over the states. In his decision Marshall notes a contention by the State of Maryland, which, though somewhat awkward, would prove to be much more amenable to the preservation of the intent of the Constitution than Marshall's lopsided doctrine. He states: "The argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in confidence that they will not abuse it." While the actual nature of how the system would operate under such a doctrine is somewhat unpredictable, it is likely that a sense of comity would develop among the governments, as it has among the branches of federal government.

Still it would be even better to avoid the whole mess by having a tribunal willing to weigh in the balance all legitimate Constitutional interests when a question of federalism presents itself. This has proven the most judicious means of reconciling almost all conflicting
claims of Constitutional privilege. And it was practiced with regard to the states and the national government for a brief time. The doctrine is known as "dual federalism."\textsuperscript{46} It was first used in Collector v. Day in 1871.\textsuperscript{47} The doctrine was best promulgated by Justice Roberts in United States v. Butler(1935). Robert Cushman characterizes this particular example thus, "The Court does not contend that such a processing tax, taken alone, would be void; but when coupled with a clear attempt to regulate agriculture, it was an unconstitutional use of the delegated power."\textsuperscript{48}

The greatest casualty of the Revolution of 1937 was dual federalism. Cushman calls it "destined to be short-lived." And he is correct when one considers the nature of the Court. One year after Butler, the Court reversed it in the Social Security Act Cases.\textsuperscript{49} In 1976 there was a weak attempt to resurrect dual federalism in National League of Cities v. usery(1976). But it was quickly aborted.

The greatest damage wrought by "national supremacy" has come, as McCulloch v. Maryland predicted, from the power to tax, exacerbated by the Sixteenth Amendment. The federal government constantly forces states to conform to the national program and agenda, with the threat of withholding funds. Such a practice should be prima facie unconstitutional, for it is an improper use of delegated powers of taxing and spending. The question is asked whether the federal government is to have no power to place conditions on the use of federal money, at least accounting controls to prevent fraud. The answer to this is that the federal government should not be in the business of dispensing to the states funds to build up their states. There is no need, and certainly no Constitutional provision for the national government to collect taxes and then redistribute them
among the states. If the money is not for a national purpose, it should be left in the hands of the people of the individual states. If it is for a national purpose, then the federal government is perfectly capable of executing it on its own.

The second development of the Supreme Court to which we will draw our attention is the expansion of the commerce clause. This too was greatly precipitated by the Revolution of 1937. But I see this expansion of federal power as the most appropriate, even essential. The presence of Congress' commerce power negates any claims that there can be no national influence on domestic affairs under a true Constitutional scheme. The Constitution provides that Congress shall have the power to regulate and facilitate interstate commerce.\(^5\) With the increase in interstate trade in the modern era, it is only appropriate that the duties of the Congress should expand. We are blessed with a national legislature which can increase the efficiency of the interstate commerce and protect the citizenry from commerce which takes on harmful or repugnant forms. It can protect the environment, fight racism, manage limited resources which are essential to interstate commerce, such as the airways or airwaves; and prevent fraudulent practices. It would be a foolish locality indeed which did not demand such protection, so far as it was strictly interstate.

Even with the national government's most plenary domestic power, the Supreme Court could not find it within its grace to be moderate, balanced, or restrained. Congress has come to control, under the commerce clause, not only interstate commerce and that which significantly affects interstate commerce, but also anything that has anything remotely to do with interstate commerce; that means everything. I recognize that developing a jurisprudence which draws a line between
interstate and intrastate commerce is no simple task. The Court has not even attempted it, but has instead adopted the most simplistic of solutions—anything may be considered interstate commerce. The Court certainly breached that fine line in Katzenbach v. McClung (1964).

In this case the Court declared that Billie's Bar-B-Cue of Birmingham, Alabama could be regulated by the Congress because the food he served, was purchased from a local supplier who procured it from outside the State. This restaurant operated and advertised locally; it even had a take-out service. It therefore did not constitute interstate commerce, nor have any effect on it. The District Court, which the Highest Court had reversed in this decision applied the proper reasoning. Mr. Justice Clark speaking of the lower decision,

As to the Commerce Clause, the court found...that the clause was...a grant of power to regulate intrastate activities, but only to the extent that action on its part is necessary and appropriate to the effective execution of its expressly granted power to regulate interstate commerce. There must be, it said, a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter.

This was consistent with Supreme Court's reasoning in Heart of Atlanta Motel v. United States (1964), where the Court allowed the Congress to regulate a motel which solicited and received considerable business from outside of the state, and which obviously affected other interstate commerce. But Mr. Clark and his colleagues chose to expand this beyond any restrictions in Katzenbach.

Let us move on to more pernicious forms of judicial tyranny. After the Civil War the nation passed three amendments in order to end slavery, and to prevent de facto subjugation of former slaves. It might well be said that the Fourteenth Amendment, the middle one of the three, was intended to protect against legal or official discrimination. But the Supreme Court has used two of its clauses to dismantle the State
republics. The first is the due process, and the second is the equal protection clause. We shall see that the Court's application of these clauses has been inconsistent with the intent of the amendment, with the Constitution generally, and with any concept of logic. The brethren have used the equal protection clause to deprive the people of the right to elect their executive and legislative branches and the due process clause to do the same with respect to the local judiciary.

The Court's approach to the due process clause has come to be known as "incorporation." In short, it is the belief that the Fourteenth Amendment requires the states to abide by the national Bill of Rights. While a majority of the Court has never embraced such a view, it is a policy which, nevertheless, is steadily being implemented by the Court.

The history of the Court's development of the doctrine of "selective incorporation" demonstrates how the federal judiciary stealthily strips the states of all sovereignty. In 1930 Justice Oliver Wendell Holmes, sounded a warning against this trend. He wrote in Baldwin v. Missouri:54

I have not yet adequately expressed the more than anxiety I feel at the ever-increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the amendment was intended to give us carte blanche to embody our economic or social beliefs in its prohibitions...."

There has probably never been a statement of greater insight or foresight issued from the Supreme Court.

In Twining v. New Jersey(1908), the Supreme Court recognized that "it is possible that some of the personal rights guarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be denial of due process."55
An innocent enough statement. That the authors of the Fourteenth Amendment had included the phrase due process in the Amendment, indicates that they thought there were some essentials to a judicial process which are fundamental to the rights which they hoped to preserve for Blacks. But some of these had been acknowledged in the Bill of Rights hardly seems like a far-fetched idea. But historical evidence does not lead us to believe that the Bill of Rights was to be the standard. Raoul Berger writes that, "to read the Bill of Rights into 'privileges and immunities' is therefore no more reasonable than to read a 'Bill of Attainder' into 'habeas corpus.""56

For the Court to mention the Bill of Rights while discussing fundamental right is probably natural, but unfortunate. Because Justices quickly came up with the idea of incorporation. They soon would require the states to implement trial by jury (Duncan v. Louisiana), unanimous jury convictions, Miranda readings; and the Court's views on cruel and unusual punishment (Furman v. Georgia, Coker v. Georgia, Harry Roberts v. Louisiana), unlawful search and seizure (Ohio v. Mapp), and right to counsel (Gideon v. Wainwright). The doctrine became known as "selective incorporation;" in effect it meant that whenever the Court encountered the opportunity, it would incorporate its own views of what due process meant onto the states.

It is ironic indeed that that the Bill of Rights, designed, by those who wanted to protect the states and their people, to keep the national government as a limited government, is now being used for exactly the opposite, as an instrument for the national government to limit the powers of the states. Both those who favor full incorporation and those who have sought to let the states define due process for themselves have expounded on the irrationality
and capriciousness of selective incorporation. But, as noted by Justice Hugo Black, a full incorporationist, the practice of selective incorporation in much more amenable to incorporationist theory than to state sovereignty. The dissensions in these decisions are full of misgivings about the harm to justice done by forcing uniformity on to the nation's judicial systems. Justice Felix Frankfurter is first among his peers in denouncing selective incorporation, as he is first in many things. He writes in his concurrence in Adamson v. California:

A construction which gives to due process no independent function but turns it into a summary of specific provisions of the Bill of Rights (would) deprive the States of opportunity for reforms in legal process designed for extending freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791.

Thus he states that judicial process is a complex matter, deserving sophisticated and intimate analysis across both space and time. He notes the tyranny of arbitrarily assigning naive preconditions to all due process in the nation. And Justice John Harlan continues the fight for federalism valiantly and eloquently. He notes in his Malloy v. Hogan dissent the benefits of federalism and the stagnation which arises from its demise:

The consequence is inevitably disregard of all relevant differences which may exist between state and federal criminal law and its enforcement. The ultimate result 'a compelled uniformity, which is inconsistent with the purposes of our federal system and which is achieved either by encroachment on the State's sovereign powers or by dilution in federal law enforcement of the specific protections in the Bill of Rights.'

He continues in Baldwin v. New York:

(These decisions) demonstrate that the difference between a 'due process' approach, that considers each particular case on its bottom to see whether the right alleged is one 'implicit in the concept of ordered liberty,' and 'selective incorporation' is not an abstract one whereby different verbal formulae achieve the same results. The internal logic of the selective incorporation cannot be respected if the Court is both committed to interpreting faithfully the meaning of the federal Bill of Rights and recognizing the governmental diversity that exists in this country. The
'backlash' in Williams exposes the malaise, for there the Court dilutes a federal guarantee in order to reconcile the logic of 'incorporation,' the 'bet-for-bet and case-for-case' application of the federal right to the States, with the reality of federalism. Thus he points out how this middling uniformity hurts both federal and local due process. Fundamental to the thinking of Frankfurter and Harlan, and alien to the theory of incorporation, is the underlying faith in the people of each state to preserve due process, through their own judiciary and republican government.

If we could come to accept all three of the judicial doctrines just discussed above, the one that follows would be sufficient to demand an alteration in our government. When the federal judiciary chose to reapportion the States according to its own current philosophy of the best form of representation, it destroyed any hope of a peaceful resolution to Justice Douglas's "war." Traditionally apportionment had been held as a political question, and therefore beyond the Court's jurisdiction. But in 1962 the Supreme Court decided Baker v. Carr, and began to change all of that. As is often the case, the holding in Baker v. Carr was not nearly so irresponsible as the dicta were reckless. Justice Potter Stewart approached the subject rather moderately when he wrote, "Contrary to my Brother Harlan, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality of every voter' (or) that there is anything in the Federal Constitution 'to prevent a State acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of the people."61

But Justice Stewart probably should have said that that was not what he was doing. Justices Harlan and Frankfurter responded with shock as they correctly read the implications of the majority opinion. In
this opinion the Court first raise the spectre of "equal protection." It declared itself the "ultimate interpreter of the Constitution."

Probably most significant, it declared that the state governments were not entitled to any consideration of political questions. Thus the Court was able to ignore its own enumeration of possible political questions, which the Court would come to throw to the wind with respect to the states. Further it had taken upon itself the stewardship of determining whether an apportionment plan was reasonable or rational in all of its complexity. Finally, the majority opinion here first sung the praises of one man, one vote, calling it "the basic principle of representative government." In short, the Court had demanded that apportionment be "fair, as defined by whatever court might be hearing the case.

As surely as Harlan and Frankfurter had predicted the Court soon adopted these principles under the guise of the equal protection clause of the Fourteenth Amendment. In Reynolds v. Sims (1964) the Court demanded that both houses of a state's legislature be apportioned according to population— one man, one vote— in order to be fair. Following the reasoning of Baker, the Justices declared this to be the intent of the Constitution. They dismissed with the design of the Congress as having historical significance which has nothing to do with state government. And concerning the only other Constitutional precedent of an electoral scheme, the Court labeled the Electoral College as archaic. Having summarily thrown out any real Constitutional precedent, they were free to force upon states their version of the Constitution.

And this they did to the fullest extent, leaving only Justice Harlan to mourn the demise of the Constitution. Not even Mr. Frankfurter could
predict what ominous form this judicial monster would take on. His
declaration that surely the courts would not take it upon themselves to
reapportion the state legislatures had already been proven false. The
Court had in effect struck down most of the state apportionment plans
in the nation. It had robbed them of the privilege of dealing with the
complexities and history of their own state, by denying the existence of
such. The Court forsook any pretense of protecting the unexpressed will
of the majorities of the states when it decided Lucas v. Colorado
General Assembly on the same day as Reynolds. In this case the people
of Colorado had rejected a system that would have provided equal
popular representation, by a two-to-one margin in a popular referendum.
But the Court had committed itself to this ludicrous doctrine, so it
struck down the Colorado Constitution, saying, "a citizen's rights can
hardly be infringed simply because a majority of the people choose to do
so." 62

The last quote demonstrates how far afield from the Constitution the
Court had strayed. First of all, there is no fundamental right to
vote, like a right to freedom of religion or the pursuit of happiness.
Some people feel that the Fifteenth and Nineteenth Amendments set a
precedent for a right to vote. Actually these amendments recognized the
state's power to limit the franchise by forbidding them to use gender or
race as criteria. If the Fourteenth Amendment had guaranteed a right
to vote, then there would have been no need for the 15th, 19th, and 26th
Amendments. Voters are merely an instrument toward making the government
more responsive, a part of the constitution, like the legislature or the
judiciary. To have one or two houses of the Assembly districted other
than by a population basis, does not deprive the people of their check
on legislation. But it may allow minorities to check the tyranny of a
majority.

My reasoning is of course not at all novel. It is that of virtual representation. It is the idea that one's interest may be represented by different means. It is a concept which has literally dominated Anglo-American tradition. When we broke with the British, we did not reject virtual representation. We merely declared that the preponderance of the evidence suggested that we were not enjoying it. And in 1787, the Constitutional Convention embraced the idea in designing the new government. The Electoral College which a few justices labeled as archaic in the early 1960s elected a president in 1984. Justice Frankfurter's reply in Baker:

Any doubt as to the Supreme Court's antipathy toward the states should now have been put to rest. The fairness principle becomes absolutely farcical when viewed in light of other "unfair" practices which the Court has chosen to ignore. For example, if the Court was really concerned with fairness in government it would have tried to abolish the congressional committee system, which is patently unfair. Both houses of congress are organized into a hierarchical system of committees. At the peak of the house is the Speaker. This structure determines what legislation will come before the House or the Senate,
and those with powerful positions have undue influence over what legislation is passed and what form it takes. These include the Speaker, committee and subcommittee chairmen, and even members of certain key committees. While some representatives have very little influence over the legislative process. A district's representative is at an immediate disadvantage if he is from the minority party, because he will be unable to chair a committee nor have much influence over those who do or the Speaker... gets to determine which committee will get to debate and draft a bill for any particular proposal. This system deprives many districts and states of their effective voice in Congress, making it a little pointless for the Court to worry about how he was selected. It is clear from its history that it is a system developed to serve certain vested interests. But if the Court were to challenge such a clear congressional prerogative, Congress might very well gut the Court. So the Brethren rather cowardly pick on the states.
It is not at all unreasonable to classify much arbitrariness as tyranny. And the first casualties of this tyranny are legitimate government, constitutionalism, and the Constitution. John Harlan concludes in his Reynold dissent that the Court's action "amounts to nothing less than an exercise of the amending power." We remember that the Declaration of Independence reserved this privilege for the people. Judicial supremacy is inconsistent with the idea of a government of limited powers, one restricted by a written constitution. The Court recognized this when it declared that legislative acts must be consistent with the Constitution in order to qualify as law. But when it placed itself above the Constitution, it defeated that very idea.

While the debate over the beneficence of judicial review continues to this day and good arguments have undermined its legitimacy, I am willing to concede it a place in our constitutional system. But it becomes intolerable when stretched to a judicial-supremacy extreme (particularly when exercised over legislatures which have no means of resisting it.)

It is one thing for the court to say that a particular piece of legislation cannot be applied as it was in the case it is hearing, because such an application would be unconstitutional. It is quite another for the Court to try to strike down a whole class of legislation, which may have existed since the time of the ratification of the Constitution, because it has "discovered" a new intent within the Constitution or has perceived a change in the constitution of our society, which has somehow escaped the perception of the Congress.

Abraham Lincoln noted the need for all of the branches of the government
to be subject to the caprices of the Constitutional process. In
the debates with Douglas, he declared:

We do not propose that when Dred Scott has been decided to be a
slave by the court, we, as a mob, will decide him to be free,
We do not propose that, when any other one, or one thousand, shall
be decided by the court to be slaves, we still in any violent way
disturb the rights of property thus settled; but we nevertheless do
oppose that decision as a political rule, which shall be binding
on the voter to vote for nobody who thinks it wrong, which shall
be binding on the members of Congress or the President to favor no
measure that does not actually concur with the principles of the
decision.

If the Congress has it in its power to resist judicial supremacy--
and this is highly questionable--the states do not. The capriciousness
of the Court has already been demonstrated by its treatment of the states.
It has bent or deformed any Constitutional principle to its own liking, whether
it be equal protection, federalism, due process, or interstate commerce;
so that it might destroy other Constitutional provisions. The
Constitution can hardly be considered intact after such an assault.
Perhaps defenders of the Court would suggest that the Constitution is
only meant to be a launching pad for the government. This is
obviously inconsistent with the Court's philosophy, but it is
characteristic for the Court to be deceptive, so perhaps a more Anglican
conception of constitution is at the root of the Court's self-image. But
if we must have a constitution subject to alteration by its own creations,
please let it be the legislature, as is the precedent in England, and since
it is closest to the will of the people. I think the best analysis of
the situation is that the Court cannot have it both ways. Either it must
forsake its supremacy over the Constitution, or it must forsake its
claim that the Congress cannot exceed the Constitution. Without a firm
constitution, a strong court has no legitimacy.

The most prominent damage wrought by the current constitutional
arrangement is the demise of federalism. I have alluded to this often
In this paper, more will elaborate on it. Another principle of good government, which I might have claimed as self-evident in the American sense, in the practice of this paper, is local rule of local affairs. I remained from doing so only because the concept is so central to this thesis, that I feel it needs to be fully explained within the main body of the paper.

It was over this principle more than anything else that the revolutionary war was fought. Andrew Bell while writes:66

The declarations against parliamentary taxation included for protection of the colonies as constituent parts of the empire to tax themselves; they included, therefore, the striving for personal rights and for the recognition of colonial competence. The rights of the individual and the rights of each colony appeared, though logically distinguishable, to rest in some respects on a common foundation. It is important to note that half of the complaints enumerated against the King, in the Declaration of Independence, concern the empire deprivation of colonial governments. The colonies had developed political competency almost over night, perhaps even greater competency than England herself. Edmund Burke noted this in his speech to Parliament calling for reconciliation with the colonies.67 It is rather curious that Georgia was considered by Edmund Burke to be competent enough to govern herself in local affairs in the latter half of the eighteenth century, but that the Supreme Court rejects this concept 200 years later. It points up the incompetence of the Supreme Court. As Burke put it, "Magnanimity in politics, is not seldom the truest wisdom; and a great empire and little minds go ill together."68

In many great empires federalism has occurred naturally--the Roman Empire, the Ottoman Empire, etc.--because they lacked the technology to oversee all aspects of society efficiently. The American Constitution of 1787 tried to institutionalize the natural benefits of a federal...
system, the current status of the Supreme Court has deprived us of the benefits of federalism. Included among these are the benefits of variety. The multifarious nature of our government has bred great political progress in the past. Many examples of this were noted in the preface. And Justices Harlan and Frankfurter noted the stagnating effect uniformity has on the development of the law and due process.

The most repugnant consequence of this uniformity is the installation of a stagnant, self-perpetuating bureaucracy. This bureaucracy is of course unresponsive to the desires of the people. Richard Neustadt notes in his book, *Presidential Power* how presidents come to power, even with a popular mandate, and have great difficulty initiating their programs because they meet resistance from a bureaucracy with its own agenda. Instead of a citizen-legislature providing for local needs, we have a paternalistic army of federal agents which set the local agenda, except for those cases where the Court has assumed this prerogative. This is the very antithesis of self-government. One of the goals of our government is to inculcate in the people the competency to govern themselves. Self-governance is more than the masses going to the polls every two or four years, but must include individuals taking societal responsibilities upon themselves. Bureaucracy discourages this. Federalism provides a format where it can be developed, by allowing the States to govern affairs at a state level, and by allowing them to constitute themselves in a manner which will provide and develop greater autonomy and responsibility at an increasingly-more-intimate level. Any hope for this is diminished with Reynolds v. Sims.

The current relationship between the federal courts and the states stifles the democratic process and rapes republican government. The
Supreme Court has put itself in a position on any local issue. It has demonstrated a propensity for disbanding legislatures and forcing items on their agenda. In forcing on the states one man, one vote, it has created a situation where a majority interest may dominate a minority in the statehouse. Of course the Court has set itself up as the defender of minority rights. Though I am confident that the Court would like to do so, it simply cannot even attempt to protect these minorities from an unfair allocation of public resources. In the State of Illinois, the Chicago area has a two-to-one majority. On any issue where the suburbs and the City have a common interest, they can ram it through the political process, over any and all objections from the whole of the Downstate. These two regions of the State have a long history of competition and animosity.

This is currently the most tragic aspect of the Court’s activism—its inability to resolve complex issues with the competence of the political branches of our governments. For example its inability to comprehend the complexities of virtual representation. It is true that our republican institutions are not perfect, but the Court’s imposition of naive formulae has only served to impede their development.

The actions of the Court are often justified because they were relieving the impatience of a large segment of the population with the slowness of the political process. McClaughlin tells us that in the late 1760s Parliament too was impatient, and “it is the nature of fatuous high-handedness to be impatient.” While it would be inappropriate to label the aggrieved parties as high-handed, it is a perfect appellation for the Supreme Court. History is littered with republics giving way to the institution most willing to satisfy current demand: the Roman Republic, the First French Republic, Weimar
Republic, etc. And in the third world today it is all too common to have the military seize power. It just happened in Sudan, and the people took to the streets in celebration. I do not wish to pass judgement on these governments in their circumstances, but the Supreme Court’s pattern is analogous to these usurpations, and these are solutions incompatible with the goals of the American tradition of constitution. Ours was a Revolution of the people and reconstitution by convention and ratification, not by a party, the military, an emperor or king, or a group of jurists. The Court has in short usurped the sovereign prerogative of the people to constitute their own communities.

Summarizing the injury done by the Supreme Court in its jurisdiction over the states, we may conclude that it has shaken the very foundations of the Constitution: limited government, federalism, virtual representation, the right of the people to abolish and reform their government, and respect for governments long-established. While the Court has not yet become as oppressive as King George III, any moderation it still maintains is aggravated by the fact that it, unlike George, is a usurper of the throne. Furthermore, there are specific parallels between Jefferson’s litany of complaints against the crown and the crimes of the Court. To paraphrase Thomas Jefferson:

The History of (the Supreme Court of the United States) is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, Facts be submitted to a candid world. (It) has refused their Assent to Laws, most wholesome and necessary for public good. (It) has dissolved Representative Houses repeatedly, etc. It (has) obstructed the Administration of Justice, by refusing (its) Assent to Laws for establishing Judiciary powers. (The federal government in general) has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out our substance. For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments; For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.
Reining in the judiciary has proven to be very difficult. But checks on the judiciary are not unprecedented. The history of such events shows us that popular sentiment can rise up and reverse an unpopular court action. But these measures are only piecemeal and address only the unpopularity of the court's action and not the impropriety of it. The Court has learned to hide its time and wait for an opportune time to establish long-term precedent on a current popular whim which corresponds with their own political philosophy. But though the Supreme Court has learned quite a bit about avoiding taking a beating in the political process, political opinion is once again developing an anti-Court sentiment. This time as the trend foments, action should be directed toward the process instead of the product.

What is needed is fundamental change in our political constitution which will make the Supreme Court subject to laws and considerate of local needs and interests.

At this time there are two different means available for adjusting the Supreme Court's power—statute and amendment to the Constitution. Congress has the power to limit the Court's appellate jurisdiction. The Court, itself, has several times admitted the Congress to have this power. But Article III, section 2 does not give to the Congress such discretion over the Court's original jurisdiction, which includes "all Cases...in which a State shall be, Party,..." Several proposals, to limit the Court's jurisdiction, with regard to the areas are discussed in this paper, have already been made. But any such proposals as it is applied to the states could be circumvented by a Court claiming original jurisdiction. This severely limits the effectiveness of such a
statute. In addition Congress is reluctant to do this for a few very good reasons. They do not want to rob the people of part of their due process. They do not want to be politically manipulating litigation. And if the Court is using current popular opinion to usurp authority, then Congress is ill-equipped to react. Hence, Congress has only once moderately restricted the Supreme Court's jurisdiction. Further there is little hope in the Congress uniting itself for the sake of the states.

But let us look at some of these proposals. The thrust of such legislation is instructive, even if its feasibility and effectiveness are questionable. On October 1, 1982 Senator John East introduced the Judicial Reform Act. This proposal focuses mainly on the doctrine of incorporation. It would forbid the Court to rule on any case that involved an issue of state due process. Other legislation might forbid the Court to hear cases which involve questions of apportionment.

Another type of legislation which is gaining in popularity is that in which Congress tries to redefine the terms of the Constitution. One example of this is Senator Jesse Helms's Human Life Statute, which defines person or citizen in such a way as to include feti, thus making abortion murder. Without commenting on the wisdom of this particular bill, we should note that such a measure would be the most awkward step in the most twisted and peculiar path of legislation imaginable. I agree that the people through their legislators should work out such complex social issues as abortion. The debates and resolution of what are essentially issues of how society will take shape should not begin and end in the Court. But if the legislature is to have power to rule on such questions it should not have to preface each one by defining the issues in a separate statute. Let us look at how ludicrous all of
1. A state legislature or Congress passes a law.

2. 30 years later the Supreme Court discovers a right within the Bill of Rights (which the framers and everyone else has overlooked for 150 years) and overturns this law and all like it.

3. The legislatures and executives of the nation abide by this ruling, but Congress passes a law which says that the Court was wrong. The next move is the Court's. We cannot be sure what they will do, but the odds are that they will declare the second law unconstitutional also.

The only advantage to such a law is that it forces the issue on the Court. They are forced to deal with the fact that legislatures do have a legitimate interest in dealing with these issues. If the results are not changed, the bench will at least have to reevaluate some of their simplistic holdings, such as Roe v. Wade.

There is one way in which a reining in of the Court might be accomplished with legislation. Congress might engage in a general assault on its jurisdiction. The Congress could just start stripping the Court of all appellate jurisdiction until it became less activist. And this could be done without impairing due process. If it is felt that a type of case deserves greater consideration through the possibility of more appeals, Congress can just create more courts to handle the final appeals. The president and the Senate could conduct the appointment process just as vigorously as they do Supreme Court selections. I think that providing an alternative judicial authority or authorities is the best way to counter the Court's excesses.

The best argument against this is that a multiplicity of courts would fragment and base constitutional and legal doctrines. In countering this,
I begin by pointing out that constitutional doctrine was meant to be
developed through the influence of diverse institutions, and interests,
including legislative, judicial, executive, local and national. And
there is no risk in losing any foundation of consistency within
our legal system. I think that the multiplicity of lower courts in
this nation have proven more consistent amongst themselves, than the
Supreme Court has alone. We currently have a Court which finds
employing publicly hired teachers to teach courses in a building
where religion is also taught an unconstitutional "establishment of
religion." But it finds the employment of military chaplains
sufficiently secular in nature. (Note that one is a state employee
and the other an employee of the federal government.) Unfortunately the
Congress has no stomach for such aggressive actions.

Amending the Constitution, while it is a more burdensome process
than passing a bill, is preferable in that it is permanent, and the
states can influence even dominate the process. A review of the
amendment process will reveal how a defense of states' rights might
be erected against judicial usurpation. Amending the Constitution
is a two-tiered process. First an amendment must be proposed and then
it must be ratified. At each level there are two permissible modes
of operation.

An amendment may be proposed by a two-thirds vote in both of the
houses of Congress. Or it may be proposed by a Convention for
specifically that purpose, called by Congress when petitioned by
the legislatures of two-thirds of all of the states. The latter method
is preferable, though not perfect, in that it increases the states'
role and decreases the federal government's. No amendment has ever
succeeded in being proposed by this method, much less ratified later.
on. But a peculiar history explains the non-use of this mode of
proposition. Congress has the discretion to determine when two-thirds
of the states have united together to demand a Convention be called.
Congress has used this discretion to try to monopolize the proposing
process, imposing the strictest standards on any attempt to call for
a convention. The Congress has used time elapsed between the first
and last application to deny the need for a convention. It has declared
that requests for a convention based specific complaints, requests, or
needs must be based on exactly the same complaint in order to qualify
together. In fact, the Congress has gone as far as to require that
a group of applications to qualify as cosignators in a request for a
convention, they must contain exactly the same language. Now that
these standards have been established, conforming to them will be
less difficult, but except for a reasonable time requirement, none
of these were intended in Article V of the Constitution. The language
of Article V clearly intends the initiative to come from the states, and
for the convention—not the states—to propose amendments. This mode
was designed to measure grass-roots dissatisfaction and then respond to
it with expertise and lively debate at a national level. Congress'
role in calling the Convention is a technical necessity, as it is the
only institution under our Constitution capable of calling such a
convention.

The purpose of using a convention as opposed to a legislature is
to avoid the pressures of current political concerns. Just because some
overzealous state legislatures chose to suggest amendments which the
convention should propose is no reason for the Congress to dilute and
qualify their applications. Congress might claim that the states
themselves placed the qualifications on their applications, until it
demanded that these applications be verbally identical. Here we have
a clear violation of the intent and language of the Constitution. The Supreme Court unsurprisingly has upheld the Congress' use of this power.

We are currently close to achieving the necessary two-thirds states in calling for an amendment to require a balanced federal budget. Hence impassioned warnings are being sounded about the perils of a Constitutional Convention. Similar arguments were given in the early 1960s. At the root of all of them is a lack of confidence in today's society to constitute its own government. The eminent Gerald Gunther of Stanford University expresses some of these fears in an interview with USA Today magazine. At first he lauds the concept as inspiring, but from there he follows a line of reasoning which precludes any use of a convention. He claims that the states should debate all possible amendments a runaway convention might propose before they go on to call for a constitutional convention. In his mind the states must be willing to risk complete dissolution of the Constitution over this particular problem before they should apply for such a convention. He complains that since the states have not done so, sophisticated debate of how the Constitution should be amended is beginning much too late in the process. I reiterate that the purpose of the state applications is to measure grass-roots discontent. There are more safeguards against irresponsibility in this mode of proposition than in having the Congress propose amendments. Congress will be designing the convention. Congress itself might propose all kinds of crazy amendments. This mode of proposition allows for checks by Congress, the convention, and the states twice. It is very unlikely that three-fourths of the state legislatures will push through ratifications of an amendment to eliminate the Presidency because of election-year fever, as Gunther suggests. Actually our one experience with a
constitutional convention has proven rather successful, and it was a runaway convention.

The two methods of ratifications are the same except that in the one amendment is ratified by the state legislatures and in the other by state convention. It must be ratified by three-fourths of the states. Once again conventions might be called in order to avoid a conflict of current political interests. Only once have state conventions been used to ratify an amendment—the Twenty-first, the repeal of prohibition. Presumably state legislatures can be trusted to seek to increase their own power in the nation. But we might want to consider conventions when an issue like Baker v. Carr is at stake, because the legislatures might feel threatened.

There is an inexhaustible source of ideas on how the Constitution should be amended. And there a few which have been suggested in the past which are of interest to us. Many of these seek to rein in the Supreme Court or protect states' rights or both. We will look at as many of these as possible, as we explore a way to try to rectify this local-national, legislative-judicial imbalance. On the other hand, we will ignore George Will's call for an amendment to make English the official language of the nation. These suggested amendments can be usefully divided into three categories: 1.) those which seek to reverse specific court cases, 2.) those which seek to limit the Court's jurisdiction or redirect its focus, 3.) and those which seek radical change in the overall structure of our government. The last group are the riskiest, but also have the greatest potential for success.

Those suggested amendments which address a specific case or issue include ant-abortion amendments, anti-busing amendments, and prayer-in-school amendments. While such amendments are of great
interest to those who take special offense to those court rulings, to afford each one an amendment is to clutter up the Constitution and to miss the point. Most proponents of these amendments are not nearly so concerned with the Supreme Court’s interference in the matter, as with the fact that the Court came down on the wrong side of the issue. They would be just as vehemently opposed to their state and local governments instituting forced integration, legal abortion, or prohibition against school prayer. Hence their amendments have a tendency to be too specific and go too far. Such as the suggested amendment which would make federal citizens. Having to reverse every judicial decision with a specific amendment is bad government, because it is slow and awkward. Still a few of these would be better than nothing, as they might for the Court’s state of mind.

The more general of amendments are much more preferable in that they go closer to the source of the problem and will most likely address the specific grievances anyway. These amendments clarify earlier statements in the Constitution and should cause the Court to abandon a particular doctrine or approach. An example of this is a Federalism Amendment which has been advocated by Professor Cary L. McDowell of Dickinson College. While McDowell has not written the language of this would-be amendment, its purpose is to do away with the theory of "incorporation." And it would read something like, "Nothing in the Constitution or its Amendments should be read in such a manner as to apply the Bill of Rights to the State or local governments."

McDowell spells out the advantages of this approach for us:

Thus what lies at the heart of the current problem is the deterioration of the principle of federalism as a source of restraint on the exercise of judicial power.

Prayer in public schools is only one policy choice; the school prayer amendment seeks only to substitute one policy choice for
another. It does not reach to the level of principle. Like the amendments dealing with abortion, busing, criminal justice and legislative apportionment, the school prayer amendment seeks only to treat symptoms at the expense of curing causes. But there is another way.

By...advocating a federalism amendment, a stronger case can be made for achieving with one amendment the same results that the collection of amendments currently being tossed about are designed to secure.

A federalism amendment would seek to nullify the judicially created notion of "incorporation" by clearly stating that the Bill of Rights applies only to the national government.... Such an amendment would be potent indeed. While it would leave the Court room for creative interpretation in other areas, it would strike at the heart of much of the Court's activism. This Federalism Amendment would affect the Court's meddling in school prayer, abortion, freedom of the press, affirmative action, and most importantly state and local due process. While the Court might find imaginative ways to get at some of these, it would be forced to pause, pay respect to an unambiguous Constitutional directive, and reorient itself. This would constitute quite a victory for federalism. Similar amendments might be passed clarifying national supremacy and the equal protection clause of the Fourteenth Amendment.

The final set of would-be amendments we will review have a major advantage in that there is the potential to restructure our legal and governmental systems so that they are more balanced. But an amendment which alters, creates, or dismantles institutions, as is being suggested, would not immediately reverse past excess which have become legal precedent. But I am not sure that this is necessary. The results of Supreme Court activism are not always pernicious in themselves. And a more balanced system should have little trouble righting itself toward a course of government in line with the wishes and better second thoughts of the people.
In the wake of Baker v. Carr and the other early apportionment cases, there was a move to create an alternative judicial authority for cases involving issues of federalism. It was labeled the Court of the Union. It was being promoted alongside two other amendments: one would reverse Baker v. Carr and the third would allow the states to amend the Constitution on their own. The last of these goes too far, I think, but the other two are an example of how two amendments might be combined to completely reverse the trend toward Supreme Court domination of the states. I am particularly excited about the proposal for a Court of the Union. Under that proposal it would consist of all of the State Chief Justices. This suggestion was pretty much laughed down when it first became publicized, but the assumptions underlying its designation as ludicrous concern its radical and uncertain nature, not its merit as a useful institution. I believe this idea can be made to work.

It is difficult to address the concerns of those who opposed the idea, because they do not enunciate them, but merely dismiss the Court of the Union with belittling epithets. Walter Lippmann calls it "patently foolish." Reporter magazine—"too silly for even those who tend to silliness." But Nation magazine lets the cat out of the bag. It calls the idea "simply ridiculous," but then continues, "one which could have mustered interesting arguments in the Federalist period, but hardly in this one." In 1787 the people may constitute their own government; in 1963 the task must be left to nine "wise" men. It 1787 it is plausible to have a national government of limited powers and to have local sovereignty protected and respected; in 1963 these men favor nationalization of power and judicial activism, so there are no "interesting" arguments to support counter-measures. Speaking of
silly. Once again they try to shroud the real issues in modern-versus-archaic sophistry. It is not the Federalist period they oppose, which produced the Constitution they claim to be protecting, but federalism, an idea whose vitality should increase as modernization further complicates society and its maintainence.

The real questions which this Court of the Union raises deal more with reaching a feasible design for the Court. How do you get fifty judges from all over the country together at the same time? How do you keep this Court from completely replacing the Supreme Court? And finally, how do fifty different persons come together to produce sound legal and constitutional precedent.

None of these matters are really difficult. The first two can be dealt with in the amendment, and actually answer one another. We keep the Court of the Union from getting out of hand by limiting the amount of time it can sit to hear cases. Let’s say it just sits for one month. It can hear and decide only a few cases. And any state can rearrange its own judicial calendar to let their chief justice go for that month. Travel in our era will of course not be a problem. In order to produce some semblance of precedent, the Court would have to establish greater discipline upon itself; perhaps limiting the number of opinions to between two and five.

Another fear is perhaps that this Court constructed as such would not have a significant enough influence to be effective. We must remember that constitutional balance is a subtle and delicate thing. If the Court reversed just one major case and its progeny a year, it could have wiped out every decision discussed in this paper and dozens more.

Other possible amendments which I have not yet mentioned, because I believe they are misdirected, include establishing popular referenda on
the retention of federal judges, and repealing the Fourteenth Amendment. I think the best check on judicial excess is an alternative judicial authority which can overturn improprieties. Litigation should not be subject to popular whim. Repealing the Fourteenth Amendment would reopen the door to discrimination. The Amendment is perhaps poorly drafted. It only needs to be clarified.

I am impressed that there are a number of courses of action that might be derived from the above information and successfully implemented. Any move in the right direction will put the Supreme Court on its guard.
Now is an appropriate time to consider and execute revisions to our constitution. The Supreme Court continues to accrue more power and to hammer away at the states. Just this year the Supreme Court reversed National League of Cities v. Usery, the last weak attempt to protect some state sovereignty, in Garcia v. San Antonio Metropolitan Transit Authority. This decision allowed the Congress to regulate how the states and municipalities deal with their employees.87

While I personally favor a Court of the Union, I realize that any changes which are affected will have to be done within our political system and may need to be less radical. Therefore, I have included a whole gamut of alternatives. But the prospects for successfully implementing federalist reform are as good now as they have ever been. The nation is increasingly more dissatisfied with the courts' actions. A Heritage Foundation survey found that in 1981 77.3% of the people felt that the federal judiciary did not represent their views, 73.7% favored having federal judges undergo periodic reconfirmation and 68% would support direct election of federal judges.88 Almost every segment of the nation has or may have reason to be offended by the federal judiciary's activism. 70% of the nation favors prayer in public schools. The Courts have recently struck down local affirmative action programs, while simultaneously insisting that Chicago wards have super-majorities of minorities in order to insure that one of their number be elected. Since the courts have recently struck down federal campaign-spending reforms, we can be sure that any state efforts along those lines will be short-lived. Those who live in urban areas have taken offense to the Court's hindering criminal prosecution in their communities. And rural residents have lost most of their political power.
We can also take heart in the fact that a president who at least pays lip service to federalism has been elected twice in electoral landslides.

Most of the fears conjured up by naysayers and sophists are hobgoblins. The nation did not reel in despotism when governmental affairs were dominated by local influences. We will not now. Totalitarianism can only come from a centralized power. It is true that anarchy constitutes tyranny itself and paves the way for despotic government, but nothing suggested here comes close to this. A multiplicity of sovereigns in this nation has never constituted anarchy.

We as a people have a choice between vigorous self-government or submitting to a paternalistic bureaucracy and judiciary. We can either bravely reconstitute our system of government or allow the federal courts to define the principles we as a society will operate under and the bureaucracy spell out the specifics of our lives. The prospect of attempting to come one step closer to a Jeffersonian Utopia of citizen-legislators in this complex modern era should be exciting. And for a nation which beat the British of the late 18th century in battle, and in its infancy formed a compact which has survived the most tumultuous 200 years in history, it should be a cake walk.
FOOTNOTES

(1) *The Founders' Constitution*, Phillip Kurland and Ralph Lerner, p. 311. My copy of the text is unpublished, though I understand that the University of Chicago Press of Chicago has just recently agreed to publish the work.


(3) ibid.

(4) Kurland and Lerner, pp. 33-34.

(5) ibid., pp. 47-53.

(6) ibid., pp. 35-40.

(7) Though the framers of the Constitution carefully avoided the word "slavery," Art. I, sec. 9, clause 1 prohibits Congress from restricting the slave trade before the year 1808, and Art. I, sec. 2 recognizes slaves as 3/5 of a person for the purpose of taxes and apportionment.


(9) *Cotton is King*, E. N. Elliot, New York: Negro Universities Press, p. 35.

(10) Dred Scott v. Sanford.

(11) E. N. Elliot does an excellent job of showing the economic correlation between the rise of the cotton industry and slavery in the South.


(13) ibid.

(14) I do not mean to intimate in any way that Lincoln was a "Northeastern plutocrat." He did not write the platform and was among the most tolerant of men.

(15) I say "somewhat" because only two to three percent of the Mormon actually practiced polygamy. The term polygamy is actually a misnomer. What the Mormons practiced was polygamy, limiting plural marriages to men. Flexner, p. 163.


(17) Actually the government under the Articles of Confederation had a better record of dealing with non-sovereigns; note the Northwest Territories Ordinance.


(20) ibid., p. 49.

(21) ibid., p. 54.

(22) Kurland and Lerner, Vol.1, Chapt. 4, p. 272.

(23) ibid.


(27) ibid. The Senate failed to convict Chase, and it is generally thought that if they had succeeded, the other Federalist judges would fail soon thereafter.

(28) NLRB v. Jones & Laughlin Steel Corporation 301 U.S. 1, 57 S. Ct. 615; 81 L. Ed, 893 (1937). See also Cushman, p. 229.

(29) It has been postulated by some that the Presidency has been steadily gaining in power over the years, as technology demands more dispatch in policy making. I take no exception with this theory; it is probably inevitable.

(30) Federalist #81, Alexander Hamilton.

(31) ibid.

(32) ibid.

(33) ibid.


(35) ibid.

(36) Federalist #46, James Madison.

(37) Federalist #28, Alexander Hamilton.

(38) Federalist #46, James Madison.

(39) Federalist #82, Alexander Hamilton.

(40) McLaughlin, p. 454.
(41) ibid.
(42) "The Tenth Amendment". Walter Berns.
(43) McLaughlin, p. 300.
(44) McCulloch v. Maryland 4 Wheaton 316; 4 L. Ed. 579 (1819). See also Cushman, p. 166.
(45) ibid.
(46) Cushman, p. 177.
(47) ibid.
(48) ibid., p. 175.
(49) ibid.
(50) Article 1, Section 8, Clause 3, The Constitution of the United States of America.
(52) ibid.
(57) Twining v. New Jersey, Black, J., dissent. See also Lockhart, et. al., p. 105.
(62) Cushman, p. 152.
(63) Baker v. Carr.
Committees in Congress, Steven Smith and Christopher Deering, Washington: Congressional Quarterly Inc., 1984, pp. 7-34.

McLaughlin, p. 581.

ibid, p. 6.

ibid, p. 64.

ibid.


McLaughlin, p. 66.

Weyrich & Marshner, p. 199.

ibid., p. 201.


ibid., p. 200.

The wisdom of it is in doubt. I would produce problems in taxing, census, and medical ethics.

Even abortion opponents have become disillusioned with Roe v. Wade, as it becomes more inoperable as feti become viable at an earlier age.

USA Today, April, 1984, pp. 1-4.

"In Defense of the Mother Tongue", George F. Will, Newsweek, July 8, 1985, p. 76.

Weyrich and Marshner, p. 204.

ibid.

Burnham, p. 532.


Weyrich and Marshner, p. 199.

(87) "Reversing 'New Federalism'". *Newsweek*, March 4, 1985, p. 20.


(89) Actually, he has hurt federalism by signing a bill that would withhold funds from states that did not raise their drinking age to 21.