I

The Development of the Constitution

NOTE

In *Marbury* v. *Madison* the Supreme Court for the first time declared an Act of Congress unconstitutional. From 1803 to the present, the Court, exercising the power of judicial review, has played the role of arbiter in American constitutional development.

Judicial review was little discussed at the convention of 1787. What discussion there was arose in connection with the veto power. The Virginia plan, for example, provided that 'the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate . . . and that the dissent of the said Council shall amount to a rejection. . .'[1] Similar proposals were made at different times during the proceedings, but each was rejected.

Although opposed to a council of revision, a number of convention leaders assumed the power of courts to invalidate legislative acts. Gerry spoke of the power of judges to decide on the constitutionality of laws. Rufus King declared that the judges 'will no doubt stop the operation of such [laws] as shall appear repugnant to the constitution.'[2] And Madison was of the opinion that a 'law violating a constitution established by the people themselves, would be considered by the Judges as null & void.'[3]

By 1787 the states already had a history of judicial review. Gerry, speaking in the convention, asserted that in 'some States the Judges had [actually] set aside laws as being agst. the Constitution. This was done too with general approbation.'[4] Between 1780 and 1787 there had been a number of decisions or dicta in the state courts to the effect that an unconstitutional legislative act might be disregarded by the courts.[5]

There had developed in the colonies and later in the states the notion of a fundamental law or basic constitution as a source of governmental power and individual liberty. 'From the day in 1639,' says Benjamin Wright, 'when the settlers in Connecticut gave to the modern world its first constitution[6] adopted by popular authority, it gradually became increasingly clear that in this country the theory and practice of written constitutions was to occupy a position of importance. . .'[7] Again and again in the struggle with Britain the colonists

[1] *The Records of the Federal Convention of* 1787, ed. by Max Farrand, New Haven, 1937, I, p. 21.
[2] Ibid. p. 109.
[3] Ibid. II, p. 93.
[4] Ibid. I, p. 97.
[5] See Thayer, James Bradley, *Cases on Constitutional Law*, Cambridge, 1895, I, pp. 55-80.
[6] The Fundamental Orders of Connecticut.
[7] *The Growth of American Constitutional Law*, New York, 1942, p. 11.

asserted the existence of a fundamental law superior to Parliament and the executive. 'There are, my Lord,' so ran a letter from the Massachusetts House to the Earl of Shelburne in protest against the Townshend Acts of 1767, 'fundamental rules of the constitution, which it is humbly presumed, neither the supreme legislative nor the supreme executive can alter. In all free states, the constitution is fixed; it is from thence, that the legislative derives its authority; therefore it cannot change the constitution without destroying its own foundation.'[8] A Massachusetts circular letter written by Sam Adams contained the proposition that 'the constitution ascertains & limits both Sovereignty and allegiance, &, therefore, his Majesty's American subjects, who acknowledge themselves bound by the Ties of Allegiance, have an equitable Claim to the full enjoyment of the fundamental Rules of the British Constitution. . .'[9] The Pennsylvania Resolutions of 1774, protesting against the closing of the port of Boston, set forth a hope for the re-establishment of 'peace and harmony between Great Britain and these colonies, on a constitutional foundation.'[10] The framers of the Constitution might well have assumed that the document they were building, if adopted, would be the source of governmental power and the guarantor of liberty, and that it would be superior to the legislature, the executive, and the judiciary; and some of the framers were of the opinion that if the legislature enacted laws contrary to the basic instrument, the courts would declare them null and void. But such power was not expressly given the federal judiciary.

The Supreme Court under the chief-justiceship of John Marshall laid the foundation of judicial review in the American constitutional system. This was in the case of *Marbury* v. *Madison,* decided in 1803. In accordance with an act of Congress, William Marbury and forty-one others were appointed by President Adams justices of the peace for the District of Columbia. The commissions were signed and the seal of the United States affixed to them by the Secretary of State, John Marshall. The commissions, however, were not delivered; and when Jefferson became President he ordered his Secretary of State, James Madison, to issue commissions to twenty-five of the justices but to withhold the remaining seventeen. Of the latter, four, including Marbury, instituted an original mandamus proceeding in the Supreme Court on the basis of section 13 of the Judiciary Act of 1789. This section authorized the Supreme Court to issue 'writs of mandamus[11] in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under authority of the United States.' The plaintiffs moved for a rule to Secretary of State Madison to show cause why a mandamus should not issue commanding the delivery of the commissions to the applicants.

[8] *Documents of American History,* ed. by Henry Steele Commager, New York, 1935, p. 65.
[9] Ibid. p. 66.
[10] Ibid. p. 76.
[11] A prerogative writ issued by a court requiring the person (in this case a public officer) to whom it is addressed to do some act of a non-discretionary nature therein specified.

MARBURY v. MADISON

1 Cranch 137 (1803)

At the last term, viz., December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe and William Harper, by their counsel, Charles Lee, Esq., late attorney-general of the United States, severally moved the court for a rule on James Madison, secretary of state of the United States, to show cause why a *mandamus* should not issue, commanding him to cause to be delivered to them, respectively, their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate, for their advice and consent, to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president, appointing them justices, &c., and that the seal of the United States was in due form affixed to the said commissions, by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison, as secretary of state of the United States, at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory explanation has not been given, in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate, for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate. Whereupon, a rule was laid, to show cause on the fourth day of this term. . .

Afterwards, on the 24th February, the following opinion of the court was delivered by the Chief Justice:

OPINION OF THE COURT.—At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded. These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? . . .

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was ap-

pointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . .

It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years. 2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. The nature of the writ. . .

This, then, is a plain case for a *mandamus,* either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court? . . .

[The Court then decided that power to issue mandamus in this case was not within the original jurisdiction of the Supreme Court under Art. III, § 2, of the Constitution.]

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to

different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.

Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in

reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that 'no tax or duty shall be laid on articles exported from any state.' Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares 'that no bill of attainder or *ex post facto* law shall be passed.' If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

'No person,' says the constitution, 'shall be convicted of treason, unless on the testimony of two witnesses to the same *overt* act, or on confession in open court.' Here, the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ——, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the

laws of the United States, generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

NOTE

Whether the referendum provisions of the state constitutions and statutes are applicable in the adoption or rejection of amendments to the federal Constitution was the question before the Supreme Court in *Hawke* v. *Smith*.

Aware that the instrument of government they were building would contain defects, and that, whatever its nature, it would have to meet the needs of succeeding generations, the framers of the Constitution accepted unanimously the principle 'That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary.'[1] This would seem an obvious principle to adopt, but several members of the convention at first did not appreciate the need of an amending clause.

The method of amendment had yet to be decided. Originally, the delegates approved a plan whereby the national legislature, on application of the legislatures of two-thirds of the states, would call a convention for the purpose of amending the Constitution. The initiative was to rest with the states alone. Dissatisfaction with the method proposed led to its reconsideration.

It was Madison who proposed that 'The Legislature of the U—S—whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.'[2]

Rutledge of South Carolina approved Madison's proposal in general but 'he never could agree to give a power by which the articles relating to slaves might be altered by the States not interested in that property. . .'[3] To meet this objection the following proviso was added to Madison's proposition: 'provided that no amendments which may be made prior to the year 1808. shall in any manner affect the 4 & 5 sections of the VII article.'[4] With this change, Madison's proposal was approved.

[1] *The Records of the Federal Convention of* 1787, ed. by Max Farrand, New Haven, 1937, II, p. 84.
[2] Ibid. p. 559.
[3] Ibid.
[4] Ibid. The seventh article of a draft of the Constitution prepared by the Committee of Detail and reported to the convention, 6 August 1787. See *The Records of the Federal Convention of* 1787, op. cit. II, pp. 177-89. Section 4 provided that 'No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.' Section 5 provided that 'No capitation tax shall be laid, unless in proportion to the Census hereinbefore directed to be taken.' Ibid. p. 183.

Two days previous to the final adjournment of the convention the amending article was reconsidered and two provisions added. In addition to the power of Congress to propose amendments, Congress was to call a convention for the purpose of proposing amendments when called upon to do so by two-thirds of the state legislatures. As an added safeguard to the states it was provided 'that no State, without its consent shall be deprived of its equal suffrage in the Senate.'[5] Thus, Madison's proposition as amended became Article v.

Formal amendment of the Constitution has been deemed by some writers to be slow and cumbersome. One scholar holds that the Constitution 'was purposely made most difficult to amend.'[6] Be this as it may, the procedure adopted in 1787 was a step forward. Though the Articles of Confederation did provide for formal change, amendment could be accomplished only by the unanimous approval of Congress and confirmation by the legislatures of all the states. Some of the state constitutions, for example, those of Virginia, New Jersey, and New York, provided no means of amendment whatsoever.[7]

The people of the colonies had had little or no experience with amending processes.[8] Of all the colonial charters only Pennsylvania's *Frame of Government* incorporated a means of amendment. *The Frame of Government* of 1682-3 required that the charter was not to be changed, altered, or diminished in form or effect, 'without the consent of the Governor, his heirs, or assigns, and six parts of seven of the said freemen in provincial Council and General Assembly.'[9] This would seem to be the first instance of a definite amending procedure in American government.

The framers of the Constitution were seeking stability in government; as Madison declared in the *Federalist,* they provided a mode of amendment that would guard 'equally against that extreme facility, which would render the Constitution too mutable'; at the same time, they wished to avoid that extreme difficulty of amendment 'which might perpetuate its discovered faults.'

The Supreme Court considered the validity of the Eleventh Amendment in the early case of *Hollingsworth* v. *Virginia.*[10] Mr. Justice Chase declared without argument that a proposed amendment need not be submitted to the President for approval. In the *National Prohibition Cases*[11] the Court interpreted the two-thirds of both Houses requirement in proposing amendments to mean two-thirds of the members present, assuming the presence of a quorum. In *Dillon* v. *Gloss*[12] it was decided that Congress could impose a time-limit upon ratification. In *United States* v. *Sprague*[13] the Court held that Congress alone decided the

[5] Ibid. p. 631.

[6] Finer, Herman, *The Theory and Practice of Modern Government,* New York, 1934, pp. 118-19.

[7] Dodd, Walter Fairleigh, *The Revision and Amendment of State Constitutions,* Baltimore, 1910, p. 27.

[8] Jameson, John Alexander, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding,* Chicago, 1887, pp. 547-8.

[9] Thorpe, Francis Newton, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws,* Washington, 1909, p. 3059.

[10] 3 Dall. 378 (1798).

[11] 253 U.S. 350 (1920).

[12] 256 U.S. 368 (1921).

[13] 282 U.S. 716 (1931).

mode of ratification. In *Leser* v. *Garnett*[14] it was contended that the amending power did not extend to the subject-matter of the Nineteenth Amendment. The argument was that the Nineteenth Amendment, which was not ratified by the State of Maryland, so greatly added to the electorate as to destroy the political autonomy of the state. The Court rejected this contention. How long a proposed amendment shall be subject to ratification was held in *Coleman* v. *Miller*[15] to be a political question and thus for Congress to decide.

An amendment to the Ohio Constitution adopted in 1918 provided that 'The people also reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States.' The Eighteenth Amendment was proposed by Congress in December 1917, and the General Assembly of Ohio ratified the proposed amendment in January 1919. The Secretary of State of the United States proclaimed the adoption of the amendment on 29 January 1919, naming Ohio as one of the thirty-six ratifying States.

The plaintiff in error (plaintiff in the lower court), Hawke, sought an injunction to enjoin the Secretary of State of Ohio, Smith, from spending public money in printing ballots for submission of a referendum to the voters of the state on the action of the General Assembly in ratifying the Eighteenth Amendment. A demurrer to the petition was sustained in the Court of Common Pleas. Its judgment was affirmed by the Court of Appeals of Franklin County. The Supreme Court of Ohio affirmed the judgment of the lower court. Appeal was then made to the Supreme Court of the United States.

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253 U.S. 221 (1920)

Mr. Justice Day delivered the opinion of the court. . .

The question for our consideration is: Whether the provision of the Ohio constitution, adopted at the general election, November, 1918, extending the referendum to the ratification by the General Assembly of proposed amendments to the Federal Constitution is in conflict with Article v of the Constitution of the United States. . .

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge* v. *Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by

[14] 258 U.S. 130 (1922).
[15] 307 U.S. 433 (1939).

this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by '*Legislatures*'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article I, § 2, prescribes the qualifications of electors of congressmen as those 'requisite for electors of the most numerous branch of the state legislature.' Article I, § 3, provided that senators shall be chosen in each State by the legislature thereof, and this was the method of choosing senators until the adoption of the Seventeenth Amendment which made provision for the election of senators by vote of the people, the electors to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the States understood that this election by the people was entirely distinct from legislative action is shown by the provision of the amendment giving the legislature of any State the power to authorize the Executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment. In Article IV the United States is required to protect every State against domestic violence upon application of the legislature, or of the Executive when the legislature cannot be convened. Article VI requires the members of the several legislatures to be bound by oath, or affirmation, to support the Constitution of the United States. By Article I, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the State in which the same shall be. Article IV, § 3, provides that no new States shall be carved out of old States without the consent of the legislatures of the States concerned.

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several States. Article I, § 2.

The constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a General Assembly consisting of a Senate and House of Representatives. Article II, § 1, provides:

'The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people shall reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.'

The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the ex-

pression of the assent of the State to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the Eleventh Amendment. *Hollingsworth* v. *Virginia,* 3 Dall. 378. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with Article 1, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a foot-note to this argument of the Attorney General, Justice Chase said: 'There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation: He has nothing to do with the proposition or adoption of amendments to the constitution.' The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

This view of the provision for amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 *et seq.* Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States.

But it is said this view runs counter to the decision of this court in *Davis* v. *Hildebrant,* 241 U.S. 565. But that case is inapposite. It dealt with Article 1, § 4, of the Constitution, which provides that the times, places and manners of holding elections for Senators and Representatives in each State shall be determined by the respective legislatures thereof, but that Congress may at any time make or alter such regulations, except as to the place for choosing Senators. As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article 1, § 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.

It follows that the court erred in holding that the State had authority to require the submission of the ratification to a referendum under the state constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.