University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania
Law School, at 236 Chestnut Street, Philadelphia, Pa., and
34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 65

March, 1917.

NUMBER 5

THE PROPOSED WOMAN SUFFRAGE AMENDMENT AND THE AMENDING POWER.

The woman suffrage amendment as proposed in the Senate joint resolution reads as follows:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

It will be observed that this language is the same as that of the Fifteenth Amendment, with the exception that the word "sex" is substituted for the words "race, color or previous condition of servitude."

The joint resolution then provides that the amendment shall become operative upon ratification by the legislatures of three-fourths of the States.

We may assume for the purposes of this article (and only for those purposes) that the prohibition contained in this amendment would apply to voting at elections for state officers and United States Senators, as well as elections for members of Congress, and we shall discuss the question under consideration upon that assumption. We shall assume also that it is the purpose of this amendment, in effect, to confer upon the women in every State the same right to vote which is now or may hereafter be possessed by the men.

The first question which naturally suggests itself is—

whether or not there is any limit to the amending power? It is probable that it has not been generally realized that there are any limitations upon this power, yet even a cursory examination of the question will suffice to make it clear that such limitations do exist—that a certain class of amendments would be void, because not within the limitations of the amending power. The question is—whether the proposed woman suffrage amendment would be in that class?

Prior to the Civil War it was always the contention of one of the great political parties of the time that the Constitution of the United States was the result of a compact between the States—that it was a creation of the States themselves. On the other hand, the contention of the Federalist Party, and the successive parties which adopted its doctrine in that regard was, that the Federal Government was “ordained and established” by the *people* of the United States,” as recited in the preamble of the Constitution.

The Federalist view ultimately prevailed. This view was stated by Chief Justice Marshall in the course of his great opinion in the case of *McCulloch v. Maryland*,¹ in these words:

“In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. . . . It would be difficult to sustain this proposition. The Convention which framed the Constitution was indeed elected by the State Legislatures. But the instrument when it came from their hands was a mere proposal without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’ This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the *people*.”

The judgment thus rendered by Marshall was confirmed at Appanattox. Whether right or wrong, it is no longer open to discussion in this country.

¹ 4 Wheaton 316.

But it follows, as the night the day, that the *States*, not having created or made the Constitution, have no power to alter or amend it by the action of their several legislatures, or three-fourths of them, except in so far as the power so to do has been conferred upon them by the *people* in the Constitution itself.

The people who created the Constitution, acting through a national constitutional convention—the instrumentality through which they ordinarily exercise their ultimate powers of sovereignty—may not only amend but also abolish the Federal Constitution, if they see fit to do so, and adopt some other form of government. Their power in conventions assembled, in a legal constitutional sense, is unlimited.

On the other hand, the amending power conferred upon the *State legislatures*, or three-fourths of them, is not unlimited.

What then is the scope of the power thus conferred? It will be found in Article V of the Constitution expressed in the following terms:

“The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the legislatures of two-thirds of the several States shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by the Congress: *Provided*, That no amendment which may be made prior to the year 1808 shall in any manner affect the First and Fourth Clauses in the Ninth Section of the First Article; and that no State without its consent shall be deprived of its equal suffrage in the Senate.”

It will be seen that we have here practically three methods provided for amending the Federal Constitution, which differ from one another very radically.

The first method provides for amending by the States, or three-fourths of them, acting through their respective State legislatures, upon amendments proposed by Congress.

The second method provides for amendments to be made by the *people* in convention assembled in their respective States

in the same manner in which the Constitution itself was originally "ordained and established"; that is, by adopting amendments proposed by Congress.

The third method is by the action of a national constitutional convention called by Congress, at the instance of the legislatures of two-thirds of the several States, in submitting and proposing amendments for the approval of the legislatures of three-fourths of the States. Amendments enacted by the last-mentioned method would have the sanction of the whole people of the Union, acting through their delegates chosen for that express purpose, in convention assembled, even before submission to the State legislatures.

If Congress had seen fit to call a constitutional convention, and the people had elected delegates to that convention with the power such delegates *usually* have, there could be no question as to the right of such a convention to adopt such an amendment as is proposed. Even if the people had not seen fit to give express authority to the delegates to such a convention, it may very well be that it would have the power and the constitutional right to submit for ratification by the States almost any amendment it saw fit. It is hard to place limitations on the power of a constitutional convention—the people in convention assembled—no matter what the particular purposes for which such convention is called, may have been.

Or even if Congress had seen fit to propose this amendment for adoption by the people in conventions assembled in their respective States, the question as to whether, when thus adopted, it would be valid, is a different question from that which we now have under consideration; but Congress does not employ either of the above methods. The Senate joint resolution instead of thus submitting the proposed amendment to the people in convention or conventions assembled, provides for submitting it for the ratification of the *States*, or three-fourths of them, acting through their respective legislatures.

The question now under consideration, therefore, is—not whether the proposed woman suffrage amendment is one which could lawfully be adopted by the *people* either in the manner

prescribed by the Constitution itself, or through the instrumentality of a national constitutional convention assembled independently of the Constitution,—but whether or not it is one which the *States*, acting through their *legislatures*, have power to adopt.

It is manifest, of course, that the people, in “ordaining and establishing” the Federal Constitution, did not intend to confer upon the States, or three-fourths of them, an unlimited power to alter or amend it. As we have already seen, Article V of the Constitution, in conferring this amending power upon the States, expressly forbids the enactment of any amendment which shall deprive any State “without its consent . . . of its equal suffrage in the Senate.” The bearing of this express limitation of the amending power upon the question which we are considering will be discussed later.

But independently of this express limitation or proviso, there is one general implied limitation upon the power of the States, or three-fourths of them, to amend the Constitution, which all will admit, *viz.*, no amendment could be deemed valid which would have the effect of defeating in whole, or in part, the primary object which the people had in view in adopting the Constitution.

The Civil War and the subsequent repeated decisions of the Supreme Court have finally settled the question as to what that object was. It was to establish and create a Federal Union which should be *perpetual*. That being so, it follows inevitably that the people could not have intended to confer upon the States the power to *destroy* the Union by any enactment under the guise of an amendment to the Federal Constitution.

But it is also settled now by the decisions of the Supreme Court that the preservation of the respective States in their integrity as autonomous political entities, and with independent existence within their proper spheres, is necessary to the perpetuity of the Union; so that any amendment which would have the effect of destroying a State would defeat the very purpose which the people had in view in establishing the Constitution, by, to that extent, destroying the Union itself.

Moreover, it is not necessary, in order to come within this implied limitation, that an amendment, any more than a mere legislative act, should destroy a State entirely. It is sufficient if it has the effect of stripping the State wholly or partially of any power or function "necessary to its independent existence as a State."

In the case of *Lane County v. Oregon*,² the Supreme Court had occasion to pass upon the question of the validity *vel non* of an act of Congress, under which it was claimed that the State of Oregon was required to accept legal tender notes of the United States in payment of State taxes. The court held that the power to levy and collect taxes for the support of the State government was one of those powers which was essential to the separate and independent existence of a State. It could not be claimed that the effect of the act of Congress in question was entirely to take away this taxing power from the State, because, of course, the United States legal tender notes had some value. Nevertheless, it was held that the act was void, because it interfered with that power and undertook to restrain the State in the free exercise thereof, the court saying:

"On the other hand, the people of each State compose a State having its own government and endowed with all the functions essential to separate and independent existence. The States dis-united might continue to exist. Without the States in union there could be no such political body as the United States.

"Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. . . . If, therefore, the condition of any State in the judgment of its Legislature, required the collection of taxes in kind—that is to say, by the delivery to proper officers a certain proportion of products, or in gold and silver bullion, or in gold or silver coin—it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States and never as yet surrendered."

Again, in the case of *Collector v. Day*,³ it was held that the right and power to establish and maintain a judiciary was

² 7 Wall. 71.

³ 11 Wall. 113.

one of the functions essential to the independent existence of a State as such. That although Section 8 of Article 1 of the Constitution confers upon Congress in the broadest terms the—"power to lay and collect taxes, duties, imposts, and excises . . . and provide for the common defense and general welfare of the United States,"

and nowhere expressly forbids Congress in the exercise of this taxing power to tax the salary of a State official, yet that such an act of Congress was void, for the reason that it came within the implied limitation upon the taxing power; that it should not be used in effect, to destroy a State by interfering with the exercise by that State, even in a small degree, of one of the powers essential to its existence as a State.

In delivering the opinion of the court in that case, Mr. Justice Nelson discusses ⁴ the necessary limitations of the taxing power in a manner which would seem to be equally applicable to the amending power, as follows:

"The cases of *McCulloch v. Maryland* (4 Wheaton 316), and *Weston v. Charles* (2 Peters 449), were referred to as settling the principle that governed the case, namely, that the State governments can not lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers.

"The soundness of this principle is happily illustrated by the Chief Justice in *McCulloch v. Maryland*. 'If the States,' he observed, 'may tax one instrument employed by the Government in the execution of its powers, they may tax any and every instrument.' They may tax the mint. They may tax patent rights. They may tax judicial process. They may tax all the means employed by the Government to an extent which would defeat all the ends of government.

" 'This,' he observes, 'was not intended by the American people. They did not design to make their Government dependent on the State.' [And it must be equally true that the American people did not design to make any of the States dependent for their existence as Republics—as States with a republican form of government—upon the will of any particular number of States.] And, again: 'That the power of taxing it (the bank) by the State may be exercised so far as to destroy it is too obvious to be denied. . . . If the right to impose the tax exists, it is a right which in its nature acknowledges no limit.' "

⁴ Page 123.

This reasoning is equally applicable to the proposed woman suffrage amendment. That the right of a State to determine for itself who shall constitute its electorate—who shall vote at State elections—is one of the powers “essential to the existence of a State” would seem to be self-evident. If any outside power has the right to regulate or control the right to vote at State elections in one respect, it has the right to regulate or control it in others. If it has a right to say that women shall vote at State elections, it would equally have the right to say that men should not vote. It would equally have the right to say that only children or that only certain classes of men having certain political or religious opinions should vote, or that only one or two men should vote.

Upon the principles announced in the opinion just quoted from, it would seem to be clear that the proposed amendment would have to be regarded as a recognition of the right of three-fourths of the States to restrain at least or hamper in its exercise one of the functions essential to the very existence of a State within the meaning of the Constitution, and therefore void.

Quoting further from the same opinion:

“Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States.

“The Constitution guarantees to the States a republican form of government and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable that *without them the General Government itself would disappear from the family of nations*, it would seem to follow as a reasonable, if not necessary, consequence that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. . . . Without this power and the exercise of it, we risk nothing in saying that no one of the States under the form of government

guaranteed by the Constitution could long preserve its existence. A despotic government might.²

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation, *as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?*"

Now, applying this reasoning to the question in hand, it is submitted that if the right to tax is "a right which in its nature acknowledges no limits," so the right to extend or limit the elective franchise in a State is equally a right which in its nature acknowledges no limits. If three-fourths of the States have the right under the amending power, or under the pretense of exercising the amending power, to say that a State shall *not* deny or abridge the right to vote at State elections to any person on account of his or her sex, they have an equal right to say that a State *shall* deny to such person the right to vote on account of sex. They have a right, as already suggested, to forbid men or grown persons of either sex to vote altogether; they have a right to say that only Indians shall vote in Oklahoma; they have a right to say that only Japanese or Chinese shall vote in California; they have a right to say that only Scotch Presbyterians or Irish Catholics or Hebrews or Episcopalians shall vote in New York. Clearly, the power that has a right to determine all this is the State, since it has the power to elect public officials, the instruments through which the powers of the State are exercised in the legislative, executive and judicial departments of the government. When the French monarch made the historic boast, "I am the state," he spoke the truth, because he stated a fact which none could deny. His will was law, and he determined who should fill all the offices of government. Therefore he was the state.

² Pages 124-126.

It is true that there is no express provision in the Constitution forbidding three-fourths of the States from interfering with the control of any State of its own electorate. But, as was said by the Supreme Court in the case from which we have been quoting, in denying the power of the Federal Government to tax the means and instrumentalities of the governments of the States, the exemption from such interference "rests upon necessary implication and is upheld by the great law of self-preservation," as any government whose power to control its own elections is subject to the control of another distinct government and authority "can exist only at the mercy of the latter."

In *McCulloch v. Maryland*,⁶ Chief Justice Marshall said "that the power to tax involves the power to destroy," and while the tax in question did not, as a matter of fact, destroy the United States bank, the law imposing the tax was held to be void because of its violation of the immunity which the bank as an instrumentality of the Federal Government possessed against even the beginning of such destruction. In other words, for all practical purposes any government which has lost the power and the constitutional—legal—*right* to protect itself from destruction at the hands of another government or other outside authority is regarded as having been destroyed as an independent political entity.

Again, the very language of Article V, in conferring the amending power upon the States, contemplated, necessarily, the continued existence of the States. Once destroy or change the essential character of the States, or any one of them, and there will no longer be any means of amending the Constitution in the manner provided for in the Constitution itself.

That does not mean, of course, that the people of the United States have surrendered the right which all free people possess of changing their form of government whenever they see fit to do so. It does not mean that the people of the United States may not, through their representatives in national constitutional conventions assembled, make any change in the Constitution they

⁶ Note 1, *supra*.

see fit. Such a convention is, in a legal sense, omnipotent. It could change the government from a federal republic to an absolute autocracy. It could abolish all States and State legislatures. It could adopt an amendment abolishing the Senate and the House of Representatives, as well as the State legislatures. The time may come when, if democracy does not prove itself adequately efficient to protect the people against anarchy or foreign invasion, *they* may adopt some such form of government, but nobody will pretend that the *State legislatures* have any constitutional power or authority to do so.

Next to the case of *Lane County v. Oregon*,⁷ from which quotations have been given, came the great case of *Texas v. White*.⁸ That case turned upon the question as to whether Texas, after its admitted separation from the Union, was still a State, and required an examination of the question as to what constitutes a "State" within the meaning of the Federal Constitution, in the course of which examination, the Supreme Court said:

"If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it."⁹

"Some not unimportant aid, however, in ascertaining the true sense of the Constitution may be derived from considering what is the correct idea of a State apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different specifications; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

"It describes sometimes a people or community of individuals united more or less closely in political relations inhabiting temporarily or permanently the same country, often it denotes only the country or territorial region inhabited by such a community; not infrequently it is applied to the Government under which the people live, at other times it represents the combined idea of people, territory, and government.

⁷ Note 2, *supra*.

⁸ 7 Wall. 700.

⁹ Page 719.

"It is not difficult to see that in all these senses the primary conception is that of a people or community. The people in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations constitute the State.

"In the Constitution the term state most frequently expressed the combined idea, just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution and established *by the consent of the governed*. It is the union of *such* states under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States and makes of the people and states which compose it one people and one country."¹⁰

"The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies and grew out of common origin: mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared to 'be perpetual.' And when these articles were found to be inadequate to the exigencies of the country the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union made more perfect, is not?

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted still, all powers not delegated to the United States nor prohibited to the States are preserved to the States, respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there would be no such political body as the United States.' Not only therefore can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within

¹⁰ Pages 720-721.

the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution in all of its provisions looks to an indestructible Union composed of indestructible States."¹¹

How can it be said that the people intended to establish a perpetual Union and at the same time—in the same breath—that they intended to confer upon any number of States the right to destroy it?

But it would seem to be hardly necessary to resort to the theory of implied limitations upon the amending power in order to demonstrate the invalidity of the proposed woman suffrage amendment, at any rate, so far as such an amendment would apply to elections of United States Senators, in view of the express limitation to the effect that "no State without its consent shall be deprived of its equal suffrage in the Senate." To quote again from the opinion of the Supreme Court in the case of *Texas v. White*:¹²

"A State in the ordinary sense of the Constitution is a political community of free citizens occupying territory of defined boundaries and organized under a Government sanctioned and limited by a written Constitution and established by consent of the governed."

It is such States that constitute the United States. It is such States that are guaranteed by this proviso perpetual "equal suffrage in the Senate." That guaranty is necessarily equivalent to a guaranty that they shall continue to be such States, States sovereign within their proper sphere of political power.

How could the people of Oregon, for example, be said to be any longer a "political community of free citizens," with "a government established by the consent of the governed," if *without* their consent—by an act of Congress and an amendment adopted by other States—enough Chinese or Japanese were directly or indirectly enfranchised within its borders completely to dominate its State government? Or suppose an "amendment" were adopted conferring the right of suffrage at State elections or senatorial elections upon women in Oregon and taking it

¹¹ Pages 724-725.

¹² Note 8. *supra*.

away from men, or conferring it upon Asiatics and taking it away from the Caucasian element, would that be a fulfillment of the guaranty that Oregon should never be deprived of its equal suffrage in the Senate? Would a "State" thus constituted or re-constituted against its will be the same Oregon which had been guaranteed forever equal suffrage in the Senate?

Again, what is a "political community of free citizens"? What constitutes a "State"? Clearly it is those people in the State who have and exercise the political power—they constitute the State. In other words, it is the electorate that for all political purposes constitutes the State—it and such other persons as it may from time to time voluntarily admit to participate with it in the political power, *i. e.*, the suffrage. Whenever the electorate is forced against its will to admit others to participate in the exercise of the powers of government the result is an entirely new State and not the State which was guaranteed perpetual, equal representation in the United States Senate by the constitutional provisions already mentioned.

It may be suggested—in fact, it has been suggested—that this argument might be cited against the validity of the Fourteenth Amendment also, or that portion of it which undertakes to determine who shall be citizens of a State by declaring them "all persons born in the United States or within the jurisdiction thereof shall be citizens of the United States and of the State in which they reside." But it seems clear that no such argument can be maintained. The citizenship of a State may be added to or taken from by an outside power; but so long as the new citizens are not given by that outside power the right to vote at State elections or the right to participate in the election of those who are to exercise for the State its right of "equal suffrage in the Senate," the autonomy of that State is not affected in the slightest degree. Neither is its constitutional guaranty of equal suffrage in the Senate affected.

But it may be said, and doubtless will be, by lawyers familiar with decisions of the Supreme Court, that whatever force there might otherwise be in the arguments above set forth against the validity of the proposed woman suffrage amendment, has

been taken away by the decision of the Supreme Court in the recent case of *Myers v. Anderson*,¹³ in which by necessary implication, though not in express terms, the validity of the Fifteenth Amendment, or at any rate, its existence as a part of the Constitution, was recognized.

Due regard for candor requires the admission that such a contention is not easily answered, and yet it is submitted that this contention, *i. e.*, that *Myers v. Anderson* must be deemed to be conclusive authority in favor of the constitutional validity of the proposed woman suffrage amendment, is answered by the following considerations among others:

There is not a word in the opinion of the court in that case to indicate that the court was consciously passing upon any such question as the validity *vel non* of the Fifteenth Amendment. With the exception of one or two more or less technical points, the opinion is devoted entirely to a discussion of the question as to whether or not the so-called "grandfather clause" in the registration law of the city of Annapolis was or was not in conflict with the Fifteenth Amendment. Yet many of the considerations which have been suggested in this article were urged against the validity of the Fifteenth Amendment by counsel in that case.

The case was argued, as appears from the report, and submitted on October 17, 1913. It was held under consideration by the court and not decided until June 21, 1915, a period of more than nineteen months; whereas the Supreme Court usually decides cases within a few weeks after oral argument. That the questions involved were, during that long period, thoroughly considered and debated by the learned justices of that court cannot admit of doubt, yet in the opinion nothing was said about the main defense which had been set up. If the court had been perfectly satisfied that the contention made against the validity of the Fifteenth Amendment to the effect that it was not within the amending power, *etc.*, was unsound, it would scarcely have failed to say so, and put such question at rest.

¹³ 238 U. S. 368.

The court, of course, knew that failure to do so in its opinion would have the effect of leaving the general question unsettled—open for further consideration by the legal profession.

It will scarcely be maintained that the court deemed the arguments against the validity of the Fifteenth Amendment to be so lacking in merit as not to be entitled to a reasoned answer. Arguments of the same character had been made by some of the ablest lawyers in the United States. For instance, in the course of his argument against the Senate joint resolution submitting the woman suffrage amendment, Senator Borah, of Idaho (although representing a woman suffrage State), with characteristic courage had said:

"I cannot conceive of a State, or anything of sufficient dignity to be called a State, which has lost the right to say who shall vote for its State officers."¹⁴

Also, Senator Salisbury, of Delaware, in the course of his argument during the debate on the passage of the resolution submitting the Fifteenth Amendment, had spoken as follows:

"If two-thirds of Congress were to propose an amendment, and three-fourths of the States were to ratify it, to blot out the State of Rhode Island and the State of Delaware, two of the smallest States in the Union, could you legitimately do so? Would it be a legitimate exercise of the power of amendment to destroy the members composing the Federal Union, to destroy the parties to the Federal Union? I presume that it will not be contended as possible.

"What is the difference when two-thirds of the States propose and three-fourths of the States ratify what they call an amendment which deprives the States of Delaware and Rhode Island of the exercise of authority within their own limits? . . .

"It is a perfectly legitimate mode of testing the soundness of a principle by carrying it out to its logical conclusions. If you have the authority to say who shall vote in a State, you have the authority to say who shall not vote in a State. If you have the authority to say who shall not vote in a State, you have the authority to say that no one shall vote in a State. . . . If you have that authority, you have the authority to say what shall be the law of that State; how that law shall be enacted; by whom the functions of government shall be exercised."

It will not be easily supposed that the Supreme Court did

¹⁴ Congressional Record, March 20, 1914, page 5561.

not give this question serious consideration. Why then did that court, after nineteen months of deliberation, refrain from noticing it? Of course, no one but the court itself can answer that question with certainty, but there is an answer which naturally suggests itself to the mind of any lawyer familiar with the habits and established practice of that court and that answer is this:

The court may not have considered that the validity of the Fifteenth Amendment was open for consideration or adjudication by it, because of the fact—the overpowering fact—that for forty-five years it had been accepted and acquiesced in as valid by all the departments of the Government, in every State of the Union and by the people as a whole without question. If it took this view, the court was only acting in accordance with the policy which it had frequently observed in dealing with the question of the constitutional validity of acts of Congress where the question was a debatable one. For instance, in the case of *McCulloch v. Maryland*, already quoted,¹⁵ Chief Justice Marshall says:¹⁶

“The first question made in the cause is—has Congress power to incorporate a bank? It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

“It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, *one on which human reason may pause, and the human judgment be suspended*, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by the legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.”

¹⁵ Note 1, *supra*.

¹⁶ Page 400.

It may very well be that the Supreme Court felt compelled, in consideration of the principle thus announced by Chief Justice Marshall, and other cognate considerations, to regard the question of the validity of the Fifteenth Amendment as settled—practically not open to review by the judicial department of the Government—and therefore did not deem itself justified in passing upon the general question as to the scope and extent of the amending power conferred upon legislatures of the States, and hence allowed it to pass *sub silentio*.

If the proposed woman suffrage amendment should at any time in the future come before the Supreme Court without the sanction of any convention or conventions of the people—with only the endorsement of State legislatures—it is difficult to see how that tribunal could hold it to be valid.

It will be argued, of course, especially by those who are unable to rid their minds of the delusion that in determining the meaning, operation and effect of the provisions of the constitution of an empire, the courts are confined to the rules applicable to the interpretation of an ordinary deed or business contract between individuals, that the Constitution does not, in terms, accord any greater sanction to an amendment which has been considered, approved, and submitted by a national constitutional convention, or which has been submitted to and ratified by constitutional conventions assembled in the various States for the express purpose of considering it, than it accords to an amendment which has received only the ratification of State legislatures.

When a court which is charged with the tremendous responsibility of adjudicating controversies between sovereign States, and the still more responsible duty of determining the respective powers of State and National Governments, has before it a question, the decision of which may determine the course of future history—when the “fate of men and empires” may wait upon its judgment, it is not to be assumed that it will readily yield to such an argument.¹⁷

¹⁷ It is not intended to suggest, of course, that the Supreme Court would hesitate to declare an amendment void, even though it had received the

Perhaps the gravity of the question which will be presented to the courts in the event of the adoption of the proposed woman suffrage amendment has never been shown in a more striking manner than in a letter addressed by Hon. Elihu Root to the National Convention of the National Association Opposed to Woman Suffrage held at Washington, D. C., December 7, 1916. This letter, while not purporting in any way to be an argument on the question of the constitutional validity of the proposed amendment, presents, with the lucidity which always characterizes the utterances of that great lawyer, some of the considerations which the court will necessarily have to take into account if the question ever arises. For instance, Mr. Root says:

"If the people of the State of New York were to vote for Woman Suffrage I should think they had made a mistake, but a mistake which they had a right to make—one of those mistakes which are inevitable in the process of developing free self-government. If, however, some other State or combination of States, acquires the power to compel and does compel the State of New York, against its will, to employ Woman Suffrage in carrying on its government, that is no step in the exercise of self-government. It is *pro tanto* a destruction of the right of self-government and a subjection of the people of New York to the government of others. That is what the proposed Amendment seeks to accomplish. Having failed to secure the assent to Woman Suffrage of such States as South Dakota and West Virginia and Ohio and New York and Pennsylvania, the advocates of Woman Suffrage now seek to compel such States to accept it against their will and to compel them to carry on their local government and select their representatives in the National Government in conformity to the opinions of the people of other States who are in favor of Woman Suffrage. I think such an attempt is contrary to the principles of liberty upon which the American Union was established and without which *it cannot endure*. Our system of government rests upon direct allegiance and loyalty to the nation, composed of all the people of all the States, and the power of the nation as a whole to control and require obedience in all things national, and also upon the idea of absolute liberty to the people of each separate State to govern themselves in all their local affairs according to their own free opinions and will. Without assurance

approval of constitutional conventions in three-fourths of the States, if it were clearly not within the amending power. Neither is it intended to concede that the proposed Woman's Suffrage Amendment would be valid, even though adopted in that manner.

that both of these ideas, the principle of nationality and the principle of local self-government, would be preserved, the Union would not have been formed and *without them it cannot be maintained*. Without the power of the nation we should become the prey of external aggression and internal dissension. Without the right of local self-government we should lose the better part of our liberty, the liberty to order our own lives in our homes and our own communities according to our consciences and our opinions and to be governed only, in matters not national, by officers chosen by ourselves in such ways as we consider suited to our conditions. This country is so vast, the difference in climate, in physical characteristics, in capacity for production, in predominant industries, and in the resultant habits of living and thinking, are so great that there are necessarily wide differences of view as to the conduct of life, and to subject any section of the country in its local affairs to the dictation of the vast multitude of voters living in other parts of the country would create a condition of intolerable tyranny, and to use the power of the nation to bring about that condition would be to make the nation an instrument of tyranny. It is needless to argue that *this would ultimately destroy the nation*. It is free adjustment of the separate parts of our country, the unchecked opportunity of each community to live in its own home according to its own opinions and wishes, that has made it possible for us all to unite in maintaining the power of the nation for all national purposes. If you destroy that free adjustment by enabling some parts of the country to coerce other parts of the country in their local affairs by the use of national power, you will destroy the whole system *and ultimately break up the Union*. That is precisely what this Amendment undertakes to do.

"There is nothing more essentially and vitally local to a community than the way in which it shall select the officers who are to govern it. Any external power which can control that, can control the local government. Nothing is more clear in the Constitution under which our Union was formed than that this is a matter of purely local concern. The one exercise of national power over suffrage to prevent discrimination against the black race was made and justified only upon the same grounds which justified the war and the Emancipation Proclamation and for the time being destroyed all local government in the seceding States. It establishes no precedent and justifies no attempt at control upon a less terrible and compelling cause."

Action taken in the midst of the fiery excitement of the Civil War, even judicial action, can never be recognized by sane men as constituting a precedent binding upon the judgment of the courts after that excitement and the occasion for it has passed away.

The unshakable firmness with which the Supreme Court of the United States held the balance of the Constitution, while the passions of the war were still far from having entirely faded, in a series of decisions regarding the legislation enacted by Congress during the so-called Reconstruction Period, affords the best guaranty perhaps that the country could have that that balance will still be maintained by a court having power to declare even a constitutional amendment to be unauthorized and void. In so doing, the court would only be discharging the greatest of its many great functions.

Wm. L. Marbury.

Baltimore.