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THE APPROACH TO WORLD GOVERNMENT THROUGH THE TECHNIQUE OF THE WORLD CONSTITUTIONAL CONVENTION: AMERICAN EXPERIENCE

JOHN H. DAVENPORT *

Ever since the beginning of the Atomic Era when embryonic world citizens and decaying nationalists alike were afforded convincing proof that the World would be either One or None, there have been efforts in the United States and elsewhere to make a peaceful and lawful transition to One World rather than a violent transition to No World. While these efforts have concerned education and publicity in the broadest sense, there have also been proposals to effect the legal changes which would make world government a reality. The four major lines of action which have been canvassed and are being followed, none necessarily exclusive of the others are:

(1) Popular referenda and polls on the question of the desirability of world government;

(2) Diplomatic negotiation by the President or his representatives to establish world government by treaty agreement among nations;

(3) Amendment of the United States Constitution to provide for the entry of the United States into a world federation;

(4) Election of delegates to a world constitutional convention by the people of the United States.

It is the writer's view that the first approach, while useful for publicity purposes, is futile from a legal standpoint; that the second is unconstitutional; that the third is unnecessary; and that the fourth line of action is difficult. The difficulties are of a practical nature only and are outweighed by the prestige of this approach in the American tradition. It is believed that much light can be shed on the solution of the practical problems involved in this fourth method by the rich and varied precedents in American experience since 1775 or even earlier.

INTRODUCTION

The idea of world government is not a new one. Ever since Alexander the Great, men have dreamed of establishing government over the world as they knew it. Even the idea of world federal government is not new. The empires established by Alexander and Caesar were loose confederations which did not attempt to disturb local customs and loyalties, though Hitler, latest in the line of the Caesars, went far in destroying or degrading the cultural

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diversity of the countries he conquered. Stalin, by contrast, realizes that world conquerors must maintain large degrees of national autonomy, and should he forget this important political truth, there is always a Tito or a General Mao Tse-Tung to remind him.

What is new in the history of ideas is the notion of democratic federation of the world. And in the realm of practical application of ideas, it is only as old as the United States Constitution, which begins significantly enough, "We, the People, . . . do ordain and establish this Constitution." This was, it is true, only a small scale "world" federation—taking in only the New World and not all of that—but it was a model for later federations. It was, as Carl Van Doren has called it, "the Great Rehearsal" for world federation. It established patterns and precedents, not to be religiously mimicked, but to be used as suggestions for the political imagination, analogies, and as vicarious experience.

If the Constitution of the United States was not as democratic in substance or form as it might have been, at least it established firmly the idea of popular sovereignty, leaving to later generations by interpretation and practice to approach closer the democratic ideal. By contrast, the blueprint for world federation advanced by Communist theory establishes a hierarchy of mankind in which Communist Party members occupy the highest position and the hated bourgeoisie the lowest. "All men are created equal," according to Jefferson's deathless version of Locke in the Declaration of Independence. This states a present fact and holds before us an ideal classless society toward which to strive. But the classless society of the Communist is one which can be achieved only by exterminating one of the classes and ruling the other for an indefinite period of history. And until the day when the one is exterminated completely and the other has learned to govern itself to the satisfaction of its Party Rulers, the pattern of Communist society is a triplex one of elite (members of the Party) masses or majority (the proletariat) and oppressed minority (the bourgeoisie). Both distinctions are abhorrent to the idea of democratic world federation. A democratic world federation could not stand if it were based on a distinction between members of the elite and the masses—the core of democratic doctrine is that all men have the same nature and that virtue is not the monopoly of any elite, whether it be an elite of power, of intellect, or of wealth. No more could a world federation be democratic if the rights of all men, regardless of their economic status, were not respected and protected. The idea of democratic world federation is based therefore on these two fundamental assumptions: that one man is or can be as fit to rule or as good as another, and that minorities must be protected in their human rights no less than majorities.

At the same time it must be recognized in all candor that in no national state today are these fundamental assumptions embodied perfectly in practice.

In other words there is a gap between practice and ideal. If the gap between ideal and reality is to be bridged in the creation of a world constitution and a democratic world federation, therefore, we must make a third assumption. This is that every extant national state must be left free to determine how the question of ratification of a world constitution shall be decided, according to its own constitution and political forms. In other words, while a world constitution must be based explicitly on the assumption of the democratic equality of all men and must guarantee their human rights, its actual entry into force must be conditioned on the existent political realities, which nowhere approximate the ideals of the constitution.¹ This necessity was recognized by the Founding Fathers of the United States Constitution when they provided for its ratification by states whose constitutions and local customs were so diverse as those of Massachusetts and South Carolina, or Rhode Island and Maryland.

This article will not argue the desirability of a greater degree of world law and order under a world federation. Rather, it will be assumed that this is a generally recognized necessity, and addressed to the more practical and productive question of ways and means of achieving this goal in time to prevent a war which the atomic scientists and military technicians never tire of telling us will be little short of catastrophic for the civilization of the world.² That this is a reasonable assumption to make might seem self-evident, but public opinion polls from time to time give fresh indications of the deep emotional conviction with which the ordinary citizen holds to the idea of world peace. The same polls, however, show evidence of much confusion and doubt about the means proposed to this end.³ It is therefore fair to assume that a more realistic question than the desirability of world government is that of just how such a government is to be established and what are to be its characteristics beyond those previously mentioned.

It is necessary therefore to add one more assumption to those already mentioned. This is the assumption that the characteristics of any world government which would be desirable must represent the will and reason of

1. COMMITTEE TO FRAME A WORLD CONSTITUTION DOCUMENT NO. 4, CONSIDERATIONS RELEVANT TO THE DEFINITION OF WORLD FEDERAL GOVERNMENT 6 (Chicago 1946) (Washington: American Council on Public Affairs, microfilm ed. 1948), p. 22. Hereafter cited as CFWC.

2. See DEXTER MASTERS AND KATHERINE WAY, ONE WORLD OR NONE (New York, 1946). Following the first shock, the last year has seen a new crop of books on the subject, e.g., LAPP, MUST WE HIDE? (Boston, 1949); BLACKETT, FEAR, WAR AND THE BOMB (N. Y., 1949); DAVID BRADLEY, NO PLACE TO HIDE (Boston, 1948). A review of Lapp appears in U. S. News, April 29, 1949, p. 11.

3. Fortune, March 1944, pp. 94, 98. When the question, "Do you think the United Nations should be strengthened to make it a world government with power to control the armed forces of all nations, including the United States?" was put to voters with opinions on the question in Holland, Sweden and the U. S. A., Americans voted nearly 2 to 1, the Dutch more than 2 to 1, and the Swedes more than 3 to 1 in favor of the proposal, according to a news release of the AMERICAN INSTITUTE OF PUBLIC OPINION (Gallup), December 24, 1947.

the people of the world as well as of the nations of the world.⁴ It must represent all the people, rather than any one nation or any group of nations. World government by conquest and imposition of a particular form on the vanquished is hereby ruled out as a desirable means of establishing world peace. To put the assumption in other words, what is sought is the establishment of world government by democratic compromise rather than by the violent dictation of any one nation or group of nations or of any ideological group.⁵

This article will be based on these assumptions therefore: that world federation must be democratic in form and philosophy; that some practical way must be found to establish the government over nations whose own constitutions and political forms are not perfectly democratic in form and philosophy; that it is unnecessary to discuss in detail the necessity and desirability of world federation; and that it must be established by the method of peaceful persuasion and compromise rather than by violence and war.

There have been four general categories of activity in the United States directed toward gaining the goal of world federation. These are (1) popular referenda, both official and unofficial, on the question of the desirability of world government; (2) popular and congressional pressure on the President to initiate a call for a conference of the members of the United Nations to revise the United Nations Charter; (3) requests by State Legislatures for a United States Constitutional Convention to provide for amendments to the Federal Constitution to enable the United States to enter into a world federation if, as and when one is formed; (4) State legislation to provide for the election of delegates to a world constitutional convention by the people of the United States.

The first of these activities will be dealt with only summarily, for its bearing on the subject of this paper is only indirect.

UNOFFICIAL AND OFFICIAL REFERENDA ON THE DESIRABILITY OF WORLD GOVERNMENT

In November, 1946, 255 cities and towns in Massachusetts placed a question on the ballot about the strengthening of the United Nations into a world organization able to prevent war. Voting favorably on the proposal were 586,093 people as against 63,624, a ratio of nearly 10 to 1.⁶ The total number

4. CFVC, p. 7 (microfilm ed., p. 21).

5. Compare Communist International, *Blueprint for World Conquest* edited by W. H. Chamberlin (Chicago, 1946), pp. 119-120. For the Russian view on democratic proposals for world government, however, see "Doctor Einstein's Mistaken Notions, an open letter from four Soviet Scientists," *New Times* (Moscow) November 26, 1947, reprinted with "A Reply to the Soviet Scientists, by Albert Einstein," by the Emergency Committee of Atomic Scientists, Inc., Princeton, New Jersey, 1948.

6. MASS. SEN. MEMORIAL No. 204 (January, 1947), "Resolutions providing for request for amendments to the Charter of the United Nations resulting in a limited world federal government."

of those expressing an opinion was 72 per cent of the total vote cast, an almost unheard-of record of participation in a referendum question.⁷

In November, 1948, a similar referendum was held in Connecticut, where the final tally showed a ratio of 12 to 1 in favor of the proposal. Incomplete returns, however, indicated that little more than 16 per cent of those who voted for candidates on the same ballot bothered to register an opinion on the referendum question. This is higher than is usual in a ballot referendum in this democratic nation.⁸

The question has been a favorite of the public opinion surveys, and it has been asked in a variety of ways. An Elmo Roper poll in the fall of 1948 found 51 per cent who wanted to "make UN work" and an additional 24 per cent who believed that "America should start now to organize a world government in which we would become a member state." More intensive polling questions and techniques might clarify still further the opinions of the American people.⁹ The almost unintelligible question put to the Connecticut voters in their polling booths was, "Question *re* recommendation providing for strengthening of United Nations to prevent war, Yes or No?" This was a drastic abbreviation of—but perhaps an improvement on—the official referendum question, which was: "Do you, as a sovereign citizen of Connecticut and the United States of America, direct our representatives in the national Congress to urge the President and the Congress to take the lead in calling for amendments to the United Nations Charter, strengthening the United Nations into a limited world federal government capable of enacting, interpreting, and enforcing world laws to prevent war?"¹⁰

Many members of Congress have publicly expressed the view that the United Nations was too weak to perform necessary international tasks. Representative Rayburn, remarking on the proposal that the United Nations organization assume responsibility for aid to Greece and Turkey, observed that "the United Nations is impotent to handle this matter. The United Nations has not the money, it has not the power, it has not the organization to do the job";¹¹ and Representative Jenkins of Ohio asked, "Why is it that the United Nations organization has not been called on to lend its good offices in an effort to compose and resolve these differences?"¹² Senator Byrd of Virginia concluded, "If the United Nations is not strong enough for the task, then let us take steps to make it strong."¹³ Partly as a result of these views, Congressmen were polled on the proposal to transform the UN into a

7. 6 World Government News, December, 1948, p. 9.

8. *Loc. cit.* A similar referendum held in Lauf, Germany, a little town near Nürnberg, produced from about half the voters a 97% favorable vote, in November, 1948.

9. See Fortune, November, 1948, pp. 88-90.

10. 6 World Government News, November, 1948, p. 8.

11. 93 CONG. REC. 4742 (May 7, 1947).

12. *Op. cit. supra*, at p. 4926 (May 9, 1947).

13. 93 CONG. REC. 3778 (April 22, 1947).

federal world government with powers adequate to keep peace and with direct jurisdiction over individuals in the international sphere. The 81st Congress has fifteen senators and 72 representatives who favor this proposal and have pledged themselves to work for it.¹⁴ Similar quizzing of Congressmen from Florida by Hamilton Holt of Rollins College brought affirmatives from all except Representatives Rogers and Sikes.¹⁵

An impressive list of major-party state conventions, as well as several minor parties' national conventions, went on record for world government in the election year of 1948. These included the Republican conventions of California, Maine, Minnesota, New Jersey, North Carolina and Vermont, and the Democratic conventions of California, Colorado, Connecticut, Delaware, Maine, Nebraska, New Jersey, Texas, Washington and Wyoming. "Ultimate world government" planks were nailed to the national platforms of the Socialist Party and the Progressive Party, but only the Prohibition Party came out foursquare for world federation now.¹⁶

In addition to these more or less official records of the status of public opinion, various local, state and national organizations have gone on record at one time or another as favoring world government. These run the alphabet from the American Legion (North Carolina Department) to the Zonta Club of Dallas, Texas.

Implicit in all these activities is the conviction or belief that what the ordinary citizen thinks is important, and that knowledge of the views of his representatives in government is important to him in making up his mind whether to vote for or against them. This sort of activity is based, in a word, on the belief that popular support and information is necessary to the creation of a democratic world republic. Such activities should not be decried as being useless expressions of opinion. They supply the very necessary moral support which any idea must have if it is to be acted upon. If it is certain that no officially elected representative will act contrary to the expressed will of his constituents, it is equally certain that he will not act at all if no expression of their will is available to him, especially if it is concerned with a new and uncharted problem. Referenda and public opinion polls have often been accused of presenting to the voter technical issues which he was not equipped to consider, either by interest or by intellect. This is probably true. If so, it is

14. *Where They Stand*, World Government News, October, 1948, p. 11, and *ibid.* December, 1948, p. 4.

15. Letters in the files of the Institute of World Government, Rollins College, Winter Park, Florida.

16. See World Government News, September, 1948, p. 13. The Communist Party put forward no platform of its own, but instead supported the Progressive Party candidate for the Presidency. At the same time, some of its members fought in the platform Drafting Committee to strike or water down the world government plank of the Progressive Party. This was in accord with the current "party line" of the Communists. For insight into the difficulties of working with Communists, see *Letter to Rexford G. Tugwell*, 2 COMMON CAUSE 41, September, 1948, p. 41 and *Open Reply to Mr. Borgese*, *ibid.* October, 1948, p. 81.

all the more amazing that such a large percentage of voters have shown such interest and fundamental understanding of the extraordinarily complicated issues of world government problems. These expressions of opinion have no direct effect on the establishment of world government, however. When all has been said, nothing has been done. They are merely wishes, pious expressions of hope. They do not of themselves accomplish the task of erecting a juridical structure for the world. One may speculate that the prevalence of polls may even have a deadening effect on democratic government. By asking the public what it wants, the pollsters are emphasizing desires rather than the techniques of fulfilling them. To what extent does the mere expression of a desire alleviate the psychological tension of desiring? The enervating effect of the daydream is too well known to folklore and to psychiatric science to discuss here. To what extent does the public believe that mere expressions of their desires will result in their fulfillment? It is too well known that legislators and presidents (and why not dictators?) do not follow public opinion so much as they ignore or mold it. Legislators are, after all, not so much interested in what their constituents opine on the subject of world government as they are in how fanatically convinced are their constituents that nothing is more important. They are not interested in public opinion *in vacuo* but in those opinions which will move people to go out and vote for or against a candidate for office.

DIPLOMATIC REVISION OF THE UNITED NATIONS CHARTER

Article 109 of the United Nations Charter reads as follows:¹⁷

A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. . . .

Any alteration of the present Charter recommended by a two-thirds vote of the Conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of The United Nations, including all the permanent members of the Security Council.

It should be noted that any one-third-plus-one of the Members in the General Assembly could block the calling of this General Conference, and that the agreement of all of the "Big Five" would be necessary to block it in the Security Council. In other words, if the men who attend the sessions of the General Assembly and the Security Council were free moral agents, it would not be impossible for them to decide to call such a conference. It should

17. U. S. Department of State, *Charter of the United Nations, together with the Statute of the International Court of Justice*, June 25, 1945, pub. 2353 (Washington, 1945), pp. 34-35.

also be noted, however, that any actual changes in the structure of the United Nations organization must have the approval, not only of the Soviet Union, but of the United States Senate—not only of the embattled Chinese Government, but of the French, too, and the British. Only if the treaty-makers of all of these “big” powers acquiesce, can changes be made in the Charter of the United Nations.

If this arrangement be criticized, it must be remembered that the “little” nations’ representatives at San Francisco, led by Herbert Evatt of Australia, fought hard to get even the sop of the automatic revision conference thrown to them.¹⁸

Proposals for revision of the United Nations Charter have come from several sources. Perhaps the earliest proposal in point of time came from the Dublin, New Hampshire, Conference, October 11-16, 1945, a few months after the Hiroshima and Nagasaki bombings. The idea for this conference had originated even earlier. When it became clear that the Dumbarton Oaks proposals were to be taken over practically intact by the United Nations Conference on International Organization at San Francisco, Justice Owen J. Roberts, Clarence Streit, author of *Union Now*, and Grenville Clark, New York lawyer who had drafted the Selective Service Law of 1940 and subsequent amendments, called a conference of leaders in politics, law and education to meet at Dublin, New Hampshire, to discuss the possibilities of a stronger world organization. From this meeting came the Dublin Declaration,¹⁹ and, in February, 1946, a petition to the United Nations General Assembly, gave proposals for amendments to the United Nations Charter according to the procedure envisaged by Article 109.²⁰

At about the same time, Senator Glen Taylor introduced a resolution in the United States Senate, requesting the President to instruct his delegate to the United Nations to call for a revision conference of the United Nations, saying, as he did so, that the effect of the atomic bomb on him had been like that on the man who turned around and saw a bear on his tracks. “It startled me a good deal and hurried me up considerably.”²¹ This was the first of

18. U. S. Department of State, *Charter of the United Nations, Report to the President on the Results of The San Francisco Conference*, by the Chairman of the United States Delegation, the Secretary of State, publication 2349 (Washington, 1945), p. 72, and pp. 167-169. The “automatic” revision conference provision is in art. 109, and places the proposal on the agenda of the tenth annual session of the General Assembly, and changes the two-thirds provision to a simple majority of the Members of the General Assembly.

19. *New York Times*, October 16, 1945.

20. The text of these proposals is found in a pamphlet published by Clark and others, *Proposals for Amendment of the United Nations Charter*, February 1, 1946, in accordance with the Declaration Adopted by the Conference on World Government Held at Dublin, New Hampshire, U.S.A., October 11-16, 1945: A Petition to the General Assembly of the United Nations (New York: Council for Limited World Government, 31 Nassau Street, New York).

21. S. R. 183, 79th Congress, 2nd Session, 91 *Congressional Record* 9987 (October 24, 1945). The proposal was referred to the Committee on Foreign Relations and was never heard of again.

numerous Congressional resolutions for the revision of the United Nations Charter.²²

The Rollins College Conference on World Government was held at the invitation of President Hamilton Holt of Rollins College on March 11-16, 1946, in Winter Park, Florida. Under the chairmanship of Carl Van Doren, the eminent American historian and author, an "Appeal to the Peoples of the World" was drafted and signed by a big-name group of leaders from the fields of business, politics, labor, nuclear physics, education and religion.²³

Arguing that the United Nations "as now constituted, is a league of sovereign states," and as such "cannot by law prevent armed conflict between nations," the signers of the Appeal concluded that "since the Charter provides for amendments, every effort should be made to transform the United Nations into a world government," and accordingly proposed that:

. . . a General Conference of the United Nations be called as provided in Article 109 of the Charter to draft amendments accomplishing the following objectives:

1. That the United Nations be transformed from a league of sovereign states into a government deriving its specific powers from the people of the world.
2. That the General Assembly be reconstituted as the legislative branch of the world government, in which the citizens of the member states are represented on an equitable basis.
3. That the General Assembly, in addition to its present functions, shall have power:
 - a. To make laws prohibiting or otherwise controlling weapons of mass destruction . . .
 - b. To make laws providing for such inspection as is necessary or appropriate to the execution of the foregoing powers.
 - c. To provide for appropriate civil or criminal sanctions for the laws enacted pursuant to the foregoing powers.
 - d. To provide and maintain such police forces as are necessary for law enforcement.
4. That independent judicial tribunals be created with jurisdiction over cases and controversies arising under the laws enacted by the General Assembly or involving questions concerning the interpretation of the Charter.

Other provisions called for a Bill of Rights to protect individuals against the laws made by the General Assembly, a Security Council transformed into

22. See note 23 *infra*.

23. Members of Congress who signed the Appeal were: Joseph H. Ball (D., Minnesota), Carl A. Hatch (D., New Mexico), Charles M. LaFollette (R., Indiana), Claude Pepper (D., Florida), Charles W. Tobey (R., New Hampshire), and H. Jerry Voorhis (D., California). Businessmen included: Robert M. Gaylord, chairman of the Executive Committee of the National Association of Manufacturers, W. T. Holliday, president of Standard Oil Company of Ohio, and Owen D. Young, former chairman of the board of General Electric Company. Justice William O. Douglas was also one of the signers of the Appeal. Atomic scientists included, S. K. Allison, Albert Einstein, I. I. Rabi, H. L. Smyth and Harold Urey.

an executive branch, and reservation to the member states of all powers not delegated to the General Assembly.²⁴

The largest membership organization of the United States, United World Federalists, Inc., has adopted this technique of achieving world government as its platform of ways and means. Several of the men who attended the Dublin, New Hampshire, Conference, are **leaders** in this organization, and it may be surmised that their ideas are controlling in the organization. At any rate, in the second national convention of the United World Federalists held in Minneapolis in November, 1948, the following statement was approved by delegates from approximately 350 local chapters from 24 different states:²⁵

We believe that peace is not merely the absence of war, but the presence of justice, of law, of order—in short, of government and the institutions of government; that world peace can be created and maintained only under a world federal government, universal and strong enough to prevent armed conflict between nations, and having direct jurisdiction over the individual in those matters within its authority.

Therefore, while endorsing the efforts of the United Nations to bring about a world community favorable to peace, we will work to create a world federal government with authority to enact, interpret and enforce world law adequate to assure peace:

(1) by urging use of the amendment processes of the United Nations to transform it into such a world federal government,

(2) by participating in unofficial international conferences, whether private individuals, parliamentary or other groups, seeking to produce draft constitutions for consideration and possible adoption by the United Nations or by national governments in accordance with their respective constitutional processes; and

(3) by pursuing any other reasonable and lawful means to achieve world federation.

While this statement of techniques is fairly comprehensive, in actual practice the organized efforts of this group have been toward revision of the United Nations Charter through the amendment processes provided therein. To this end, their friends in Congress have been persuaded to introduce legislative resolutions calling on the President of the United States to take action in that direction. One of a group of a dozen similarly worded read as follows:²⁶

24. Rollins College Conference on World Government, "An Appeal to the Peoples of the World" (Winter Park, Florida, Institute of World Government, 1946).

25. "Statement of Beliefs and Purposes . . ." (New York, 1948) (mimeo'd). The organization has about 40,000 members and is reputed to be the fastest growing in the United States, having doubled its membership in a year.

26. H. Con. Resolutions 59-68 and their counterpart, S. C. R. 23, were introduced July 9, 1947. (80th Congress, 1st Session) C. R. 8567, 8487. The latter, introduced by Senator Ferguson for himself and Messrs. Tobey, Baldwin, Flanders, Cain, Byrd, O'Mahoney, McMahan, Sparkman and Taylor, proposed similar action to "strengthen the United Nations as an instrument to prevent war and maintain world peace."

Whereas, all the world deeply desires durable peace; and
 Whereas, the United Nations was created as an instrument to preserve the peace of the world; and
 Whereas, experience increasingly indicates that the United Nations in its present structure is not fully adequate for this task; and
 Whereas, the United Nations Charter in its article 109 provides a procedure whereby the Charter of the United Nations may be revised and amended:

Now, therefore, be it resolved, by the House of Representatives (the Senate concurring), That it is the sense of the Congress that the President of the United States should immediately take the initiative in calling a general conference of the United Nations pursuant to Article 109 for the purpose of making the United Nations capable of enacting, interpreting, and enforcing world law to prevent war.

This is a fairly pure and logical little gem. Such pristine logic fared ill in the push and pull of legislative discussion and pressures of interest groups of varying ideologies. After holding extensive hearings in May, 1948, Chairman Eaton of the House Foreign Affairs Committee leaned over backwards in his efforts to accommodate everyone and introduced an "omnibus bill" so-called, but it disappeared in the final rush of legislation. It ought better to have been called a "junkwagon" bill. The main purpose of the bill, in the first place, had been to get \$65 million to build an adequate physical structure for the permanent offices of the United Nations in New York. This was only accomplished by the passage of a Senate bill in the special session called by Mr. Truman. This procedure was made necessary partly because of the following policy provisions Eaton had seen fit to write into the House measure, a conglomeration of illogical, inconsistent notions, an "omnibus" bill indeed:²⁷

It is the policy of the people of the United States through constitutional processes to strive to accomplish the aims and purposes set forth in the Charter of the United Nations and to strengthen the United Nations by—

(1) confirming the status of the United Nations in its site within the United States with appropriate privileges and immunities, facilitating its headquarters building program, and increasing the effectiveness of the United States in the work of the United Nations;

(2) seeking by voluntary agreements, interpretations, and practices to improve the functioning of the United Nations, to liberalize the voting procedures in the Security Council, and to eliminate the veto on all questions involving the pacific settlement of international disputes and situations and the admission of new members;

(3) pressing for agreements to provide the United Nations with armed forces as contemplated in the Charter, and for agreements to achieve universal control of weapons of mass destruction and universal regulation

27. Invaluable for an understanding of the Congressional mind are U. S. House of Representatives, 80th Cong. 2d Sess., *The Structure of the United Nations and the Relations of the United States to the United Nations, Hearings before the Committee on Foreign Affairs*, May 4-14, 1948 (Washington, 1948). Cited hereafter as *Structure of U.N. Hearings*. H. R. 6802, quoted above, may be considered the direct result of these hearings. Referred June 3 and reported June 9 from the Committee on Foreign Affairs, but no action taken prior to adjournment.

and reduction of armaments including armed forces under adequate safeguards to protect complying nations against violation and evasion:

(4) encouraging, and associating the United States with such regional and other collective arrangements for self-defense as are consistent with the Charter, and are based on continuous and effective self-help and mutual aid between free nations, and affect the national security of the United States; and making clear the determination of the United States to exercise the right under the Charter of individual or collective self-defense in the event of any armed attack against a member affecting the national security of the United States; and

(5) initiating consultations with other members concerning the need for and possibility of so amending the Charter as to enable the United Nations more effectively to prohibit, and prevent aggression or other breaches of the peace.

Here indeed is a heterogeneous collection of Congressional ideas as to the proper means of conducting foreign relations to achieve world peace. It is undoubtedly important to have adequate physical facilities for the UN organizations' various activities, meetings, conferences, etc. It is thought necessary, also, to eliminate the veto power—that same veto power that the United States Senate had so nobly insisted on before the San Francisco conference when the majority-vs.-minority lines had not yet formed in the yet unformed Security Council.²⁸ It is thought, by these Congressmen, that elimination of the “troublesome” Russian-Polish-Ukrainian-Byelorussian veto, which might have been the British-American veto had postwar alignments shaped up differently, will solve the problem of world peace. While it may not solve the problem of world peace, it would undoubtedly solve the problem of the Russian-etc., veto. The velvet veto in the Security Council would merely be peeled off the steel (or “Stalin”) veto in the industrial cities and the secret-size armies of Eurasia.²⁹ It is thought, by these Congressmen, that “universal regulation and reduction of armaments” will promote international cooperation for peace, despite the fact that most of these Congressmen are not youngsters and many were in public life during the 'twenties and 'thirties when various so-called disarmament conferences were in the height of fashion. From disarmament conferences they became “reduction of armament” conferences, dwindled to “limitation of armament” conferences; metamorphosing finally into extremely technical and learned discussions as to the extent to

28. U. S. Senate, 79th Cong. 2d Sess., *United Nations Charter*, Hearings before the Committee on Foreign Relations, 1945.

29. “It is not necessary to do more than guess at the reasons why both Russia and the United States insisted on this provision at San Francisco. Neither wanted to risk an alignment of a majority with the other. Communists and capitalists, about equally fervent in their ideologies, had come to feel about equally also, that their homelands were islands in a wavering or actively hostile world. With the war still in progress, there were still too many uncertain areas for either to be confident of control if anything less than unanimity was required. Asia, the Near East, India, and even Western Europe—something like two-thirds of the world's people—lived in these doubtful areas. And certainly they possessed enough votes, even on the one-nation-one-vote principle, to control a majority.” Tugwell, 2 *COMMON CAUSE* 250 (February, 1949).

which nations would be "permitted" to increase their armaments programs! While this same pattern has been repeated in the meetings of the Political Subcommittee of the United Nations Atomic Energy Commission and in the meetings of the Military Staff Committee and in the meetings of the United Nations Conventional (sic) Armaments Committee following World War II, one would think that the Congressmen would despair of attempting armament or disarmament once again, or even "regulation" of armaments. But perhaps a combination of depriving Russia of the veto and then depriving Russia of armaments is the procedure the Congressmen have in mind.

In the provision of subparagraph (4) quoted above, there seems to be some notion that the United Nations organization can be used, or is being used, as an instrument in the power politics struggle against Russia, judging from the expression of a desire to encourage "collective self-defense" arrangements among "free nations." This theme runs like a bass counterpoint through the Congressional hearings on the United Nations cited above.

Among all these hoary devices for achieving permanent world peace—short of world government—the proposal that the UN Charter be revised into a world federal constitution is virtually lost in the shuffle, and appears only as a policy of "initiating consultations with other members," not even using the phraseology of the Charter.

The Congressmen were, to tell the truth, doubtful about the wisdom of saying anything at all about the slight disabilities of the United Nations. They inquired rather timidly and respectfully of General Marshall as to whether they should tread on the sacred precincts of foreign policy. He was very reassuring, indeed almost patronizing, although their attitudes may have invited his:³⁰

Mr. RICHARDS. Do you feel that it would be helpful or harmful for the Congress of the United States to express its viewpoint on this question? (Modification of the veto power.)

Secretary MARSHALL. I think that would be helpful because it tends to help form world opinion.

Mr. RICHARDS. You would not oppose a resolution expressing the viewpoint of the Congress and stating that the Charter should be amended in certain particulars? . . .

Secretary MARSHALL. No, Sir. . . .

Mr. JUDD. Let me put it frankly: does the Secretary feel that it would be harmful to the interests of the United States and world peace for us to pass a resolution expressing the view of the Congress that the United States should take the initiative in calling a world conference to re-examine the sick patient and see if we cannot get agreement on how to treat it? What harm can come out of that?

Secretary MARSHALL. If such a resolution does not, in its phrasing, threaten the continuation of the United Nations, then I would see no particular objection to it. . . .

30. *Op. cit.*, note 24 *supra* at p. 60.

Secretary Marshall went farther in his prepared testimony before the House Committee. In it, he said,³¹

We are not opposed to amendment of the Charter in principle, provided that revision would generally strengthen the work of the United Nations, and that it is strongly supported by the Congress and the American people, with full knowledge of its implications for the United States. That is a very important thing.

One implication about which he was worried was that the mere elimination of the veto power might enable a majority of nations to involve the United States in a shooting war.³² With a veto-less Charter, it would be difficult for the military arm of the American government to plan on contingencies like this. He added that the United Nations was a convenient instrument of negotiation with the great powers of the world:³³

Under the auspices of the United Nations, we are meeting with the Soviet Union on hundred of matters each year. It is awfully easy to terminate negotiations, but it is difficult to resume them, and it is hard to tell what will occur in the interim. . . . I think I should say, though I am a little hesitant to say it in open session, that I am under constant pressure from other nations to try in every conceivable way to avoid a rupture.

The above quotations have indicated the attitudes of many leaders in the world government movement, members of Congress, and the former Secretary of State, to the proposal that world government should come through revision of the United Nations Charter by the processes indicated in Article 109 of the Charter itself. It is the expressed hope of those in the former categories, and presumably of Secretary Marshall himself, that such a General Revision Conference of the United Nations may become the Founding Convention for a world constitution in a manner analogous to our Federal Convention in Philadelphia in 1781.

It is one of the purposes of this article to examine into the reasonability of this hope. The inquiry will take two directions. First, is this approach to world government likely to be productive of the desired results? Second, is this approach a constitutional approach, or at least, does it accord with our traditional ideas of political and legal propriety?

In approaching the first question, it might be worthwhile to examine the validity of the analogy—for it is nothing more than this—of the present world situation with the situation on the Atlantic seaboard in 1785. There were precedents for federal union then, as there are now.³⁴ There was a fairly

31. *Id.* at p. 53.

32. *Id.* at p. 57.

33. *Op. cit.*, p. 55 (see note 24 *supra*).

34. *E.g.*, the Albany Plan of Union, 1754, largely the work of Benjamin Franklin. "Everybody cries, a Union is absolutely necessary; but when they come to the Manner & Form of the Union, their weak Noddles are perfectly distracted." McLAUGHLIN.

weak confederation among all the states then; we have a weaker confederation of nearly all the nations now.³⁵ The Declaration of Independence then expressed beliefs which were commonly shared,³⁶ and today the United Nations has been able to agree on a Universal Declaration of Human Rights.³⁷ Every nation in the world today, with the exception of Saudi Arabia and Yemen—and possibly a few others—has more or less elaborate provisions in its constitution or statutes for the Rights of Man.³⁸

The 13 United States of 1787 were unequal in population, the ratio of variance being more than 12 (Virginia) to 1 (Delaware). The nations of today are also unequal in population, China being about 3,500 times as populous as Iceland, both members of the United Nations.³⁹ The 13 of 1787 were unequal in geographical area, the variance being about 153 (Georgia) to 1.36 (Rhode Island). The comparison of the Soviet Union with, for example, Belgium or Luxembourg is not much more shocking.

The national and ethnic origins of the population of the 13 States were remarkably diverse, though New England was most homogeneous. More than one-sixth of the total inhabitants, about 700,000, were Negro slaves. In 1790 the white population of English background varied from 60 per cent in Maine to 82 per cent in Massachusetts, but in the Middle States, Germans constituted one-third of the population of Pennsylvania, while more than one in six of the people of New York and New Jersey were of Dutch descent. Nearly ten per cent of the inhabitants of Delaware were Swedes. In the Southern States, the proportion of whites of English origin varied from 57.4 per cent in Georgia to 68.5 per cent in Virginia. More than eight different national stocks contributed to the total white population of the 13 States.⁴⁰

Toleration of religious differences in the States was not universal. The debates in the conventions ratifying the Federal Constitution contained examples of religious friction. A Mr. Singletary of Massachusetts inquired whether there were any protections in the Constitution against a Papist or an Infidel being chosen to a Federal office.⁴¹ And while Maryland's Con-

CONSTITUTIONAL HISTORY OF THE UNITED STATES 22 (New York, 1935), quoting from FRANKLIN, WRITINGS (Smyth ed.) Vol. 3, p. 227 note.

35. Non-members of the UN include most of the Axis nations, all of the traditional neutrals except Sweden, as well as various colonies and recently independent nations, e.g., Indonesia.

36. According to Thomas Jefferson. See MERLE CURTI, *THE GROWTH OF AMERICAN THOUGHT* 139 (New York, 1943).

37. U. S. Department of State, *Universal Declaration of Human Rights*, pub. 3381 (Washington, 1949).

38. United Nations, *Yearbook on Human Rights for 1946* (Lake Success, 1947).

39. Richard J. Hooker, *The Background of Federal Union, Community and Conflict in the Thirteen States*, 1 *COMMON CAUSE* 47 (August, 1947).

40. *Ibid.* Hooker's population figures are from the Bureau of the Census, *A Century of Population Growth from the First Census of the United States to Twelfth* (Washington, 1909).

41. 2 JONATHAN ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 44 (2d ed. 1836). Cited hereafter as ELLIOTT, DEBATES.

stitution of 1776 excused "Quakers, Dunkers and Menonists" from taking the oath, it extended religious liberty only to those who professed the Christian religion. The Constitution of 1851 extended this liberty to all religious believers. A similar provision in the Constitution of Massachusetts of 1780 was also corrected later.⁴²

The colonies of 1785 were actually less united physically than is the world today. The trip from Boston to New York along the finest road in the country took from four days to a week. Today, no spot on the globe, according to the advertisements of the commercial air transport companies, is more than sixty flying hours away. And the invention of the telegraph, telephone and wireless radio nullifies even this time, replacing the more glamorous pony express or special messenger.

Unfortunately, the sense of physical unity was unrelated to social and political differences then—even as now.

A vast difference naturally existed socially and politically, as well as economically, between the Southern tobacco or rice planter, with hundreds of slaves and thousands of acres, and the New England farmer who, with his family, worked a hundred stony acres. The one was ruler of a feudal manor and, as obvious leader of his district, regularly joined with other planters to control local and state government. The New England farmer met with his fellow "plough-joggers" in the highly-democratic town meeting. . . .⁴³

One hardbitten old Massachusetts farmer is on record as saying that he would never consent to permanent national union with a foreign state like South Carolina where everyone knew slave labor existed.⁴⁴

There was, too, in the "United" States of 1785 the same despair as to the prospects of union as we find in the "United" Nations today. Thomas Paine wrote: ⁴⁵

Made up as it is of people from different nations, accustomed to different forms and habits of government, speaking different languages, and more different in their modes of worship, it would appear that the union of such a people is impracticable.

And George Washington is reported by one of the members of the Founding Convention to have counseled them in the anxious faltering days when they were waiting for a quorum of the states to appear in Philadelphia:

42. 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 1689-90, 1715, 1889, 1914 (Washington, 1909).

43. Hooker, *op. cit.*, p. 54. See also CARL VAN DOREN, THE GREAT REHEARSAL (New York, 1948).

44. ELLIOTT, DEBATES 219.

45. Quoted in VERNON NASH, IT MUST BE DONE AGAIN, p. 10 (New York, 1948).

It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If, to please the people, we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and honest can repair . . .⁴⁶

And Madison, writing in the months before the Convention:

I find men of reflection much less sanguine as to a new, than despondent as to the present, system. . . . The nearer the crisis approaches, the more I tremble for the issue. The necessity of gaining the concurrence of the Convention in some system that will answer the purpose, the subsequent approbation of Congress, and the final sanction of the States, present a series of chances which would inspire despair in any case where the alternative was less formidable.⁴⁷

Thus, it would seem that the general outlook was similar then and now. There were some factors, present then, but not now, which would make their task easier. But there are some factors present now, but not then, which would make the task of world government advocates easier. In a matter of degree of difficulty, estimates and opinions can differ.

To be more specific regarding the legal and political analogy between then and now, the United States in Congress Assembled had finished a successful war against Great Britain in 1783 and the United Nations in a loose military alliance had completed a successful war against the Axis powers. In the former case, however, the peace treaty was made by the United States, while the peace treaties are yet to be made today between the Axis powers and the once allied United Nations.⁴⁸ The confederation of the United Nations was formed at the end of the war, while the confederation of the United States had been formed early in the Revolution. On paper, they were much alike. Both maintained that the constituent states were sovereign, for example. Both United Nations Charter and Articles of Confederation provided for joint executive action only if the states acquiesced. The powers granted to both could only be exercised with the consent of all the states, although both Articles and Charter provided for recommendations or decisions of procedural importance being made without the concurrence of all the members.⁴⁹

46. 3 FARRAND, *THE RECORD OF THE FEDERAL CONVENTION OF 1887* 381-382 (Rev. Ed., New Haven, 1937).

47. 1 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 279, 317 (New York, 1884), quoted in Hooker, *op. cit.*, p. 48.

48. Treaties of peace have been concluded with Italy, Bulgaria, Hungary, Roumania and Finland. U. S. Department of State, pub. 2743 (Washington, 1947).

49. *Articles*, II: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated . . ."; *Charter*, II: "The Organization is based on the principle of the sovereign equality of all its Members." *Articles*, IX "The United States in Congress Assembled shall have authority . . . to make requisitions from each State for its quota of land forces . . ."; *Charter*, 45: "In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air force contingents. . ." *Articles*, X: "The committee of the States, or any nine of them, shall be authorized to execute such . . . powers . . . by the consent of nine States . . ."; *Charter*, 27: "Decisions of the

Both then and now relations among the member States began to deteriorate after their wars. Boundary disputes between Greece and Bulgaria today had their parallel in those between Pennsylvania and Connecticut, not excluding full scale guerilla warfare. In both cases the mediation of the confederations brought no relief. Other examples of analogous difficulties and frictions might be cited at wearisome lengths.

Finally, in January, 1786, a meeting of commissioners from the several states was called, at the initiative of the Legislature of Virginia, to meet in the fall at Annapolis, Maryland.⁵⁰ It had originated in the minds of a few men, concerned with the commercial chaos overcreeping the States.⁵¹ Here the parallel between 1785 and 1949 abruptly ends.

No such meeting preliminary to the calling of a Federal Constitutional Convention for the world has yet been called or held. If, however, we were to follow in the future days the precedents set 160 years ago, we should find a procedure quite different from that envisaged by the advocates of the proposal to amend the United Nations Charter by means of a general revision conference. Here is what might happen if we tried to hew as closely as possible to the experiences of past history.

(1) About twenty of the nations of the world respond to a formal call issued by the Congress of the United States through its representative in the Interparliamentary Union—thus ignoring the United Nations organization inviting the legislative bodies of each nation to appoint delegates to a conference to discuss, let us say, the problem of the international control of atomic energy, or the problem of the protection of civil rights. The Soviet Union is among those ignoring the invitation.⁵²

Security Council on all other (than procedural) matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members."

50. Resolution of the General Assembly of Virginia, January 21, 1786, proposing a joint meeting of commissioners from the States to consider and recommend a Federal plan for regulating Commerce." U. S. Library of Congress, Legislative Reference Service, *Documents Illustrative of the Formation of the Union of the American States*, 69th Cong., 1st Sess., H. R. Doc. 398 (Washington, 1927), selected by Charles C. Tansill, p. 38.

51. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 103 ff. (Boston, 1890). Professor Burgess claimed that while the necessity of a stronger Union had impressed both Bowdoin of Massachusetts and Hamilton of New York quite early, it was Hamilton who was able to push the important State of New York into co-operation with the Annapolis Convention, get himself elected as a delegate, and persuade the delegates from the five states represented there, to move for a more general mandate from their States. The matter was of general concern to political leaders in several of the States, however, and notably Washington who had arranged a meeting as early as March, 1785 at his home for representatives of Virginia and Maryland to discuss the navigation of the Potomac River.

52. This first step would be analogous to the Annapolis Convention, at which only five of the 13 States were represented, Virginia, New York, Pennsylvania, New Jersey and Delaware. The commissioners from New Hampshire, Massachusetts, Rhode Island, and North Carolina, although appointed, did not show up. Connecticut, Maryland, South Carolina and Georgia appointed none. The Virginia legislature ignored the Continental Congress in its original resolution, except to mention that they hoped the recommendations of the Convention would "when unanimously ratified by the States, enable the United States in Congress Assembled, effectually to provide for" (the regulation of commerce).

(2) The delegates, arriving at the meeting place and finding so few nations represented, prepare a report to their respective national legislatures, recommending that a new meeting be held at which a broader approach may be taken to the whole problem of world peace. They recommend inviting every national legislature to appoint delegates and suggest that these delegates form a convention to discuss the defects of the United Nations and to propose a new Plan. They then adjourn their meeting, after sending a copy of the resolution, out of courtesy, to the Secretariat of the United Nations.⁵³

(3) The Congress of the United States follows immediately with the appointment of some of its own members, a retired Supreme Court Justice and the Vice President of the United States, together with a detailed statement of the necessity of holding such a convention. If the rule of analogy we follow is "Do not change the method of amendment provided for in the original Charter (or Articles)," then the Congress would provide for the ratification of the results of such a convention by the orthodox treaty method. If the rule of analogy is "Do exactly what was done in 1786," then the Congress would specify that the revisions be returned to the national legislatures for ratification after having been approved by the United Nations General Assembly. That there are two rules here, either of which might be followed, is because legislatures in those days were much less timid about external affairs than they are today. Despite clamorous protestations to the contrary on the part of Congressmen, practically the legislatures have abdicated to the executive so far as initiation and conduct of international affairs is concerned.⁵⁴

(4) After the legislatures of half of the other nations of the world have appointed delegates, the General Assembly of the United Nations issues an official call to all the members of the United Nations and perhaps to non-member nations as well—to have delegates appointed by their legislatures to attend this world convention for the purpose of strengthening the United

53. The Report of the Commissioners to their respective States pointed out that "the State of New Jersey has enlarged the object of their appointment, empowering their Commissioners 'to consider how far an uniform System in their Commercial Regulations, and other important matters might be necessary to the common interest and permanent harmony of the several States'; and to 'report such an Act on the Subject, as when ratified by them' would 'enable the United States in Congress Assembled effectually to provide for the exigencies of the Union.'" *op. cit.*, note 47 *supra* at pp. 39-43. They were exceeding their instructions to recommend a new meeting whose terms of reference were to correspond with those of the New Jersey delegation, *op. cit.*, p. 43. The delegates reported directly to their States, but "nevertheless concluded from motives of respect to transmit Copies of this Report to the United States in Congress Assembled, and to the Executives of the other States." *loc. cit.*

54. The State of Virginia was the most populous state and took the initiative in most of these actions. Almost immediately following the adjournment of the Annapolis Convention, the Virginia Assembly elected seven Commissioners and issued a long statement giving them their credentials and outlining the need for a convention. This action was followed the next month by New Jersey and the other states soon after, borrowing in most instances the phraseology of the Virginia Declaration. The Virginia delegation was composed of the foremost men of the state, including General Washington, Governor Edmund Randolph, former Governor Patrick Henry, who declined the honor, saying he "smelt a Rat." 3 FARRAND, GEORGE MASON AND YOUNG JAMES MADISON 560 ff.

Nations organization. The terms of the call follow the phraseology of the United States Congress' invitation. They are that the convention deliberate on proposals to make the United Nations structure more adequate to the exigencies of the Union and the establishment of world peace, and that any proposals the delegates make be submitted to the United Nations itself for approval before going to the national legislatures for their approval. Whereupon the legislatures of the other member nations appoint delegates with similar instructions.⁵⁵

(5) The delegates assemble at the place suggested in the invitation of the United States Congress, and finding that a quorum of nations is represented, proceed to organize themselves for the business of the convention. From this point on, it would be difficult to predict the outcome. It should be noted that the delegates to the Philadelphia convention in 1787 decided after much discussion that it would be necessary not merely to revise the Articles of Confederation but to discard them and construct a national government constitution. They expressly exceeded their terms of reference and their instructions by proposing a means of ratification of their proposals different from that specified.⁵⁶

As can be seen from the preceding discussion, the parallels between 1786 and the present are yet to be made. All of the essential ingredients of the problem then are present now, but there are differences in degree of physical community, economic and cultural community, no one of which is conclusive enough to change the character of the problem. One possible essential difference which has been noted before and which has not been mentioned here is the psychological necessity of banding together *against* an outside threat,

55. The Continental Congress finally issued its own call, after six states had already resolved and appointed delegates, February 21, 1787. The Virginia Declaration of October 16, 1786 directed the state's deputies to devise "such Alterations and farther Provisions as may be necessary to render the Foederal Constitution adequate to the exigencies of the Union and in reporting such an Act for that purpose to the United States in Congress assembled as when agreed to by them and duly confirmed by the several States will effectually provide for the same." Compare the directions of the Continental Congress: "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures . . ." *loc. cit.*, and p. 584.

56. See THE FEDERALIST, No. 40. There are very few countries of the world which do not have popularly elected legislative bodies. The 1948 World Almanac fails to mention any for 15 political subdivisions of the world, having a total population of approximately 155 million. Of these, 68 million are in French colonial possessions, some of which have elected representatives in the French National Assembly. All of the thirteen States had them, although they were chosen by an extremely restricted electorate. Only one state, Vermont, had manhood suffrage, women not then being considered competent to participate in government. If South Carolinians believed in God, owned 50 acres of land or could pay a tax on its equivalent and were the sons of white-skinned parents, they were eligible to vote. After the Federal Constitution was adopted, the requirement of belief in God was omitted, presumably due to the liberalizing influence of the Federal Constitution. McLAUGHLIN, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 367 (New York, 1935).

namely, the nations of Europe.⁵⁷ There is a pronounced lack of a threat of invasion from Mars to unify the peoples of the world.

Leaving aside this consideration, which is beyond our power to modify, there is one serious divergence between practice then and now. This is the relative importance of the legislature and the executive in initiating negotiations with other states on this matter. It is the more troublesome because practice in these days has been for the legislature to let slip from its hands the control of foreign relations and place it in the hands of the executive. The constitutions of the states prior to the formation of the Federal Union, however, placed most of the power of their governments in the hands of the legislatures. There was a fear of a strong executive, well-based on experience with royal governors. The divergence is troublesome, because the dilemma it creates is really a crucial one of fundamental political principles. It may be stated as follows: those persons in present-day governments who are assuming the responsibility and powers of conducting the foreign relations and commanding the armed forces of each nation are the same persons of whom these powers would be divested in the course of establishing a world federation. This is axiomatic, since the very minimum of powers which a world federation must have to be workable includes those of regulation of international relations and the instruments of war.⁵⁸

The other horn of the dilemma is simply stated in Lord Acton's famous and almost equally axiomatic dictum, "All power corrupts, and absolute power corrupts absolutely." There have been so few examples in history of the voluntary renunciation of power that we may be justified in regarding them as exceptional occurrences.

The problem of divesting the state legislatures of their power to regulate interstate affairs and military affairs was fairly easily solved in the Philadelphia convention by the bold and revolutionary step of referring the completed constitution, not to the State legislatures as the delegates had been instructed, but to State conventions, specially elected for the purpose of ratification by the limited electorate of that time.⁵⁹ Whether it would be as easy to by-pass the

57. *Op. cit.*, nos. 5, 6, 11 and 16. "Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth." No. 16, p. 65 (Washington, sesquicentennial edition, 1937).

58. CFWC, *op. cit.*, pp. 22-23 (microfilm ed.).

59. "Colonel Mason considered a reference of the plan to the authority of the people as one of the most important and essential Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions and cannot be greater than their creators. . . . Mr. RANDOLPH . . . Whose opposition will be most likely to be excited against the System? That of the local demagogues who will be degraded by it from the importance they now hold. These will spare no efforts to impede that progress in the popular mind which will be necessary to the adoption of the plan. . . . It is of great importance therefore that the consideration of this subject should be transferred from the legislatures where this class of men have their full influence to a field in which their efforts can be less mischievous. . . . Madison's Notes on the Federal Convention, July, 23, 1787, reprinted in U. S. Library of Congress, *op. cit.*, pp. 434-439.

executives of every country is a question which can be answered finally only by future developments. It was a revolutionary act in every sense of the word except the bloody one, which consisted of outwitting the legislatures who maintained control of the situation as long as they could sit back and approve whatever measures issued from the Philadelphia convention.

The delegates were aware that they had exceeded their instructions, but they justified their action by an appeal to necessity.

In one particular it is admitted that the convention has departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation of *the legislatures of all the states*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine states only*. . . . Let us view the ground on which the Convention stood. It may be collected from their proceedings, that they were deeply and unanimously impressed with the crisis which had led their country almost with one voice to make so singular and solemn an experiment for correcting the errors of a system by which this crisis had been produced; that they were no less deeply and unanimously convinced that such a reform as they have proposed was absolutely necessary to effect the purposes of their appointment. . . . They had seen in the origin and progress of the experiment, the alacrity with which the *proposition* made by a single State (Virginia), towards a partial amendment of the Confederation, had been attended to and promoted. They had seen the *liberty assumed* by a *very few* deputies from a *very few* States, convened at Annapolis, of recommending a great and critical object, wholly foreign to their commission, not only justified by the public opinion, but actually carried into effect by twelve out of the thirteen States. . . . They must have reflected, that in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former would render nominal and nugatory the transcendent and precious right of the people to "abolish or alter their governments as to them shall seem most likely to effect their safety and happiness," since it is impossible for the people spontaneously and universally to move in concert toward their object, and it is therefore essential that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizen or number of citizens. They must have recollected that it was by this irregular and assumed privilege of proposing to the people plans for their safety and happiness, that the States were first united against the danger with which they were threatened by their ancient government; that committees and congresses were formed for concentrating their efforts and defending their rights; and that conventions were elected in the several States for establishing the constitutions under which they are now governed, nor could it have been forgotten that no little ill-timed scruples, no zeal for adhering to ordinary forms, were anywhere seen, except in those who wished to indulge under these masks, their secret enmity to the substance contended for. They must have borne in mind, that, as the plan to be framed and proposed was to be submitted to *the people themselves*, the disapprobation of this supreme authority would destroy it for ever; its approbation blot out antecedent errors and irregularities. . . .

. . . If there be a man whose propensity to condemn is susceptible of no control, let me then ask what sentence he has in reserve for the twelve States who *usurped the power* of sending deputies to the convention, a *body*

utterly unknown to their constitutions; for Congress, who recommended the appointment of this body, equally unknown to the Confederation; and for the State of New York, in particular, which first urged and then complied with this unauthorized interposition? ⁶⁰

The recognition of the supra-legal origin of the Federal Convention, thus made explicit by one of its members, has been assented to by later commentators. ⁶¹

The difficulty today is not so much with the legislatures of this or of other countries. They have pretty well abdicated to the executive branch. There is thus a genuine question as to whether the national legislature can "interfere" with the executive's conduct of foreign relations. Several of the Congressmen at the hearings in May, 1948 on the revision of the United Nations Charter were preoccupied with this problem.

Mr. VORYS. You said this (reading):

"Only the Congress can take the initiative for the American people in advocating the need for better machinery for assuring peace and preserving freedom."

Every time we study this thing we find that in our foreign relations only the Executive can take the initiative for the American people in advocating the need for better machinery, under the United Nations Charter and our existing legislation, and our Executive is not taking such initiative.

Where do you get the idea that "only Congress can take the initiative" in this matter?

Mr. (William L.) BATT. It would seem to me, Mr. Vorys, as a layman, that the attitude of the State Department, which, of course, is a part of the Executive, has materially changed during the last weeks that this body has been holding its hearings.

Mr. VORYS. If by merely holding these hearings we can bring encouragement and turpentine and so forth, where they will be helpful, that is what we are doing. However, every resolution that is pending here so far starts off about like this: (reading)

"It is the sense of the Congress that the President should—" and so forth.

That is a recognition of the peculiarly responsible and powerful position that the Executive has in our constitutional set-up. ⁶²

From the standpoint of Lord Acton's dictum, both Executive and Legislature are interested parties who, practically, share control of foreign affairs, though the latter's be negative control only. As members of national govern-

60. THE FEDERALIST, No. 40.

61. See for example, BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 104-108 (Boston, 1890).

62. Structure of UNN, Hearings, p. 412. Elsewhere in the hearings Congressman Vorys expressed the belief that Congress should take the initiative in proposing specific measures in the form of law and if necessary even going beyond the Executive in trying to implement them. He believed that the method of executive negotiation had led nowhere in the past. See *op. cit.*, 236-238, 260, 288 and comments on the testimony of W. T. Holliday, President of Standard Oil Company of Ohio, pp. 256-260.

ments, therefore, they would stand to lose some of their vested interests in the control of foreign relations by the formation of a world federation having exclusive jurisdiction in the area of inter-nation relations.

There have been two views of the power of the national Government in the conduct of foreign affairs. One is that the national Government is the sole and exclusive and unlimited agency to exercise this power.⁶³ The other is that while this power now rests in the national Government and is exercised only by it, it may at any time be exercised concurrently or exclusively by the people of the nation acting in their sovereign capacity.⁶⁴ These two views are, of course, not mutually exclusive. To say, as Justice Sutherland said, in the *Curtiss-Wright* case, that the national Government—and especially the President—is the sole agency with the right to exercise the foreign affairs function, is not to deny that if some better technique is devised, some more fitting and proper agency, the people may not delegate authority to the latter, either concurrently, or exclusively, temporarily or permanently, in a general way or in a specific field of jurisdiction.⁶⁵ If we proceed on this assumption, it is not necessary to question the validity of Sutherland's questionable historical myth that "the states never possessed international powers."⁶⁶

Let us examine the first contention in connection with the proposal that the national government's representatives in foreign affairs should take the necessary steps to call a revision conference of the United Nations to amend the Charter.

It has been said that the President of the United States has sole authority to negotiate agreements between nations.⁶⁷ This authority has been denied to the states, unless with Congressional consent.⁶⁸ It has been denied to the Congress of the United States and to the United States Senate,⁶⁹ whose advice and consent are necessary to the *ratification* of treaties. Finally, private citizens are forbidden by law to enter into negotiations with foreign governments with intent to influence the foreign policy of the United States.⁷⁰

63. *United States v. Curtiss-Wright Export Corporation*, 299 U. S. 304. (1936).

64. See *infra* note 74.

65. "When the Constitution was framed, therefore, the undivided powers of external sovereignty were in the Union . . . and the only question to be determined was, What shall be given to the general government and made active, and what shall be reserved to the people, and lie dormant?" GEORGE SUTHERLAND, *THE CONSTITUTIONAL POWER AND WORLD AFFAIRS* 45 (New York, 1919).

66. Sutherland's historical sense or lack of it has already been devastated by the analysis of C. Perry Patterson, *In re U. S. v. Curtiss-Wright, Export Corporation*, 22 *TEX. L. REV.* 286 and 445 (1944). The statement is quoted from *U. S. v. Curtiss-Wright*, 299 U. S. 304 at 316 (1936). However, we reserve the right, where myths are concerned, to choose those which best serve the dire necessities of the time.

67. *United States v. Belmont*, 301 U. S. 324, 331 (1937); *United States v. Curtiss-Wright*, 299 U. S. 304, 320 (1936). See also CORWIN, *THE PRESIDENT: OFFICE AND POWERS* (2d ed. 1941).

68. *Missouri v. Holland*, 252 U. S. 416 (1920); U. S. CONST. Art. I, § 10; WRIGHT, *CONTROL OF AMERICAN FOREIGN RELATIONS* 230 (New York, 1922).

69. See FLEMING, *THE TREATY VETO OF THE AMERICAN SENATE* 24-32 (New York, 1930).

70. "Every citizen . . . who, without the permission or authority of the government,

It is not to be denied that the states, Congress, the Senate and even influential private citizens sometimes have a direct and important influence on the actual conduct of foreign affairs. It is only to say that this influence must be exercised with the active cooperation of the President and the Department of State to be of much positive influence. Or to put it another way, it would be very difficult for these to exercise positive initiative in a direction contrary to the foreign policy being followed by the President and the Department of State.

The proposal of Representative Ludlow for a war referendum in the isolationist days of the 'thirties is on a different level. This was an attempt, however awkward, to get the consent of the sovereign people on a question which would affect their lives, safety and happiness.⁷¹ The palpable error in logic behind the Congressman's proposal was in the assumption that the people of the United States could make the decision on peace or war. These decisions are made for them by the leaders of other countries over whom they have no control—and the people of other countries likewise have the decision made for them without their control. Without world law there is no world responsibility.

Is there no limitation then, on the power of the President to negotiate agreements with other nations? There seem to be two types of limitation. One is a practical limit; the other is a theoretical one. Practically, the President cannot go further than the point at which Congress is unwilling to support him or his agreements if they are non-self-executing. But, in practice, this has not worked out to be much of a limitation.⁷² Much more of a practical limitation is the fact that so far neither the President nor the Congress has seen fit to take the initiative in negotiating a conference for world government, although Mr. Truman was overheard by a newspaperman on his way back from the San Francisco Conference saying something to the effect that there was no reason why the nations of the world could not eventually form an organization like that of the 48 States. Beyond this, nothing has been heard from or done by the White House.

The theoretical limitation, the constitutional limitation on the power of the President in foreign affairs, is that he may not change the constitution

... carries on any ... intercourse with any foreign government ... with an intent to influence (it) ... or to defeat the measures of the government of the United States ... shall be fined ... or imprisoned. ... " U. S. C., Tit. 18, § 5; see debates in *Annals of Congress*, 12-27-1798 and following. Originally passed to prevent the repetition of the attempt by a Quaker businessman, Logan, to prevent war between France and the United States, the Act has been brandished at regular intervals at peace-loving citizens. The latest suggestions for application were on Henry Ford for his 1915 "Peace Ship" effort, and Henry Wallace for his 1947 European junket in the midst of the "cold war."

71. Specifically, it was for a constitutional amendment: "Congress, when it deems a national crisis to exist in conformance with this article, shall by concurrent resolution refer the question (of declaration of war) to the people." 83 CONG. REC. 276-283 (January 10, 1938). It was defeated on a motion to discharge from the Committee on Judiciary.

72. McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 321, 326 (1939).

or form of government by treaty or executive agreement.⁷³ May he negotiate such changes subject to ratification by the sovereign people, the principals for whom he is acting as agent? There seems to be little doubt that tradition, practice and the laws have given him that power.⁷⁴

Only two questions remain to be discussed. First, are there any practical objections in the form of insuperable difficulties involved in Presidential negotiation with the heads of other States for a genuine world government proposal? That is, would negotiation in such a manner be likely to achieve a viable world constitution proposal? Second, may the people who are sovereign withdraw the powers in foreign relations which they have delegated to the President and grant them to other representatives or delegates specially selected or otherwise exercise these powers themselves?

With regard to the first question, it may be observed that the proposal has already been made that presidential negotiation be the first step toward world government.⁷⁵

Mr. VORYS. Mr. Finletter, you stated at the end of your remarks a sort of time table in which one of the steps was a preliminary meeting between Chiefs of State; is that right?

Mr. FINLETTER. That is correct, sir.

It may also be observed that the method of diplomatic negotiation has never produced anything more than treaty agreements, as easily broken as made, in fact, more easily broken than made.

73. *The Cherokee Tobacco*, 11 Wall. 616 (U. S. 1870). "A treaty cannot change the Constitution or be held valid if it be in violation of that instrument." Sutherland, *op. cit.* note 63 *supra*; "No limitations upon the treaty-making power, therefore, exist by reason of the terms by which the power is conferred, or by reason of any *directly* restrictive language; but as do exist, result from the nature and fundamental principles of our government, which forbid that a treaty should change the constitution or be held valid if it be in violation of that instrument." *Id.* at 143. CALHOUN, 1 WORKS 203-204 (New York, 1853): "There still remains another and more important limitation; but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the constitution-making power." The constitution-making power he defines as being "the power which ordains and establishes the fundamental laws; which creates, organizes, and invests government with its authority, and subjects it to restrictions." "Clearly the National Government would not be competent by treaty to change the form of government or usurp functions of the Constitution-making power or alter the nature or structure of the government, or the objects for which it was formed. And this for the double reason that it would not only violate the Constitution or the fundamental principles on which it rests, but also because it would constitute a gratuitous intrusion upon the purely internal affairs of the Nation." Sutherland, *op. cit.* p. 146 (italics added).

74. U. S. CONST. Art. II, § 2, cl. 2, and sec. 3; *The Federalist*, no. 75. See also, CORWIN, *PRESIDENT*, pp. 240-254, and note 123 at p. 420.

75. World government makes strange bedfellows. At the same time Thomas K. Finletter, former State Department official, former Chairman of the President's Air Policy Commission, present Chief of the European Cooperation Administration in England, was advocating a meeting between the heads of State, Senator Glen Taylor, vice presidential candidate of the Progressive Party was introducing another world government resolution providing for a preliminary meeting between the heads of the "Big Two" powers. (S. C. RES. 54, introduced May 3, 1948.)

Mr. VORYS. That is one of the things that has failed so far every time we have tried it in recent years. We have taken a diplomatic licking at Tehran, Yalta and Potsdam; is that not true?

Mr. FINLETTER. Mr. Congressman, I think I would be unprepared to debate Tehran and Yalta.

Mr. VORYS. Your suggestion is that we do the kind of thing that has brought us to where we are, instead of trying to do something different. . . .

This should not lead us to conclude that diplomatic negotiation may not in the future produce more lasting results. Miracles have been known to happen. But there are more serious objections or difficulties involved in the problem of diplomatic negotiation by executives. In the first place, negotiators are handicapped in their negotiations by an uncertainty as to whether their negotiations will be upheld by the ratifying governments. In the case of the United States, the problem is whether the proposal or treaty will be approved or ratified by the members of the Senate. If the proposal is in the form of a mere executive agreement, not requiring the approval of the Senate, there is serious doubt about the legality of such presidential action, without curing ratification at some point by the people.⁷⁶ If the President is merely to negotiate a constitution for world government to be ratified by the people or by the device of an amendment to the United States Constitution, then the question may be asked whether officials of the government to be curtailed are appropriate representatives of the people.

A Secretary of State speaks as a representative of a sovereign government which has a past, not as a private citizen expressing a personal opinion. For this reason, General Marshall is morally obligated to do everything within his power to make the United Nations work as it is now constituted. He must stand on the bridge with the other captains of sovereign states as the ship sinks. Furthermore, in his capacity of United States Secretary of State, *he must be the last man to say that it is sinking*, lest he be accused of wishing it to do so.⁷⁷

The attitude of the United States towards the problems of the United Nations will have a profound effect on the future of the organization. . . . The core of the world security problems is the relationship between the East and the West. . . . The fact that in the short span of its existence, the United Nations has not been able to solve this basic problem has profoundly affected the thinking of many members of Congress. . . . The most likely result of revision, under the present circumstances would be the destruction of the United Nations.⁷⁸

76. This would only apply to an executive act of the peculiar nature under discussion in this paper. Other executive agreements have been held to have the force of law, and one territorial court decision went so far as to say, in regard to a British-American agreement regarding the island of San Juan, that while it was not a "casting of the national will into a firm and permanent condition of law," it was "some sort" of an expression of the will of the people expressed through the political arm of the government. See *Watts v. U. S.* 1 Wash. Terr. 288 at 294 (1870).

77. CARNEY, *AN APPEAL TO REASON* 11 (Chicago, 1946).

78. U. S. Department of State, "Strengthening the United Nations," reprinted from the Department of State Bulletin (May 16, 1948), pub. 3159 (Washington, 1948), excerpts from statements by General Marshall and Ambassador Austin.

Recently the Labour Party of the United Kingdom issued a pamphlet . . . "An attempt to federate now," says this pamphlet, "would exaggerate divisions, excite mutual fear, distrust, contempt, and jealousy and greatly favour centrifugal tendencies."⁷⁹

Examples could be multiplied of the thesis that changes must not be made in the existing order because the only alternative available would be no order, which presumably is even less order than we have now. Trapped in this logic of their own making, diplomats are powerless in actual practice to deliver themselves or their people from it.

Since the forms of government are so incomplete and rudimentary at the world level, the only authorized procedure for changing the form is one in which the sovereign people participate not at all. It is for this fundamental reason that governmental negotiators find themselves in the squirrel-cage of treaty-negotiation, ratification, dissatisfaction and breach or disregard of the provisions thereof. Never are they able, by themselves, to rise to the fount of power, to create true world law. Thus from a purely formal and legal point of view, the procedures authorized by the Charter of the United Nations do not authorize the people of the world to ratify a world constitution. Articles 108 and 109 of the Charter provide for ratification of changes made by the representatives of national governments by the constitutional processes of the Member States. Since the changes made in the United Nations Charter must be in the form of treaties, and since in most countries treaty-making procedure does not require submission for approval to the people, the validity of his procedure in changing the Charter into a real world constitution and establishing a government of delegated powers rather than an administrative agency like the present United Nations organization is subject to much doubt.⁸⁰ So far as the United States is concerned, such a treaty could not be considered an act of the people, but only an act of the people's agent in foreign affairs, the national government. An agent may not re-delegate powers given him by his principal without first gaining the latter's consent. The treaty-making procedure does not provide for securing such consent. The most that it can be considered to achieve is the consent of two-thirds of the states of the Union, through the representatives of the states in the Senate.⁸¹

79. Quoted by Ambassador Austin in an address before the Vermont General Assembly, February 24, 1949. U. S. Department of State Press Release No. 555.

80. *Burnet v. Brooks*, 288 U. S. 378 at 400: "In its international relations the United States is as competent as other nations to enter into such negotiations and to become a party to such conventions without any disadvantages due to limitations of its sovereign power, unless that limit is necessarily to be found to be imposed by its own Constitution." The Charter lends some color to the notion of its popular origin by beginning its Preamble with the words, "We the peoples of the United Nations . . . have resolved to combine our efforts . . ." but its ending snatches away whatever flush of life might have accrued to the Charter: "Accordingly, our respective Governments, through representatives assembled . . . do hereby establish an international organization . . ." One gets the notion that at all costs the "peoples" must be kept from direct contact with each other. Governments become intercessors.

81. *The Federalist*, No. 62, p. 402 and No. 64, pp. 421-422 (Washington, 1937). But States have no competence at international law severally.

In summary, then, it would seem that the proposals to direct the President of the United States to instruct his diplomatic representatives in the United Nations to place on the agenda of the General Assembly the question of a revision conference of the United Nations—at which he or his representatives would work out amendments to the Charter which would make it a world government when ratified by the constitutional processes of the Big Five and 34 of the other 58 States—are proposals which are beset with difficulties. These difficulties are, first, that neither Congress nor the President has any authority to negotiate a treaty changing the fundamental form of our nation's government and re-delegating the most important powers of external sovereignty to a world federation without securing the consent of the people, but the express terms of the United Nations Charter provide that the revisions shall be ratified according to "the constitutional processes" of the Member States and thus forbid the submission of the changes to the people of the United States. In the second place, national leaders, having a vested interest in the maintenance of their own power, are the least appropriate delegates to a revision conference of the United Nations whose purpose would be to divest them of that power at least in the field of foreign relations. Third, the past conduct of such negotiators at international conferences gives us very little hope that their future conduct will be different. Fourth, that international suspicion of the representatives of the governments of other nations is at its peak in these days, and that therefore, their official moves would be watched with psychopathic awareness.

The question to which we must therefore address ourselves is, must we change our constitutional processes for the ratification of treaties? If this be answered in the negative, we may still consider the desirability of amending the constitutional provisions. If a given proposal is not in the nature of a "must" if it is not absolutely necessary, we should presumably avoid the exertion of taking that step, however. So that if we find that it is not absolutely necessary to amend the constitutional processes of treaty-ratification, we must then ask, "If National Governments, executives, or Congressmen cannot negotiate the people of the United States into a world constitution, without violating the provisions of the Constitution, and if an amendment of the Constitution is not necessary, then how can the people become part of a world commonwealth?"

AMERICAN CONSTITUTIONAL CONVENTION ON FOREIGN AFFAIRS

There are two ways of initiating amendments to the Constitution of the United States. Only one has ever been used, though the other has been tried.⁸² The first way to initiate an amendment to the Federal Constitution

82. See U. S. Senate, 71st Cong. 2d Sess., *Federal Constitutional Convention*, Senate Document No. 78 (January 6, 1930).

is for both the Senate and the House of Representatives to approve it by a two-thirds vote. The other way is for the Legislatures of two thirds of the states to apply to Congress to call a national convention, for the purpose of considering amendments to the Constitution. The language of Article V is mandatory: Congress "shall call a convention."

Congress has discretion as to the time, place and composition of the convention and the method of electing delegates. Clearly Article V does not grant Congress the power to limit the scope of the convention, *nor does it prohibit Congress from limiting the scope of the convention.*⁸³

However, according to a well-established rule of constitutional construction, all powers not granted in the Constitution to Congress or necessary and proper to the fulfillment and use of the powers expressly granted are denied.

The proposal for an American constitutional convention to revamp the powers of the government to deal with foreign affairs is based on the belief that the national government at present cannot commit into the hands of a world federation the powers to deal with inter-nation affairs, because of constitutional limitations. The example of the French Constitution of 1946 which commits the French nation to limit its sovereignty on a reciprocal basis if necessary for the organization and defense of peace is held before us.⁸⁴ The postwar Italian constitution contains a similar provision.⁸⁵

The text of request by state legislatures to the Congress for the calling of an American constitutional convention suggest that amendments to the United States Constitution should "authorize the United States to negotiate with other nations, subject to later ratification, a constitution of a world federal government, open to all nations, with limited powers adequate to assure peace."⁸⁶ If, however, the convention is convened after a world constitution has already been presented for American ratification, the resolution provides that amendments necessary for ratification be considered instead.⁸⁷ Two years ago a similar proposal was defeated in the Wisconsin General Assembly by a margin of three votes.⁸⁸ Florida, California, Maine and New Jersey legisla-

83. William B. Lloyd, Jr., *Constitutional Action for Peace*, Human Events pamphlet No. 24, p. 16 (Hinsdale, Illinois, 1947).

84. Preamble, French Constitution of 1946. See also Albert Guerard, *The French Constitution*, 1946, 1 COMMON CAUSE 45 (August, 1947).

85. English translation of text in U. S. Department of State, Documents and State Papers, I (April, 1948), 46-63: "Italy consents; on conditions of parity with other states, to limitations of sovereignty necessary to an order for assuring peace and justice among the nations; it promotes and favors international organizations directed toward that end." See also Gertrude S. Hooker, *Constitutions in the Making: Italy* 2 COMMON CAUSE 235 (January, 1949).

86. Conn. S. J. R., 15, pending since public hearings on March 23, 1949. See 74 World Government News 5 (May, 1949).

87. 72 World Government News 8 (March, 1949).

88. Joint Resolution No. 25A, 1947 Sessions Wisconsin. March 26, 1947. The text of this resolution was "Resolved . . . that the legislature of the State of Wisconsin does hereby make application to the Congress of the United States to call a Constitutional

tures have already passed such a request for an American constitutional convention: the proposal has been approved by the House in North Carolina and Iowa and by the Senate in Florida, and has been introduced in Utah, Connecticut and Minnesota.⁸⁹

There is some confusion about the reason for attempting to call an American constitutional convention rather than a world constitutional convention.

There is little doubt that the President possesses the power and authority to discuss and negotiate United States participation in a world government subject to due ratification. However, for political and psychological reasons it would unquestionably make successful negotiation of the transformation of the UN into a world government more likely if our constitution were amended expressly to grant the President such powers. Such action would dispel all foreign and domestic doubts as to our constitutional capacity, and even more, our political willingness, to enter a world government.⁹⁰

From the above quotation, it would appear that the device of requesting a national constitutional convention is merely a psychological one or one designed to educate the public or to put pressure upon the national government to take action which it has not so far undertaken. What is here proposed is a constitutional amendment to enable the President to take action which no one denies him the power to take at the present time, even before such an amendment is passed. Such shadow-boxing is fit for timid souls. The mere presence of an "enabling" amendment is no guarantee whatsoever that the President will follow such a mandate—his powers are "plenary, delicate and exclusive" according to Sutherland—and what is more crucial, is no guarantee that such negotiations will result in anything more than past negotiations have achieved.

But another reason is suggested by United World Federalists, the American organization which is sponsoring the constitutional convention proposal.

It is generally believed by constitutional authorities that actual entry of the U. S. into a world government of any sort will require amendment of our Constitution. One lawyer consulted by UWF on this matter

Convention for proposing such amendment or amendments to the foreign affairs provisions of the Constitution as may be deemed necessary."

89. See Journal of the House of Representatives of Florida, May 10, 1949, pp. 498-99, for text of Sen. Mem. 282 as amended. In California, A. J. R. 26 passed the Assembly 68-0 on March 24 and the Senate 22-12 on April 6, 1949. In Maine, a slightly modified request was passed unanimously by the House on April 2 and the Senate on April 4. In New Jersey, A. C. R. 17 was passed on March 31 by the Assembly unanimously and by the Senate with one dissenting vote on April 8, 1949. See 74 World Government News 5 (May, 1949).

90. Foreign Affairs Research Council of United World Federalists, Inc., Political Action Letter I, "Project to Amend Federal Constitution to Provide for United States Participation in Limited World Government, January 24, 1949" (Washington, 1949) (mimeo'd).

unequivocally stated that it is his opinion that entry into a world government would require amendment of our constitution.⁹¹

No "constitutional authorities" are cited in the above quoted "political action letter." And of course there are no precedents. If, however, we go back to the favorite historical period of world federalists and inquire about how many of the thirteen federating states then amended their constitutions to enable them to join the Union, the answer, quite simply, is: None. Thirty years after the Constitution went into effect Connecticut established its first constitution, superseding a charter from Charles II. The constitution required state officers to swear to support the United States Constitution. No other provision mentioned the Federal Constitution.

In 1792, Delaware's second constitution made the governor commander-in-chief of the army and navy of Delaware "except when they shall be called into the service of the United States." No other provision mentioned the Federal Constitution.

Georgia ratified the Federal Constitution in January, 1788 and it went into effect for Georgia and the eight other states when New Hampshire ratified on June 21, 1788. In November of that same year, a convention met in Georgia and proposed the state's second constitution. This constitution made no mention of the United States or its existence as a government, but on the contrary provided that the governor should be commander-in-chief of the militia with no exceptions, or provisos about the jurisdiction of the United States Government over them. The existence of the Federal Union was first recognized in the Georgia Constitution of 1798, ten years later.

Maryland in 1792 provided for separation of national and state offices in different individuals—no person to be a holder of both state and national office—by an amendment to its constitution of 1776.

The Massachusetts Constitution of 1780 was in force until 1918. The earliest amendments to this pre-Federal constitution were in 1821. Amendment VIII provided that no State officer should hold office under the United States Government. Chapter IV of the Massachusetts Constitution provided for the election of delegates to the Continental Congress. So far as any state action to cancel this provision is concerned, none was taken, even though there was provision for a convention in 1795 if desired by two-thirds of the voters for the purpose of amending the commonwealth's constitution.

Thorpe, compiler of these constitutional changes, says cryptically, though perfectly adequately, of this provision of the constitution—which he placed in brackets—"superseded by Art. I, Constitution United States."⁹²

In the Massachusetts and New Hampshire constitutions, incidentally, appears a clause which is virtually analogous to the phrases appearing in the

91. *Ibid.*, *loc. cit.*

92. 3 THORPE, *THE FEDERAL AND STATE CONSTITUTIONS* 1906 (Washington, 1909).

French and Italian constitutions on limitation of sovereignty, and is only slightly more general than that proposed at the present time by United World Federalists for an American constitutional amendment:

The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.⁹³

Needless to say, it was never necessary to make any delegation of power to the Continental Congress. Among its last official acts, completed in the spirit of John the Baptist who heralded a greater than he, it named the date and place of meeting for the new Congress and adjourned *sine die*.⁹⁴

New Hampshire (1792), New York (1801), and Virginia (1830) in their constitutional changes after the inception of Federal Constitution, made no constitutional mention of the United States Government, while New Jersey (1844), North Carolina (1835), Rhode Island (1842), and South Carolina (1790) had provisions for disposal of the militia when not in the service of the United States, or for separation of state and national offices or for oaths of allegiance to both state and national governments.⁹⁵

None of the states, with the possible exception of Massachusetts and New Hampshire mentioned above, made any provision before the convention in Philadelphia to make delegations of power possible. Hamilton was impeccably correct in saying that the convention was "a body utterly unknown to their constitutions."⁹⁶

It was not necessary for the states to make any preliminary or any later approval of the Constitution. In the first case, the convention was wholly without legal authority, being purely informally called together for the purpose of making proposals, and therefore needed no sanction by state constitutions. On the other hand, no later approval of the Constitution was necessary, for a very simple reason. What the state ratifying conventions had agreed to on behalf of the sovereign people in ratifying the United States Constitution was an instrument which contained the phrase:

This Constitution . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁹⁷

Thomas Paine, writing in *The Rights of Man*, tells us:

93. *Id.* at 1890.

94. McLAUGHLIN, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 224 (New York, 1935).

95. I am indebted for the foregoing analysis of the constitutions in Thorpe's seven-volume work to Carl A. Ross, attorney, Albion, Michigan.

96. *THE FEDERALIST*, No. 40.

97. Art. VI, § 2.

After the new federal Constitution was established, the state of Pennsylvania, conceiving that some parts of its own constitution required to be altered, elected a convention for that purpose. The proposed alterations were published, and the people concurring therein, they were established.⁹⁸

An examination of the changes made by the people, however, revealed that they were the minor ones of requiring that no member of the National Congress should hold office in the state legislature and that the governor was to be commander-in-chief of the militia unless when called into the actual service of the United States. Neither of these changes was by way of "an enabling" act. The Federal Constitution expressly provides that the President shall be the commander-in-chief of the militia "when called into the actual service of the United States," and so the related provision in the Pennsylvania constitution was merely concerned with the command of the militia when *not* under federal control. In no sense do these provisions enable or ratify the changes which occurred, as the result of the ratification of the Federal Constitution, in their inter-state relationships. Further, the fact that they occurred in only a few constitutions and then some years later, shows that they are of no help in providing a precedent for pre or post-world-constitutional action by the United States unilaterally. Certainly such analogous action by the United States today is not grasping at the heart of the matter, which is to achieve, in some way, universal and binding action to establish world federation.

We may consider, as established, then, that national governments cannot constitutionally involve the people of the United States in a world federation without their consent; that they may, however, negotiate, but are extremely unlikely to do so, or to do so effectively; that historical experience has been that a constitutional amendment was not necessary, and was not necessary because the constitutional proposal approved by the people in 1788 contained the provision that it was the supreme law of the land and superseded contrary provisions of the constitutions of the constituent political units.

We must therefore turn our attention to a third line of action in an attempt to answer the question: How may the people become part of a world political commonwealth in a world already interdependent physically, economically, politically and culturally?

WORLD CONSTITUTIONAL CONVENTION

The Declaration of Independence states in immortal phrases that:

Whenever any form of government becomes destructive of these Ends (of life, liberty and the pursuit of happiness), it is the right of the people to alter or abolish it, and to institute new government, laying its

98. (New York: Modern Library ed. 1946) p. 214.

foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Presumably this right to "alter or abolish" government extends to the creation of government where none yet exists, on the world level.⁹⁹ The United States of America is in a unique position to share its knowledge and experience of a practical technique of instituting new government with the rest of the people of the world. This is the technique of the constitutional convention. There have been over 200 constitutional conventions held by the states in the United States and one Federal Convention, although the United States Constitution provides for the holding of other Federal Conventions to amend the original Constitution.¹⁰⁰ Jefferson liked this method of altering the fundamental law of the community because it provided for peaceable revolution. He realized at the same time that it would strike terror into the hearts of those who wanted no revolution, peaceful or otherwise. In the midst of the most serious crisis our government has ever had to face, perhaps not even excluding the Civil war, when our Constitution seemed about to be unequal to the strains put upon it, he wrote, almost gleefully to Monroe:

They (the Federalists' party) were completely alarmed at the resource for which we declared, to wit, a convention to reorganize the government and to amend it. The very word convention gives them the horrors, as in the present democratical spirit of America, they fear they should lose some of the favorite morsels of the Constitution.¹⁰¹

When the crisis had successfully been passed, he wrote more soberly and also more appreciatively, of the merits of the convention method, to Nathaniel Niles:¹⁰²

. . . There was general alarm during the pending of the election in Congress, lest no President should be chosen, the government be dissolved, and anarchy ensue. But the cool determination of the really patriotic to call a convention in that case, which might be on the ground in eight weeks, and wind up the machine again which had only run down, pointed out to my mind a perpetual and peaceable resource against . . . in whatever extremity might befall us; and I am certain a convention would have commanded immediate and universal obedience. . . .

There are several questions which could be asked about the convention approach to the drafting of a world constitution. For example,

99. It is the view of Quincy Wright and others that "world government exists now, but not with sufficient centralization." *The U. N. Charter as a World Constitution*, 2 COMMON CAUSE 223 (January, 1949). It is his contention, therefore, that the emphasis should be placed on "altering" by a gradual process the U. N. Charter to make it more "centralized." See also his *Constitution-Making as Process*, 1 COMMON CAUSE 284 (February, 1948) and his letter on the Preliminary Draft of a World Constitution, February 17, 1948, 2 COMMON CAUSE 63-65 (September, 1948).

100. O'ROURKE, CONSTITUTION-MAKING IN A DEMOCRACY 23 (Baltimore, 1943).

101. 10 WRITINGS OF THOMAS JEFFERSON 201 (Memorial ed., 1903).

102. *Id.* at 233.

- (1) Would a world constitutional convention be legal?
- (2) How should—or could—a world constitutional convention be initiated or called?
- (3) What have been—and what should be—the size and character of personnel of past and future constitutional conventions?
- (4) What are the powers of a constitutional convention and can they be limited in any way?
- (5) How have constitutions been ratified—and how should they be ratified—which have proceeded from constitutional conventions?
- (6) What are some current proposals for world constitutional conventions?

For reasons of space we shall omit consideration of (3) and (5) and consider (6) in connection with (2).

Would a world constitutional convention be legal? The point is too well established to be labored that the American people have the right to change their government at any time. The Declaration of Independence, above-mentioned, while not a part of our law in the same sense that the Constitution is, nevertheless states such fundamental principles of our legal philosophy that it would be impossible to imagine a denial of them.

But the Federal Constitution itself contains the recognition that it is an act of the Sovereign People of the United States, and Amendments Nine and Ten recognize that the Constitution establishes a government of limited powers.

The natural construction of the Constitution is made absolutely certain by the tenth amendment. This amendment . . . disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people. . . . The argument of counsel ignores the principal factor in this article (X), to wit, "the people." Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. . . . All powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. . . .

This article X is not to be shorn of its meaning by any narrow or technical construction, but it is to be considered fairly and liberally so as to give effect to its scope and meaning.¹⁰³

The truth of this holding is not derogated in the slightest by the opinion in the case of *United States v. Curtiss-Wright Export Corporation*:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such

103. *Kansas v. Colorado*, 206 U. S. 46 (1907).

implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.¹⁰⁴

Justice Sutherland's argument was concerned with the so-called "twilight zone" of powers not specifically delegated to the Federal Government by the Constitution, yet denied to the states. This is clear from the statement immediately following the one just quoted:

In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the States* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.

It is also clear from his own words that he was not considering the question of the division of powers between the Federal Government delegated by the people and those remaining in the people, nor was he considering the right of the people—rather than the states—to reclaim those powers in the event they were needed, for in his *Constitutional Power and World Affairs*, he says:

When the Constitution was framed, therefore, the undivided powers of external sovereignty were in the Union, which antedated the Constitution and was made "more perfect" by it. Hence, the disposition of these powers did not involve taking something from the mass of state power . . . for they already belonged to the Nation, and the only question to be determined was, What shall be given to the general government and made active, and what shall be reserved to the people and lie dormant? ¹⁰⁵

As a practical matter, Sutherland could not conceive of a national government not having enough power to achieve the ends it has been formed to achieve.

Inasmuch as the powers of government must be commensurate with the ends for which the government was instituted in order to assure attainment, a presumption arises that every necessary power is conferred unless prohibited. . . . The government was created and constituted as the sole agency of the Nation in all its external relations, charged with the responsibility of preserving it and of maintaining its equality. For the accomplishment of these ends, it must be assumed as a necessary and self-evident postulate, that no legitimate power would be intentionally withheld.¹⁰⁶

This is simply the notion of external sovereignty—the belief that a sovereign nation can exist which is absolutely unlimited in its power to deal with foreign nations. What Sutherland did not do is make clear the distinction, an absolutely crucial one, between authority and power. While it may be true that the national government possesses full and exclusive authority to

104. 299 U. S. 304, 307 (1936).

105. Sutherland, *op. cit. supra* at p. 45.

106. *Ibid.*

deal with foreign affairs, it is not true that the national government, or even the sovereign People of the United States, possesses power to preserve the State against outside enemies or to maintain its equality. One may authorize a blind man to review a motion picture though he is powerless to do so. One may authorize a paralytic to drive his car. Or one may authorize his national government to avoid war and seek peace. The belief in external sovereignty's reality in the Atomic Era is the most vicious of social myths because the most dangerous to the welfare and happiness of the American people. Sutherland is right: "A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense." When therefore the external sovereignty of Great Britain in respect of the Colonies ceased, it immediately passed to the Union. But when we examine the case cited in defense of this statement, we find that:

. . . these high acts of sovereignty were submitted to, acquiesced in and approved of, by the *people of America*. In Congress were vested, because by *Congress were exercised with the approbation of the people*, the rights of war and peace. . . .¹⁰⁷

And in Justice Iredell's concurring opinion we find his conclusion to be that:

Every particle of authority which originally resided either in Congress or in any branch of the State governments, was derived from the people . . . that this authority was conveyed by each body politic separately, and not by all the people in several provinces or states jointly, and of course that no authority could be conveyed to the whole but that which previously was possessed by the several parts.¹⁰⁸

Our constitutions are filled with references to the fact that government is established by consent and compact of the people and that it is the right of the people to alter or abolish it at will. For example:

All political power is vested in and derived from the people only. (South Carolina Constitution, 1776, Preamble.)

All government of right originates from the people, is founded in compact only and instituted solely for the good of the whole. (North Carolina Constitution, 1776, Art. I, Declaration of Rights.)

When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal. (Maryland Constitution, 1776, Art. I.)

Whenever these great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness. . . . The community hath an indubitable, unalienable, and indefeasible right to reform alter or abolish government in such manner as shall be by that community

107. *Penhallow v. Doane's Administrators*, 3 Dallas 54, 80 (U. S. 1795).

108. *Id.* at 94.

judged most conducive to the public weal. (Pennsylvania, 1776, Preamble and Declaration of Rights, Art. V.)

The people, from whom all power originates and for whose benefit all government is intended. . . . (Georgia Constitution, 1777, Preamble.)

It needed no reservation in the organic law to preserve to the people their inherent power to change their government. (*Ellingham v. Dye*, 178 Indiana 336 at 344 (1912).)

From the above quotations it would seem clear that the powers held by the national government are derived from the people, whether they be considered the people of the United States severally or the people of each state separately.

Sutherland indeed does nowhere deny this. But it was his belief that the power "inherent" in the national government was there because it had nowhere else to go. It could not go to a world government at that time for the simple reason that none existed and besides the Thirteen States were much more isolated from the rest of the world and less influenced by or threatened by its pressures. It could not go to the people—it could not *remain* in the people because:

. . . a power reserved to a hundred million drivers is in effect a power which does not exist, since it cannot be translated into action until transferred to the government by the long tedious and almost impossible process of Constitutional amendment.¹⁰⁹

The upshot then would seem to be that the people have here a power to divide their sovereignty, giving part to a world government, but it is a power which is not actual until the people have acted, until they have used it. Like the man who feels physically exhausted only to find that when he starts to run he generates speed he thought himself incapable of the moment before, the people have the right, whenever they will to use it, to alter or abolish the powers they thought "inherent" in the national government and transfer them to new government. But until they act, national governments perforce must continue to stumble haltingly through the forests of international anarchy filled with similarly incomplete national sovereignties each fearful of the others. "Sovereignty is never held in suspense." It vests in those who are willing and able to use it.

The limitations of the Constitution are not bonds which fetter the people; they are restraints imposed by the people themselves upon the government which they have created as an instrumentality through which they rule in order that their creature may never forget that it has a creator.¹¹⁰

The device of the constitutional convention is one technique by which the people may exercise their sovereignty.

109. Sutherland, *op. cit.*, p. 42.

110. *Id.* at 11.

Perhaps some politician, who has not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power is vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that in our governments the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in this last instance, is much greater; and here James Wilson, author of these words, goes beyond Sutherland in alleging that the sovereign power of the people, far from being "in effect a power which does not exist," is effective when held by the people and *can* be exercised by them for the people possess over our constitutions control *in act*, as well as right. The consequence is, that the people may change the constitutions whenever and however they please. *This is a right of which no positive institution can ever deprive them.*

And recalling to his audience that they are members of the Pennsylvania convention elected by the people for the purpose of approving or disapproving the new Federal Constitution, Wilson emphasizes that he is not merely spinning theory—he is talking about realities:

These important truths, sir, are far from being merely speculative. We at this moment speak and deliberate under their immediate and benign influence. To the *operation* of these truths we are to ascribe the scene, hitherto unparalleled, which America now exhibits to the world—a gentle, a peaceful, a voluntary and deliberate transition from one constitution of government to another. In other parts of the world, the idea of revolutions in government, is, by a mournful and an indissoluble association, connected with the idea of wars, and all the calamities attendant upon wars. But happy experience teaches us to view such revolutions in a very different light, to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society *and mankind.*

Oft have I marked with silent pleasure and admiration, the force and prevalence throughout the United States, of the principle that *the supreme power resides in the people*, and that *they never part with it.* It may be called the panacea in politics. There can be no disorder in the community but may not here receive a radical cure. . . .

Are not these universal principles applicable no less to the world community? With what seems to this writer to be inexorable logic, Wilson went on to draw the conclusion which may be applicable to present day affairs, as he thought it to be applicable to that earlier crisis:

When the principle is once settled that the people are the source of authority, the consequence is, that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good. They can distribute one portion of power to the more contracted circle, called state governments; they can also furnish another proportion to the government of the United States. Who will under-

take to say, as a state officer, that the people may not give to the general government what powers and for what purposes they please How comes it, sir, that these state governments dictate to their superiors—to the majesty of the people? ¹¹¹

Why can they not furnish another portion to a third level of government, a world government? Who will undertake to say, as a national leader, that the people of his country may not give to a world government what powers and for what purposes they please? How is it that these national governments dictate to their superiors?

No, there is little doubt that the Constitution of the United States was superimposed upon the various state constitutions without any authority derived from state governments, and indeed in direct violation of the provisions of the Articles of Confederation. Not only this, but it might have been legally adopted by the people of the various states *against the will* of the various State governments: ¹¹²

The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

It has been said that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give. But, surely, the question, whether they may resume and modify the powers granted to government, does not remain to be settled in this country.

Jefferson, in a long discussion of the case of *Cohens v. Virginia*, concluded: ¹¹³

The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two thirds of the states. The origin of the idea of the convention method of establishing new forms of government can not be ascertained with any degree of certainty. In the formation of the state governments of the Thirteen States, John Adams declared that the people "must all be consulted, and we must realize the theories of the wisest writers, and invite the people to erect the whole building with their own hands, upon the broadest foundation." ¹¹⁴ As early as 1648 in England, according to one writer, a plan was drawn up embodying the convention idea.

That some persons be chosen by the Army to represent the whole Body; and that the well-affected in every County (if it may be) chuse some persons to represent them. . . . That those persons ought not to exercise any Legislative power, but onely to draw up the foundations of a just Government, and

111. 2 ELLIOTT, DEBATES, 432 ff. (Italics not in original.)

112. *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819).

113. Letter to Judge William S. Johnson, 15 WRITINGS 451 (June 12, 1823).

114. 3 JOHN ADAMS, WORKS 46 (C. F. Adams ed.).

to propound them to the well-affected people in every County to be agreed to; Which Agreement ought to be above Law. . . .¹¹⁵

The origin of the idea has been credited by Hoar, at least in its perfect embodiment to the town of Concord, Massachusetts. On October 21, 1776, the town voted on the question of authorizing the legislature to frame a constitution.

That the Supreme Legislative, either in their proper capacity, or in Joint Committee, are by no means a body proper to form and establish a Constitution or form of Government; for reasons following: first, because we conceive that a Constitution in its proper idea intends a system of principles established to secure the subject, in the possession and enjoyment of their rights and privileges, against any encroachments of the governing part, second, because the same body that forms a constitution have of consequence a power to alter it, third because a constitution alterable by the Supreme Legislative is no security at all to the subject against any encroachment of the governing part on any or on all of their rights and privileges.

Accordingly, they recommended the calling of a convention.¹¹⁶ The Massachusetts assembly resolved itself into a convention nevertheless and offered a constitution. It was not accepted. The town of Concord cast 111 votes against it and none in favor.¹¹⁷

On the world level, there are three possible ways in which a constitutional convention might be considered legal. (1) A constitutional convention might be considered legal if it were held in accordance with some previously authorized procedure. (2) It might be proper if it were held, even though without previous authorization, in such an orderly manner as to reflect the will of the people. (3) It might be considered legal if it were held, without previous authorization and in such a way as not to reflect the will of the people, and its results or the constitution forthcoming, vindicated or legitimized by force or by the passage of time, i.e., by passive acquiescence.

So far as the first method is concerned, the only previously authorized procedure existent on the world level is that provided for in the United Nations Charter. As we have seen, this method does not provide for ratification by the procedures required by our system for changing our Constitution. The treaty-making power does not include the power to change the fundamental law of the land. Therefore, any attempt by American diplomats to bargain away the authority granted solely and exclusively to them would be in plain contravention of our constitutional theory and practice. Only if such an attempt were acquiesced in by the people or forced on them by the might of government could it be considered "legal." And this method would then

115. PEASE, *THE LEVELLER MOVEMENT* 261, quoted in McLAUGHLIN, *op. cit.*, p. 109.

116. HOAR, *CONSTITUTIONAL CONVENTIONS* 7 (Boston, 1918), quoting from the record in 156 Mass. Archives, No. 182.

117. McLAUGHLIN, *op. cit.*, pp. 110-111.

partake of the characteristics of the third type of legitimation mentioned above, rather than the first.

Delaying for a moment the consideration of the second possibility of legality, let us consider briefly the third. It is possible that world government might be established by the spontaneous act of an unrepresentative part of the people of the world, acting without previous authority. Such world government would be tantamount to revolution. It was in this way that most of the state governments of the thirteen colonies were established.

The convention of Virginia had not the shadow of a legal, or a constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, and annul the constitution itself—namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity.¹¹⁸

World government established by such a method takes its legality basically from the fact of force. It is judged by its success rather than by the means used. It is to be distinguished on this basis from conventions which attempt to use more orthodox methods. It is on this basis that "Dorr's Rebellion" failed in Rhode Island in 1841. Such spontaneous acts have no really legal authority, even when supported by a majority of the persons in the community or even by a majority of the voters.

Suppose a constitution formed by a volunteer convention, assuming to represent the people, and an attempt to set it up and displace the existing lawful government. It is clear that neither the people as a whole nor the government having given their assent in any binding form, the executive, judiciary and all officers sworn to support the existing constitution, would be bound, in maintenance of the lawfully-existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the state. If overpowered, the new government would be established by actual revolution.¹¹⁹

On the other hand, we have several examples in the history of the states of the United States of just such volunteer conventions establishing constitutions or at least meeting to establish them. Even though thus illegally instituted, their actions were ratified by time or events. We have already mentioned the experience of the original 13 states. In addition, several of the seceded Southern states had factions within them which attempted to set up governments supported by Union armed force.¹²⁰

118. *Kemper v. Hawkins*, 3 Va. 20, 74 (1793).

119. *Wells v. Bain*, 75 Pa. 39, 43-49 (1875).

120. For example in 1848 in California, the citizens, becoming impatient of action admitting California as a state, met in several towns "for the purpose of taking into consideration the propriety of establishing a provincial territorial government for the better protection of life and property" until Congress should provide a government. They adopted resolutions calling for a constitutional convention, setting a place and time. Then when Congress adjourned without taking action, the military governor of California hastened to issue his own call for a convention, but, "the people were inclined

Our own Federal Convention, while authorized by the states, was not provided for in their constitutions nor in the Articles of Confederation, and its action as we have seen was of a completely unauthorized nature. However, its defects were cured by ratification by the people.¹²¹

Other examples are of constitutional conventions called and organized spontaneously which did not receive the support of the authorities or of the people in a regular manner and thus failed. "Dorr's Rebellion" was the result of one of these unsuccessful efforts. Rhode Island had continued after the Revolution and the establishment of the United States of America under its original charter from King James, which provided for an exceedingly limited suffrage of landholding white males. Agitation for the reform of this royal charter had started as early as 1820. An informal unauthorized convention was held in Rhode Island in 1837, but took no action, for the legislature made some reforms or at least promised them. In January, 1840, pamphlets were distributed in the towns urging the people of each

... to hold primary meetings, call a State Convention, elect delegates and append to the credentials of each member a list of the voters. The Convention ... should canvass the votes and if the whole number cast was greater than at the last general election for members of Congress, then the Convention was to consider itself the representative of a majority of the people and fully authorized to frame a Constitution. Under the Constitution so made, members of Congress were to be elected who should go to Washington and claim seats in the House of Representatives, which would thus be forced to decide

whether the old Royal Charter government was in the republican form guaranteed by the Federal Constitution. This was the plan. In response to this pamphlet and the organizing ability of Thomas W. Dorr, a young lawyer of Rhode Island who had led the struggle for a broader electorate, a mass meeting of 3,000 people was held in April, 1841, and a convention was called for October. The delegates met, drew up a constitution, and submitted it to the people—i.e., those qualified to vote under it! but more than just to the existing electorate—uninterfered with by the existing government. Fourteen

to dispute the authority of General Riley. The difficulty was adjusted by the local organizations changing the date of their proposed convention to the date fixed by General Riley in his proclamation." MASON, HISTORY OF THE CONSTITUTION OF CALIFORNIA, IN CALIFORNIA, CONSTITUTION OF THE STATE OF CALIFORNIA 360-368 (Sacramento, 1945).

A convention wholly unauthorized by the Constitution of 1836 met in 1861 in Little Rock, Arkansas, passed an ordinance of secession and made the appropriate changes in the 1836 Constitution. These amendments were not submitted to the people, nor apparently to the legislature. On January 4, 1864, under the protection of United States troops, a mass convention of the people met at Little Rock and proposed a constitution to the people. It was ratified by the suspiciously totalitarian vote of 12,177 to 266. It declared the 1861 Constitution to be null and void. It provided only for legislative amendment, no constitutional conventions being permitted. This constitution was superseded by that of 1868, drafted by a constitutional convention under the reconstruction acts of Congress and approved by 28,000 for and 26,500 against. I THORPE, *op. cit. supra* at 277, 288, 306.

121. THE FEDERALIST, No. 40; 2 ELLIOTT, DEBATES 432-433, 443-444.

thousand people voted in favor of the Constitution, a clear majority of the voters then eligible to vote and registered as such. It was said that the regular electorate boycotted the polls on the election day, however. When the Constitution was to be put into effect and officers elected under it attempted to take office, they were resisted successfully by the incumbent government by force of arms. A convention hurriedly authorized by the regular legislature then drew up a constitution which embodied a good many revisions of the old Royal Charter, on which less than half of the registered electorate voted approval, chiefly because they did not like the idea of sharing their voting privileges with the great unwashed masses of mechanics and laborers in the towns. But this constitution became effective, while the "People's Constitution" did not.¹²²

Apparently the only difference in their validity was this: that the minority who approved the second constitution had voted at a duly called election, and hence had authority to speak for the whole people; whereas, the 14,000 who voted for the "People's Convention" had voted at an irregular election, and hence spoke only for themselves.¹²³

The case of *Luther v. Borden*, although decided on other grounds, went into the validity of the latter constitution, the Court saying:

When it is necessary to ascertain the will of the people, the legislature must provide the means of ascertaining it. . . . There must be an authentic mode of ascertaining the public will somehow and somewhere. If not, it is a government of the strongest and most numerous.¹²⁴

The fundamental distinction which we are trying to make here is that so far as our laws and customs are concerned, a "spontaneous" convention is one which is not organized "through channels" while a "popular" convention is one which, though not specifically authorized, and perhaps specifically prohibited by legislative act and constitution prior, is nevertheless proposed, organized and held under "official" auspices and "through channels," and thus gains a measure of validity which does not depend on force or acquiescence.¹²⁵

This distinction has been brought into the current argument concerning proposals for world constitutional conventions in the proposals for "unofficial" and "official" conventions. As a matter of fact, however, there has been no simon-pure proposal for a completely "unofficial" world constitutional convention. That is to say, all of the various proposals put forth have contem-

122. 10 J. B. MACMASTER, A HISTORY OF THE AMERICAN PEOPLE 166-78 (1910).

123. R. S. HOAR, CONSTITUTIONAL CONVENTIONS, THEIR NATURE, POWERS AND LIMITATIONS 21-22 (1917).

124. 7 HOWARD 1, 31-32 (U. S. 1849).

125. Hoar's formal definition of a popular convention is "one which is held in an orderly manner such as to represent clearly the popular will, and yet which is not expressly authorized by the existing constitution." HOAR, *op. cit. supra* note 117, at 38 ¶

plated welcoming the assistance of national governments where possible, while declaring determination to proceed without the official sanction of national governments where necessary or where it is not forthcoming.

The plan which has received the most publicity is that sponsored by Henry Osborne, British member of Parliament and Secretary of the Parliamentary Committee which has initiated the "Crusade for World Government." But even his proposal does not contemplate the establishment of a world government without ratification by existing national legislatures.¹²⁶

The only plan which has come to the attention of this writer which envisages not only "unofficial" convening of a world constitutional convention but also, if necessary, the ratification of any constitution drafted by this convention by "unofficial" procedures is one sponsored by a group calling itself "The Peace Builders" with headquarters in Chicago, Illinois. This group has circulated a "mandate for a people's world constituent assembly" which provides for official or unofficial calling of a world constituent assembly to draft a world constitution and submission "to the governments and people of all countries for ratification."¹²⁷

One writer has cautioned, however, that, so far as the calling or initiation of a world constitutional convention is concerned, there should be a conscious and positive attempt to avoid receiving official status from any government. This is on the theory that the broad appeal of a popularly initiated convention would dispel the distrust of the people of one nation for the governments of other nations.

We must not allow world government to be taken up *at this stage* by our State Department as an official American idea. United World Federalists (the largest American membership organization) is in danger of doing just that in its attempt to put pressure on the government to act officially in proposing federation through the U. N. amendment procedure. The only result of such a successful top-level sales job that we can conceive is that the State Department might take up world government slogans as a popular and useful means of driving Russia out of the U. N. and building a grand alliance around America. We must honestly admit that world government could be an effective cloak for such an action. It would probably be fatal to our idea and lead to that very dissolution of the U. N. and the opening of the hostilities that we dread.

Even if our government sincerely adopted world government, the Russian-American vicious circle has reached a point where any proposal by one side must be opposed for face-saving reasons by the other. This is not the time for the U. S. Government to precipitate the situation over the federalist idea.

He therefore proposes an entirely unofficial campaign in this country

126. See Osborne, *The Crusade for World Government*, 3 BULLETIN OF THE ATOMIC SCIENTISTS 359-360 (1947); Mayer, *A People's World Constituent Assembly*, id. at 361-362; Osborne, *The 1950 Convention; Unofficial or Sovereign?*, 1 COMMON CAUSE 123-124 (1947).

127. *Mandate for a Peoples' World Constituent Assembly*, Mandate Committee (1947).

presumably paralleling efforts in other free countries to enroll the support of "at least ten million voters," through non-governmental channels.

In the years before the election, federalists will need to enroll the support of the major sympathetic civic and political organizations, find the hundreds of leaders willing to stand as candidates and participate in the educational debates, build an organization of several hundred thousand workers along election district lines, and canvass the population in a registration drive for ten million pledged voters. . . . The essence of the Convention campaign is the nationwide debate on issues by the candidates and a popular unofficial *election by the people*.¹²⁸

Another discussion of the popular election of delegates to a world constitutional convention indicates, however, that official support would be accepted.

The election would be unofficial, though some states might be persuaded to lend official state election machinery for this purpose. Or, in some 22 states, the referendum could be used to compel states to cooperate in the election of delegates. . . . In some states—provided the laws and election practices of the state were not discriminatory—the official state election machinery might be used in order to minimize costs and obtain a large voter participation. The aim, in either an official or unofficial state election, should be for at least one-fourth of those who voted in the last national election, or approximately 12,000,000 people, to participate in the ballot. Where the election was authorized by the state, regular state registration rules would have to be followed.¹²⁹

The Pocono Pines Conference on World Government, held in May, 1948, discussed the problem of "official" versus "unofficial" election of delegates to a world convention, and one of the participants wrote:

It is quite certain, however, that regular political channels will, to a large extent, be avoided, since this would tend to controvert the underlying theory of the plan: that peoples, not governments, are the only legitimate instruments for the execution of this job. This does not, of course, mean that we will not solicit a certain amount of advice and participation from those who are already active politically.¹³⁰

In summary, then, none of the plans being considered by American advocates of world federal government, contemplates, as a matter of principle, the refusal of offers to put state election machinery at their disposal, although there is some opinion that this would be advisable in order to encourage the participation of the people of all nations in such a world constitutional convention.

128. WOFFORD, *CROSSROADS FOR FEDERALISTS*, 11, 15, 16 (Minneapolis, University of Minnesota Chapter, United World Federalists, n.d.) Mr. Wofford was the founder of the Student Federalist movement in the U. S. A.

129. Dancer, *Campaign for a People's World Convention* 5, 12, FOUNDATION FOR WORLD GOVERNMENT (1948).

130. Letter, July 1, 1948, from Stephen Benedict, Member of the National Executive Council, United World Federalists, to the writer.

Since none of the proposals now extant contemplate exclusive popular action both at the convention-calling stage and the constitution-ratifying stage, none fall into the category of "spontaneous" or "unofficial" or "revolutionary" proposals. We may therefore consider at this point the third possible method of legitimizing the establishment of world government, that is through the "popular" or "official" approach to the problem.¹³¹

We may define a "popular convention" as one which is held in such an orderly manner as clearly to represent the popular will, and yet one which is not expressly authorized or effectually prohibited by whatever world constitutional enactments are extant (and there are none).¹³²

According to this definition, therefore, any world constitutional convention hoping to achieve official status must rely for its validity on the methods by which it is brought into being and organized, since it rests on the legally unquestionable right of the people of the world to bestow their sovereignty on whatsoever agencies of government are best able to provide for their safety and happiness. We must go on, then, to the second question of the method by which the voice and will of the sovereign people are organized and heard and felt. For depending on whether the method is fairly representative of the people of the world or whether it is a mere unofficial group of citizens purporting to act for the whole, it may be characterized as "popular" or "official" and therefore legal, or "spontaneous" ("unofficial") and therefore legitimate only to the extent that it becomes *de facto* accepted.

The second question, then, one on which the answer to the first depends, is: How should a world constitutional convention be called?

We have two types of historical precedent to guide us in this inquiry. The first is the experience of the Federal Convention in Philadelphia in 1787. This was a convention which had not been provided for in the Articles of Confederation, nor in any of the state constitutions. The second type of historical precedent arises from the experience of those states of the Union whose constitutions did not or do not provide for amendment, or which provide for amendment by some other means than the convention method. In both of these types of precedent, it is to be noted that there was no positive legal authority for the calling of a constitutional convention. There were no instructions as to what political institution was to be responsible for initiatory measures. We, the Founding Fathers, and the people living under this type of constitution were and are in the dark as to appropriate procedure to establish new government.

We have examined above in detail the nature of the precedent furnished us by the experience of the Federal Convention. It was, in short, a precedent

131. The first method, discussed *supra*, was that of diplomatic revision of the United Nations Charter through the treaty-making procedure. This, it was concluded, would be contrary to the American constitution, both in theory and in practice.

132. HOAR, *op. cit.* *supra* note 117, at 38.

authorizing the national legislature of any national state to initiate conferences for the purpose of "discussing" international relations, and to appoint delegates to represent the nation at such conferences.

Former Justice Owen J. Roberts made an analogous proposal recently before a congressional committee, the only difference being that, where all thirteen states had been invited both to the Annapolis Convention and the Philadelphia convention—not merely the slave-holding or non-slave-holding states—Justice Roberts would invite only the "democratic" nations (i.e., those which had had some experience in "self-government" such as the Union of South Africa in which a million or fewer Dutch and British invaders rule eight million natives and imported East Indians who are deprived of the franchise and all civil rights as well):

If I were the Congress of the United States, I would adopt a resolution inviting the delegates from the members of the British Commonwealth . . . France, Belgium, the Netherlands, the Scandinavian countries and Switzerland . . . let us get together and see if we can form a union, a union something on the pattern of the United States of America. . . . If the delegates could devise something . . . and would refer it back to the Congress, the Congress would examine it, and then refer it to the people for a referendum; and the people of other nations would vote on it by popular vote. . . .

Mrs. BOLTON. You are simply calling this group together to devise something?

Mr. ROBERTS. Yes; to see if they can devise something. The great thing about my proposition is that it commits nobody to anything. It does just what the States did in 1787. They said, "Let us choose wise men." I would, for example, choose four from the House, four from the Senate, eight from the community at large for our delegates, to meet with similar delegates from other nations to explore if this thing is practical and can be done, and report back what they find.

Mrs. BOLTON. To whom would they report back?

Mr. ROBERTS. To the Congress; and then the Congress would submit it to the people for ratification. . . .¹³³

Although we shall give only cursory attention to question (5), that of ratification, it might be pertinent to note that Roberts would not specify the exact technique of ratification, although it is known that he has supported the proposal for an American constitutional convention, which might be used for the purpose of ratifying a world constitution submitted to it.¹³⁴

Exactly one-fourth of the states fail to make provision for the calling of constitutional conventions, and in these there is often a question as to whether the legislature alone can call a convention. These states are: Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas and Vermont.

Two of the states, Georgia and Maine, provide that conventions may be

133. Structure of UN, Hearings, pp. 312-13, 328.

134. Wm. B. LLOYD, JR., CONSTITUTIONAL ACTION FOR PEACE 24 (1947).

called by the legislature alone, while in all the others a vote of the people is required on the question of whether to have a convention. Only in Oregon is it possible to initiate a convention by petition, and even here, of course, some provision must be made by the legislature to execute.

The new constitution of Missouri approved at a special election in 1945 provided in detail for the calling of a constitutional convention automatically every twenty years, with no intervention by the legislature whatsoever. It follows in many respects, though being more detailed, the corresponding provisions of the Model State Constitution, published by the National Municipal League.¹³⁵

We have an array of precedents to choose from, therefore, ranging from the provisions of positive law to the trial-and-error experiments of states having no guide except common sense and the practical limitations of their time and social and political environment.

Since we do not have in this country a popular initiative—only twenty-two states do—it would seem almost inevitable that some action must be taken by official legislative bodies, to get the ball rolling toward the convocation of a constitutional assembly for the world.

However, it has been found necessary to stimulate by the processes of political pressure and agitation the legislatures of this country, both state and national.¹³⁶

Hoar says that all conventions are valid if called by the people speaking through the electorate at a regular (or authorized) election. This is true, he says, regardless of whether the constitution (if one exists prior to the convention) attempts to prohibit or to authorize them or is merely silent on the subject. Their validity rests not upon constitutional provisions nor upon legislative acts, but upon the fundamental sovereignty of the people themselves.¹³⁷

It would seem, therefore, that legislatures do not have the right, of and by themselves, to proceed with the calling of a convention unless they receive authority directly from the people. Proceeding on this assumption, Assemblyman Orlo Brees of the State of New York introduced a resolution on February 3, 1949, providing for the submission to the voters of the question, "Shall the people of the United States take the initiative in calling a world

135. GRAVES, *AMERICAN STATE GOVERNMENT* 80, 81, appendix 905-906 (1941).

136. After the failure of colonial parliaments in Australia to act in 1891 to call a convention, "Henry Parkes suggested a different method of attacking the problem. Federation, he said, was a thing which concerned the Australian people as a whole; therefore let them take it out of the hands of parliaments, who seemed unable to bring the matter to a conclusion. Let the *people* elect another convention, which would draw up a Constitution for all Australia. The suggestion was opportune." By 1900, all of the Australian nations had joined the federation. The idea had been dragging for 40 years previously. F. L. WOOD, *CONSTITUTIONAL DEVELOPMENT OF AUSTRALIA* 215-222 (1933).

137. HOAR, *op. cit.*, *supra* note 117 at 52; *see In re* Opinion to the Governor, Supreme Court of Rhode Island, 178 An. 433, 451-452 (R. I. 1935).

convention in 1950, for the formulation of a world federal constitution to be submitted to the people of the participating nations for ratification?"¹³⁸

However, the significant point to remember is that at some point in the proceedings, the legislatures must step in, either to provide for the election of delegates by the people, or to take official action appointing the delegates. Most of the states have been timid about calling unauthorized conventions without the express approval of the people, although there are numerous examples of legislatures which have acted without first getting consent from the people. In the cases, where viable constitutions have come from them, it is only because the people have ratified the finished product or because it has been imposed on the people without getting their consent.

At one time in the early history of the country the view was entertained that the people could legally assemble in convention and revise their constitution without the sanction of the legislature, but this doctrine is no longer recognized.¹³⁹

On the other hand, the principle is mightily striven for that the legislature is merely the instrument by which the people exercise their constitutional or supra-constitutional right to change their constitutions.

When a law becomes the instrumental process of amendment it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an *authorized* consent of the whole people, the entire state, can be lawfully obtained in a state of peace. . . . If the legislature, possessing these powers of government, be unwilling to take the sense of the people, . . . the remedy is still in their own hands; they can elect new representatives that will. . . . The people required the law as the act of the existing government, to which they had appealed under the Bill of Rights, to furnish them legal process to raise a convention, for revision of their fundamental compact, and without which legal process the act of no one man could bind another.¹⁴⁰

Judge Jameson, in his monumental work on Constitutional Conventions remarked concisely on this decision: Admitting the competency of the people to call conventions, it would be impracticable, except through legislative interposition.¹⁴¹

Whether in the United States it should be the national Congress or the legislatures of the states which should take appropriate action to provide for the election of delegates to a world constituent assembly is a question more of

138. Passed the New York State Assembly on March 31, but not reported out for passage in the Senate. Brees said, "If the people of a State approved the calling of a constitutional convention that would carry with it a mandate to provide for representation in such a convention, or at least it would overcome the objections of the 'die-hards' to submitting the proposition of representation in such a convention to the people. Delegates might either be elected or appointed by the Legislature." Letter to writer, April 27, 1949.

139. 6 R. C. L. 27.

140. *Wells v. Bain* 75 Pa. 39 at 47-48 (1872).

141. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 539 (4th ed. 1887).

convenience than of law. A powerful factor operating to place the power in the hands of the state legislatures is that the procedure of elections of national representatives is and always has been within the jurisdiction of the states. But the constitutional provision also states that "Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." The question of course may be raised as to whether the right of Congress to regulate the times, places and manner of holding elections for senators and representatives includes the right to do the same for delegates to a world constitutional convention, or whether one may logically imply such a right or power. No popular national election has ever been held by the Federal Government, although, of course, state elections of senators and representatives have been regulated.¹⁴²

In *McCulloch v. Maryland*, Justice Marshall pointed out that the natural manner for the people to act in ratifying the Federal Constitution—and why not in electing delegates to a world constitutional convention?—was for them to act in their states.

They acted upon it, in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states.¹⁴³

And the opinion of Justice Iredell in *Penhallow v. Doane's Administrators* goes into detail on the procedure necessarily followed by the people in the States in setting up the Continental Congress:

I conclude, therefore that every particle of authority which originally resided in Congress or in any branch of the state governments, was derived

142. U. S. CONST. Art. I, § 2, cl. 1; § 3, cl. 1; AMEND. XVII (provide for election "by the people" and determination of the qualification of electors by reference to the qualifications "requisite for electors of the most numerous branch of the State legislature.")

See also discussion in *THE FEDERALIST*, Nos. 59-61 at 383-400 (Sesquicentennial ed. 1937). Hamilton declared that the provisions for Congressional regulation of elections rested on the principle that "every government ought to contain in itself the means of its own preservation." "It will not be alleged," he said, "that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will not therefore be denied that a discretionary power over elections ought to exist somewhere . . . there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the convention. . . . Suppose an article had been introduced into the Constitution, empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State governments?"

For example of federal regulatory legislation, see Corrupt Practices Act, 43 STAT. 1070 (1925), 2 U. S. C. A. § 251 (1946).

143. 4 Wheat. 316, 403 (U. S. 1819).

from the people . . . that this authority was conveyed by each body politic separately, and not by all the people in the several provinces or states jointly, and of course, that no authority could be conveyed to the whole but that which previously was possessed by the several parts.¹⁴⁴

Certainly it would not be permissible for the Congress of the United States to act without referring to the people for authority, in the important matter of establishing a world federation.

The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the Confederation the state sovereignties were certainly competent. But, when "in order to form a more perfect union" it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its power directly from them, was felt and acknowledged by all.¹⁴⁵

In view of the fact that the national Congress would naturally be reticent to part with whatever power it has in the realm of foreign affairs, the argument that the state legislatures, which have no vested interest in them, but which are much closer to the people and which do have the power to provide for elections, ought to provide for the election of delegates to a world constitutional convention, takes on greater weight on purely pragmatic grounds.

The legislature of the State of Tennessee has already passed favorably on legislation designed to enable the people of that state to participate in electing national delegates to a world constitutional convention, and similar legislation is pending in the State of Pennsylvania. Presumably this legislation would receive validation by the people of these states in the act of voting for delegates to such a convention. Although it might be argued that national delegates to such a convention, having been authorized by popular vote, would have full power to ratify any world constitution forthcoming on behalf of the people of the United States, the Tennessee legislation provides for an order to the national Congress directing it to call an American constitutional convention for the purpose of ratifying a world constitution after it has been presented by the world constituent assembly.¹⁴⁶

144. 3 Dallas 54, 94 (U. S. 1795).

145. *McCulloch v. Maryland*, 4 Wheat. 316, 404 (U. S. 1819).

146. Because the Tennessee legislation goes further than any other current proposals in taking the practical steps necessary to secure an actual popularly approved world federation, the essential parts of the model for it are reproduced below.

Sec. 1. An election for the purpose of electing delegates to the World Constituent Assembly shall be held in this state on the _____ day of _____, 1949.

2. At such election any citizen of this state who has legally qualified to vote at the election of presidential electors held on November 2, 1948, and in addition all citizens becoming so qualified after the 1948 presidential election shall be entitled to vote in the precinct or civil district in which he or she was then or would have been entitled to vote.

3. Said election shall be held at all the precincts or voting places established by law.

Similar legislation introduced in the General Assembly of Pennsylvania provides for the indirect election of delegates to the World Constituent Assembly to be held in Geneva, Switzerland in the winter of 1950. Ten delegates (figured on a basis of one per million population) are to be elected by an Electoral Assembly of fifty electors, nominated by petition having at least 500 names and elected by the voters of each Senatorial District in Pennsylvania.

and shall be managed and conducted under the laws then in force in the same manner and under the same rules and regulations governing presidential elections.

The Commissioners of Elections and other proper officers under the law in the various counties of this state shall advertise the time and place for holding such election, as in the case of other special elections. The payment of a poll tax shall not be required as a condition to the right to vote in said election.

4. The number of delegates to the World Constituent Assembly to be elected by the voters of this state shall be ——— [figured on the basis of one delegate per million population.] Candidates for the office of delegates shall be nominated and elected from the state at large. Any citizen of the state entitled to vote in the election of delegates may vote for not more than ——— delegates.

5. Candidates for the office of delegate to the World Constituent Assembly shall be under the restriction prescribed by the Constitution of the United States for presidential electors, i.e., that no Senator or Representative or person holding any office of trust or profit under the United States shall be a delegate.

6. Nominations for candidates to the office of delegates shall be by petition signed by no fewer than 500 citizens of this state entitled to vote in the election, which petition shall be filed with the Secretary of the State Board of Elections not later than 30 days prior to the election of delegates. The State Board of Elections shall immediately certify the names of candidates or nominees to be printed on the ballots.

7. [Provides for blanks on the ballots for write-in candidates. This provision was not included in the Pennsylvania bill, mentioned above.]

8. . . . The Governor and Secretary of State shall furnish to the ——— candidates receiving the highest number of votes certificates of election as provided by law in the case of presidential electors. The said ——— candidates so furnished certificates of election shall be delegates to the World Constituent Assembly, along with the delegates similarly elected in the other states and the District of Columbia. [This sentence was revised in the Tennessee legislation to meet the queries of those who wanted to make clear that the delegates were to be representing the people of the Nation rather than the State of Tennessee merely: "The said three candidates so furnished certificates of election shall be delegates to the World Constituent Assembly, and, along with the delegates similarly elected in the other states and the District of Columbia, shall compose the *national* delegation representing the people of the United States at said Assembly for the purpose of participating in the drafting of a world constitution to be submitted to the people of the nations of the world for ratification."]

9. The delegates duly accredited from this state, as above provided, shall be paid the same salary as United States Senators and in addition travel expenses to and from all sessions of the Assembly and reasonable overseas living expenses, befitting their official capacity, together with necessary expenses of communication, stenographic and clerical and interpretorial assistance; and there is hereby appropriated from the general funds of the State all such sums plus \$——— to apply on the cost of the Assembly itself.

10. When the World Constitution has been drafted it shall be transmitted to the Congress of the United States to be submitted to the people for ratification at a truly representative Convention and application is hereby made to the Congress to promptly thereafter call such Convention to meet at the earliest practicable date; the delegates to be elected on a proportionate basis by the people of the respective states, to be subject to limitation that no Senator or Representative or person holding an office of trust or profit under the United States shall be a delegate; in voting on the ratification of the Constitution (as well as other questions) each delegate shall have one vote; a quorum for this purpose shall consist of a delegate or delegates from two-thirds of the states, and a majority of all the delegates shall be necessary to decision; and until ratified by the people of the United States and the people of the requisite number of other nations, the World Constitution will have no legal effect or validity in the United States. Reprinted in 20 TENN. L. REV. 536-39 (December, 1948).

The electors are to be paid \$100 for their services, and the delegates are to be paid \$5000 each for their attendance at the constituent assembly.¹⁴⁷

The question may be raised as to whether the legislature has the power to appoint delegates without referring the question to the people, previously. If this procedure is followed, then the resulting constitution would have to be referred to the people for ratification or at the very least to a convention or conventions elected by the people. This latter course was the procedure followed by our own Founding Fathers who were doubtful of their right even to talk about a sovereign government's constitution, let alone try to ratify it themselves.

Many of the delegates to the Federal Convention of 1787 favored Patterson's New Jersey plan because of objections to Randolph's stronger plan, but also because they were convinced that the Convention had no power to discuss and propose such a radical departure from the Articles of Confederation. Lansing of New York for example,

... was decidedly of opinion that the power of the Convention was restrained to amendments of a federal nature, and having for their basis the Confederacy in being. . . . New York would never have concurred in sending deputies to the Convention, if she had supposed the deliberations were to turn on a consolidation of the states and a national government.¹⁴⁸

Patterson made the logical suggestion—but it was a suggestion which was ignored by the bolder hearts who were guiding the convention. He suggested, "Let us return to our states and obtain larger powers, not assume them ourselves."

However, as we have seen, no one followed his suggestion, and the Constitution was successfully ratified anyhow! A very illegal thing, and one which would doubtless fail today.^{148a}

But Patterson's suggestion points to an obvious out, and one for which there are precedents, even in the United States, though his suggestion was one which was more in accord with European experience. The suggestion is that if we are really interested in getting world federation quickly, the wise thing to do would be (1) make sure that delegates to a World Constituent Assembly are elected popularly and given as many instructions as are thought necessary; and (2) then give them full authority to act for the people by whom they have been elected, even to the extent of ratifying their own product. Of what benefit is our earlier experience if we cannot learn from it. The legislatures of the Thirteen States went into the Philadelphia Convention backwards. They

147. Pennsylvania General Assembly, Session of 1949, H. B. No. 968, introduced by Mary A. Varallo, March 2, 1949, referred to Committee on State Government, March 3, 1949. See *Philadelphia Inquirer*, March 3, 1949.

148. 5 ELLIOTT, DEBATES 133-34 (reprinting Madison's Notes for May 30, 1787; pp. 193-194, for debates of June 16, 1785).

148a. *In re* opinion to the Governor, 178 Atl. 433, 452 (R. I. 1935).

did not realize that they were about to be taken into a full-fledged national government. Only Patrick Henry "smelt a Rat." If we want to join a world federation, and want a world constitution, it might be simpler to empower specially elected delegates to act as a national convention after they have participated in the drafting of a constitution, and vote on whether they like the product of the joint efforts of the convention.

While every state but Delaware makes it a practice to ask the voters if they want a constitutional convention, it is not a universal practice for conventions to submit proposals to the people. Thus of 13 new constitutions adopted from 1890 to 1912, only seven were submitted to the people. In five states, there was no submission to the people (Mississippi, 1890; South Carolina, 1895; Louisiana, 1898; Delaware, 1897; and Virginia, 1902). In Kentucky in 1902 the convention met and altered the constitution after the people had approved it. Promulgation of the Virginia Constitution of 1902 without submission to the voters occurred notwithstanding the fact that the legislature in calling the convention had directed such submission.¹⁴⁹

The Pennsylvania Constitutions of 1776 and 1790 were never submitted to the people for approval, although the legislature suggested that the convention of 1789-1790 adjourn for four months before formally proclaiming the new constitution. This they did. The proposal was ostensibly to enable the people to examine and discuss the draft.¹⁵⁰

During the first eight years of national independence, constitutions were established by diverse procedures. In three states, constitutions were provided by legislative bodies, *without express authorization and without submission* to the "people" (that is, the then existing electorate). In five states, constitutions were drafted by legislative bodies expressly authorized to perform this function, but were not submitted to the electorate.¹⁵¹

The first convention held in the State of New York, in 1777, was a truly revolutionary government. While it functioned, it exercised all the powers of government. The constitution which it drafted went into effect at once, without popular ratification, but this of course, ought to be distinguished from a constitution drafted by a convention expressly authorized by the electorate of each nation.

Alabama was required by the enabling act of Congress to hold a convention to frame a government on behalf of the people, but there was no requirement in the enabling act that it be submitted for approval to the people. The convention was elected by white male citizens. The Alabama Constitution of 1865 was put in force by a constitutional convention without submission to

149. GRAVES, *AMERICAN STATE GOVERNMENTS* 96, 97 (1941).

150. *Loc. cit.*

151. O'Rourke, *op. cit.*, pp. 24, 26.

the people. The Alabama Constitution of 1901 was apparently not submitted to the electorate.

The conventions in the states to ratify the Federal Constitution—or to disapprove it—had full power to act. No proposal was ever made in the Convention or in any of the state conventions to submit the Constitution directly to the electorate.¹⁵² This was considered a normal mode of procedure.¹⁵³

The fundamental question which is being raised in this discussion is of course whether the convention itself is sovereign, and if so, under what circumstances. One circumstance under which the convention would undoubtedly be sovereign is the grant of powers expressly by whatever legislative act established it and provided for the election of delegates. It is unlikely that any convention is sovereign in the sense that it represents the people perfectly or fully, despite the grandiloquent assertions to that effect made by members of constitutional conventions.¹⁵⁴

However, there have been in our state constitutional histories many instances in which the conventions have asserted sovereignty to the extent of promulgating constitutions that they themselves have drawn up under authority of the people. For example, while the New Jersey constitution of 1776 made no provision for amendment by constitutional convention, such a convention was organized in 1844, and ratified by popular vote, the very opposite procedure of that used in establishing the constitution of 1776. In the 1776 constitution, the convention was elected by counties, drafted a constitution, which went into effect forthwith without being submitted to the people.¹⁵⁵

Among constitutions established by conventions, presently in effect, the following were not submitted to a ratifying vote by the people: Delaware, 1897; Louisiana, 1921; South Carolina, 1895; Vermont, 1793; Virginia, 1902.¹⁵⁶

The Indiana constitution of 1816 was formed by a convention authorized by the Enabling Act of the Fourteenth Congress to be elected by the adult males. This convention was given the right, by the enabling act to decide whether it was opportune to form a constitution and if so they were "authorized to form a constitution and State government." No provision was made for submission to the people.¹⁵⁷

The Florida constitution of 1883 was not submitted by the convention which drafted it to the people. The preamble of that constitution begins, "We,

152. BERGEAUD, *ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA* 132 (1895).

153. THE FEDERALIST, Nos. 39, 40, 49, 50 (Hamilton).

154. Jameson, *op. cit.*, pp. 303-304. One delegate in the Illinois Convention of 1847 said, "He had and would continue against any and every proposition which would recognize any restrictions of the powers of this Convention. We are . . . the sovereignty of the State. We are what the people of the State would be if they were congregated here in one mass meeting. . . ." *Illinois State Register* (June, 1847).

155. 4 THORPE, *op. cit. supra* at p. 2594.

156. *Council of State Governments, BOOK OF THE STATES* 72 ff. (1945-46).

157. 2 THORPE, *op. cit. supra* at 1055, 1057.

the people of the Territory of Florida, by our delegates in convention assembled . . . do mutually agree to form ourselves into a State Government. . . ." ¹⁵⁸

It does not appear that the people of Iowa ever had an opportunity to give final approval to their 1846 Constitution, despite the beginning words in its preamble, "We, the people of the Territory of Iowa . . . do ordain and establish, etc. . . ."; and the act admitting the state to the Union only alleged, that "the people of the Territory of Iowa did, by a convention of delegates called and assembled for that purpose, form for themselves a constitution and government. . . ." Similarly, it would seem that the Iowa constitution of 1857 was not submitted to the people for final ratification. ¹⁵⁹

Later enabling acts of Congress provided for popular election of delegates to state conventions *and* formation of constitutions "subject to the approval and ratification of the people. . . ." ¹⁶⁰

While previous constitutions of the State of Mississippi had been submitted to the vote of the people, ¹⁶¹ the constitutional convention of 1890 framed a constitution in which the rights of Negroes politically were restricted, and this was not submitted to the people for final ratification, notwithstanding the formal provisions of the law. It was a *coup d'etat*. Nevertheless, the preamble of this 1890 Constitution stated, "We, the people of Mississippi, in convention assembled . . . do ordain and establish, etc. . . ." ¹⁶²

The first session of the 16th Congress passed an enabling act for the State of Missouri giving the right to "free white males" to elect representatives "to form a convention who have power to form a constitution and government for the people. . . ." Submission to the electorate was not mentioned. The convention took it upon itself to accept further conditions imposed by Congress for the admission of the state to the Union "for and in behalf of the people . . . and by the authority of the people." ¹⁶³ Several amendments to this constitution of 1820 were adopted prior to, and in, 1861, by the electorate after being proposed by the legislature in accordance with the provisions of the Constitution of 1820. But several other amendments in 1861 and up until 1863 were framed by a state convention which met February 28, 1861, and was in session irregularly until 1863. There was no authorization in the constitution of 1820 for such a constitutional convention, and the acts of this convention were submitted to a vote of the people. ¹⁶⁴

The revolutionary conventions of New Hampshire, New Jersey and New York were popularly elected and authorized to form a government, according to the instructions or suggestions of the Continental Congress, and did not

158. *Id.* at 664.

159. *Id.* at 1136, 1156.

160. 4 THORPE *supra* at 1989.

161. *Id.* at 2032, 2049, 2069, 2088.

162. *Id.* at 2090, 2129; see also BORGEAUD, *op. cit. supra* note 152 at 174.

163. *Id.* at 2146, 2168.

164. *Id.* at 2169, 2174, 2176, 2183.

submit their work to the people. But the constitutional convention of New York, elected by the people in 1801, long after the unsettled conditions of the American Revolution had become history, proposed and put into force amendments without submitting them to the people.¹⁶⁵

The conclusion seems inescapable therefore that constitutional conventions have the power to form and establish governments, if they are popularly elected, whether or not they have a mandate from the people to exercise that power.¹⁶⁶

At the same time, it is recognized by several court cases that the people do have the right to put limitations on conventions, presumably by the technique of approving by referendum of popular vote any limitations which are written into the convention enabling act of the legislatures.¹⁶⁷ There seems to be no judicial authority to deny that the people can restrict the convention in advance.¹⁶⁸ In practice, of course, this power to restrict conventions is limited to the restrictions imposed by the act of the legislature itself, since submission of the enabling act to the people gives them only the choice of accepting those restrictions proposed or giving up having any convention at all. The people may of course instruct their delegates and thus control a convention, but as a practical matter, this is largely a moral problem for the individual delegate. "A delegate who desires to represent his constituents can find many ways of sounding them on their views; perhaps the simplest way being to declare his own platform in advance of his election, and let the people elect or reject him on that basis. . . ." ¹⁶⁹

In view of the numerous precedents cited above in our own history of the powers of constitutional conventions to institute government of their own motion, a current proposal in a preliminary draft of a world constitution assumes new interest. It provides for popular election of delegates to a world constitutional convention and for ratificatory action on the constitution or a constitution by those delegates acting as representatives of the people who have elected them.

4. The Federal Convention shall consist of delegates elected directly by the people of all states and nations, one delegate for each million of population or fraction thereof above one-half million, with the proviso that the people of any extant state, recognized as sovereign in 1945, and ranging between 100,000 and 1,000,000, shall be entitled to elect one delegate, but any such state with a population below 100,000 shall be aggregated for federal electoral purposes to the electoral unit closest to its borders.

165. 5 THORPE *op. cit. supra* at 2451, 2594, 2638.

166. *Kemper v. Hawkins*, 1 Va. Cas. 205 (1793); *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149 (1912); *Contra: State v. Williams*, 49 Miss. 640 (1873); *Taylor v. Commonwealth*, 101 Va. 829, 44 S. E. 754 (1903).

167. *See, e.g., Ex parte Birmingham R. R.* 145 Ala. 514, 529, 42 So. 118 (1905); *Louisiana R. R. v. Madere*, 124 La. 635, 641, 50 So. 609 (1909); *State v. Capdevielle*, 104 La. 561, 569, 29 So. 215 (1901).

168. Hoar, *op. cit. supra* note 117 at 123.

169. *Id.* at 126-127.

The delegates to the Federal Convention shall vote as individuals, not as members of national or otherwise collective representations (except as specified hereinafter). . . .

47. The Founding Convention having discussed and approved by individual majority vote this Constitution, ratification by collective majorities *within* as many delegations of states and nations as represent two-thirds of the population of the earth, shall be sufficient for the establishment of the Federal Republic of the World.¹⁷⁰

It should be noted that the phrase "elected directly by the people" has been qualified to mean that "Each state would determine by its own laws or customs the method by which it would choose delegates to a federal convention, the number of delegates being proportioned to its population."¹⁷¹ It should be further noted that since the federal constitutional convention itself is not intended by the terms of this particular draft constitution to be part of the government of the world itself, choosing delegates to this convention on the basis of population does not determine or offer a solution to the problem of representation in the world legislative body. That problem is dealt with by another *tour de force* in this proposed constitution.¹⁷²

In discussing this method of establishing a constitution and government for the world, G. A. Borgese, one of its chief architects explained the desirability of its consideration:

There can be tentative competing plans for world government. . . . These plans must be studied and presented to public opinion long before any convention is called, so that the convention will find before it a plan which makes sense—one which is organic and articulated. At that moment, before the calling of that convention, pressure will be exercised on the governments, on the powers which be, to make the convention a founding and sovereign one, which can approve a constitution, which can choose one of those which have been proposed and amend it.

This constitution then can either be immediately ratified by the convention, or at most, be submitted to speedy plebiscites. I am in favor of this course, short of which only if it fails we can think of detours.

(In answering the question, "Why do you think it has to be an official convention, sanctioned by the governments?" he replied):

Because only an official convention can have the power of approving and ratifying a constitution; and an unofficial convention can have only the job of proposing it to public opinion, to governments, to parliaments. Then, this quest for single ratifications may take a tremendous amount of time and may bump against deadlocks and conflicts which are insuperable. It is one assembly which must have this power even though followed possibly by speedy plebiscites.¹⁷³

170. COMMITTEE TO FRAME A WORLD CONSTITUTION, PRELIMINARY DRAFT OF A WORLD CONSTITUTION (1948).

171. Hutchins, *Summary and Program*, 2 COMMON CAUSE 9 (1948).

172. *Preliminary Draft*, 1 COMMON CAUSE 332 and 344 (1948), arts. 5, 46, § 2.

173. *What Are The Steps to World Government?* 499 UNIVERSITY OF CHICAGO

There have been several proposals in this country to deal with the extremely relevant problem of the election of delegates to such a world constitutional convention. It is this writer's opinion that any proposal adopted should meet the qualifications imposed on constitutional conventions in our past experience as a nation and as states. In the first place, the "people" must be represented. Here is meant "the aggregate or mass of people who constitute the state."¹⁷⁴ But as a practical matter, the people must be represented by "those persons who are permitted by the constitution of the State to exercise the elective franchise."¹⁷⁵

When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus the people elect delegates to a constitutional convention. . . . For these and similar purposes, the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people.¹⁷⁶

Any attempt of the excluded classes of people to assert their right to a share in the government, otherwise than by operating on the public opinion of those who possess the right of suffrage, would be regarded as an attempt at revolution, and any attempt by those who possess the right of suffrage to exercise their right to participate in the election of delegates to a world constitutional convention in a manner not prescribed or pointed out by statute would not be of legal force.¹⁷⁷

With these preliminary considerations in mind, we may consider some of the extant proposals for electing delegates to a world constitutional convention. The Tennessee legislation provides for election of delegates by qualified voters from the state at large, there being only three to be elected, according to the scheme of representation of one delegate per million or fraction thereof.¹⁷⁸ The Pennsylvania legislative proposal provides for popular election of one "elector of delegates" from each of the 50 senatorial districts in the State of Pennsylvania, these electors to select from their midst in Assembly convened ten delegates from Pennsylvania to join the national delegation to the World Constituent Assembly.¹⁷⁹ The New York proposal provided merely for a referendum among the qualified voters of the state on the advisability of the people of the United States taking the initiative in calling a world convention.

ROUND TABLE 7-8. (1947); See also Borgese, *Founding Convention: When? How? and Where?* 1 COMMON CAUSE 41-43 (1947).

174. *Solon v. State*, 54 Tex. Cr. R., 114 S. W. 349 (1908).

175. COOLEY, 1 CONSTITUTIONAL LIMITATIONS 81 (1927 ed.).

176. II BOUVIER'S LAW DICTIONARY 2557 (1914).

177. *Luther v. Borden*, 7 How. 1 (U. S. 1849). See also COOLEY, *loc. cit.*

178. See note 141 *supra*.

179. See note 142 *supra*.

Its sponsor intended that delegates might be either elected or appointed by the legislature of the State.¹⁸⁰ Robert M. Hutchins in a radio broadcast, April 4, 1948, said simply, "All Americans . . . should call upon the President and upon Congress to initiate a world constitutional convention."¹⁸¹ No other proposals for elections by the people of the United States to a world constituent assembly have come to the attention of the writer.

Each of the three proposals involving state action mentioned above contemplates sending delegates to a World Constituent Assembly to be held in Geneva, Switzerland, in 1950. The originator of this date and place was the British Member of Parliament, Henry Osborne. The confusing thing about this assembly, as conceived in the mind of Osborne and indeed of every exponent of its desirability, is that it is to be "unofficial."¹⁸² Not that he proposes to establish world government without the consent of the governments involved. Far from it. He, and others, intend that the convention should merely propose a world constitution to the governments of the world, and then adjourn. Far from being a revolutionary body, this world constituent assembly is conceived as being the same sort of purely informal gathering to draft a tentative proposal as our Founding Fathers considered the Philadelphia convention:

It is urged that this is not such a system as was within the powers of the Convention; they assumed the *power of proposing*. I believe they might have made proposals without going beyond their powers. . . . The fact is, they have exercised no power at all, and in point of validity, this Constitution, proposed by them for the government of the United States, claims no more than a production of the same nature would claim, flowing from a private pen. It is laid before the citizens of the United States, unfettered by restraint; it is laid before them to be judged by the natural, civil, and political rights of man. By their *fiat* it will become of value and authority; without it, it will never receive the character of authenticity.¹⁸³

But if the World Constituent Assembly is merely to be an "unofficial" gathering, why bother to go to the trouble and expense of electing delegates to it? Any group of persons could draft a constitution, and a group of ten or twelve could do a better job than a mob of 2,000 or more delegates from all over the world. And if such a constitution is to be submitted to the nations and the people of the world for their approval afterwards, why bother to insure popular representation beforehand? These are questions which cannot be satisfactorily answered—from a legal point of view—by the proponents of the "unofficial" constitutional convention. The answers they give are the answers of the public relations man or of the educator:

180. See note 133 *supra*.

181. Reprinted in 1 COMMON CAUSE 362 (1948).

182. See note 120 *supra*.

183. Wilson, 2 ELLIOTT, DEBATES 469-470.

It would doubtless be good publicity and help the cause to have prominent citizens of many nations meet and pass resolutions about world government. That, however, is a different thing from achieving anything of a binding nature.¹⁸⁴

I do feel that a World Constituent Assembly would have considerable publicity and educational value.¹⁸⁵

In particular, I see considerable value in the Peoples' Convention approach—so long as it is clear that this approach is a method of *promoting* the idea of world government rather than *achieving* it. To the extent that it can mobilize public opinion behind the idea of world government, to the extent that it can furnish working blueprints for a proposed world government, it can have great value.

But I do not see the Peoples' Convention idea—or any idea going outside established governments—as the sole, or even most effective, practical approach. It [the peoples' convention idea] involves not ratification but petition.¹⁸⁶

If public opinion is aroused to the point of demanding world government, public officials will respond; if public opinion is not so aroused, no unofficial group can do more than debate and exhort.¹⁸⁷

Such an assembly may have tremendous educational value if it is understood to be completely unofficial and for purposes of illustration. It would seem that if our government were willing to ratify the product of such an unofficial body it would be willing to be part of an official body.¹⁸⁸

As a matter of fact, both the Tennessee legislation and the Pennsylvania proposal mentioned above assume the convention would be unofficial and provide for the referral to the United States of any constitution drafted, so that it might be ratified by an American constitutional convention, in accord with the provisions of Article V of the United States Constitution.

For those who have had enough of publicity stunts and world citizens without world government, another unofficial proposal would be anathema. There have been since the war any number of "informal and unauthorized propositions, made by some patriotic and respectable citizen or number of citizens." What is wanted now is some quick and easy device which would enable an *official* proposal to be made and ratified in an orderly manner.

The best way to do this would be to insert an enabling clause in the state delegate-election legislation authorizing the delegates to the convention to form a national ratifying convention immediately upon the adjournment of the drafting convention. But even if this clause were not inserted, there seems to be a preponderance of authority to the effect that legislatures cannot bind constitu-

184. Letter from Cass Canfield, Chairman of the Board, Harper & Brothers, April 6, 1948.

185. Letter from Mrs. J. Borden Harriman, member Executive Council, United World Federalists of Washington, D. C., April 12, 1948.

186. Letter from Norman Cousins, Editor, Saturday Review of Literature, April 8, 1948.

187. Letter from Mildred Riorden Blake, Young and Rubicam, Inc., and member of Executive Board, United World Federalists, April 5, 1948.

188. Letter from Laurence Dawson, expressing views of Edison Dick, president of A. B. Dick and Co., Chicago, 3 May 1948.

tional conventions in the functions which are considered appropriate to them,¹⁸⁹ and there have been many instances of constitutional conventions which have specified the mode by which ratification of the constitutions drafted should be accomplished. If this is so, then we may conclude that even an "unofficial" constitutional convention to which delegates were regularly elected by vote of the people might use its delegated sovereignty to ratify, on behalf of their own people and the people of the world, a constitution and establish a world federation. And this, presumably, would be true for the United States no matter what the procedure for selection of delegates may be in other countries of the world. If all the henchmen of the Kremlin's men swarmed about the assembly hall and railroaded a communist constitution through the convention, the American delegates would still be as free as ever to refuse their assent to it.

189. Reasoning by analogy, if the national congress were to *appoint* members of Congress to act as delegates, without first securing popular consent, such a delegation would not or could not be legally bound by any legislative instructions. "In such a case the General Assembly is held to have summoned the people to sit, by their delegates, in convention untrammelled by rules or restraints of any kind that will interfere with the performance of its proper functions." *In re* opinion to the Governor, 55 R. I. 56, 178 Atl. 433 at pp. 452-453 (1935).

On the other hand, if *election* by the electorate of delegates to a world constitutional convention were authorized by state legislatures and if the act specified the scope of the convention and the manner in which it would conduct its deliberations and this were approved by regular popular vote, then a convention called in this manner would be bound to confine itself within stated limits.

One useful function the national congress might perform is to co-ordinate and harmonize state legislation providing for the election of delegates. Congress has the power without resorting to Constitutional amendment, to regulate the election of Representatives and Senators. Why not other national delegates as well?

One useful function the United Nations might perform on the next higher level is to co-ordinate and harmonize the procedures of national states to the end that the founding convention when finally met would have authority to proceed with dispatch. *Staples v. Gilmer*, 183 Va. 613, 33 S. E.2d 49 (1945); *Loomis v. Jackson*, 6 W. Va. 613, 708 (1873): "A constitutional convention lawfully convened does not derive its powers from the legislature but from the people." See also HOAR, *op. cit.*, 52: "All conventions are valid if called by the people speaking through the electorate at a regular election. . . . Their validity rests not upon constitutional provision nor upon legislative act, but upon the fundamental sovereignty of the people themselves." See also Dodd, *Constitutional Limitations* (1910 ed.) 92: "As a rule, then, constitutional conventions are subject only to the following restrictions: (1) those contained in or implied from provisions in the existing state and federal constitutions, the United Nations Charter? it is certainly not superior in law to anything, and (2) in the absence of constitutional provisions, those derived or implied from the limited functions of conventions. To these restrictions, Jameson and others would add those imposed by legislative acts under which conventions are called, but such restrictions are certainly not yet recognized as of absolute binding force, except in Pennsylvania, and should not be so recognized if the convention is to be an instrument of great usefulness." *Carton v. Secretary of State*, 151 Mich. 337 (1908): "By necessary implication the legislature is prohibited from any control over the method of revising the Constitution. The convention is an independent and sovereign body whose sole power and duty are to prepare and submit to the people a revision of the constitution or a new Constitution to take its place." *Accord*, *News Corp. v. Smith*, 353 Mo. 845, 184 S. W.2d 598 (1945).