would have a more accurate gauge as to whether the people are in fact consenting to the decisions of the national government, especially those of the Court.

We should adopt Madison's solution to restore some consent of the governed and to provide a check on the Court and the federal government. Congress should not have any approval or veto power. As Madison said, "The assent of the National Legislature ought *not* to be required thereto."

Madison's Article V required Congress to propose an amendment on application of two-thirds of the states:

> The Congress, whenever two thirds of both Houses shall deem necessary, *or on the application of two thirds of the Legislatures of the several States*, shall propose amendments to this Constitution which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress.

Madison believed his amendment process was appropriate since the states—whose sovereignty had been established by the Treaty of Paris in 1783—were creating the Constitution and should, of course, be able to change it. Madison's version of Article V was not opposed until the Convention's closing hours on September 15, when Gouverneur Morris of New York presented an amendment that changed Madison's proposal into the never-used convention method we now have. Morris's motion deleted the italicized portion of Madison's proposal and replaced it with new language providing that Congress "on the Application of the Legislatures of two thirds of the several states shall call a Convention for proposing Amendments." Madison, apparently as a political necessity, acceded to Morris's change but noted that "difficulties might arise as to form, the quorum, etc., which in constitutional regulations ought to be as much as possible avoided."

Our present Article V, because of Gouverneur Morris, suffers from a fatal flaw. It makes Congress a gatekeeper under both methods for proposing constitutional amendments: under the first, Congress has a direct veto—two-thirds of both Houses must approve the amendment before it can be proposed to the states; and under the convention method, it is unclear what powers that convention would have and whether they could be effectively limited. Congress also has the power to fashion the call of the convention in a way to make a good result unlikely. The convention approach is so uncertain that it has not been, and never will be, used.

Article V requires Congress to consider proposals for limiting the power of the federal government. Gouverneur Morris's version of Article V twisted the basic constitutional legal relationship—instead of a delegation of power from a principal to an agent which, of necessity, would be revocable, the Constitution became a contract between the governors and the governed which could not be changed except by the mutual consent of both parties. The governors generally choose not to consent. In 1787, the states, like Dr. Frankenstein, built a creature and lost control of it.

The Madison Amendment process would give an accurate gauge of whether the people are really consenting to the decisions of the Supreme Court. The Court would decide cases just as it does now, but the people—through three-fourths of the states—would hold a deliberative vehicle to enable them to correct its errors. The amending power becomes a realistic check on the Court. Indeed, the existence of the power is itself a check.

The present amendment system—because of the congressional gatekeeper—grants the three national branches of government a practical immunity from change. Since the first 11 amendments were adopted, only one amendment, the 22nd (presidential term limits), has curtailed the power of a national branch. (The 27th, the ban on Congress raising its own pay, does also, but by its peculiar history—proposed in 1789 as part of the original Bill of Rights and adopted in 1992—it effectively avoided the restraints of Article V.) The remaining amendments cover housekeeping (electoral college, presidential succession), and at least one, the 16th (income tax), adds a major new national power. But most amendments limit the power of the states—the direct election of senators (previously elected by the state legislature), Prohibition and women's suffrage (previously state issues), anti-poll tax, and the extension of the franchise to 18-year-olds.

Congress is willing to propose amendments which will weaken state power if ratified. But, as the proposed amendments for term limits and the balanced budget show, Congress will not give the states and the people the opportunity to ratify amendments limiting national power. Congress prefers that the Court, rather than the amending process, act as our system's agent of constitutional change. The present clause is a one-way street. Madison's amendment process would make the street two-way. The states would be able to amend the Constitution without first obtaining the consent of the government they want to control.

The Madison process would focus debate on federalism and our current government. Perhaps the states would wish to reexamine the sweeping, nationalizing decisions of John Marshall and the more recent decisions that have turned the states into regional offices of the federal government. Perhaps they would choose a different role for the national judiciary. Whatever the people decide, the Supreme Court would no longer have the last word. A state-initiated amendment process would provide the constitutional system Madison wanted, one that is more balanced and based on self-rule. We would then be able to approach Jefferson's goal of a government that is as good as the people. ◁c

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On the Carnival's Last Day

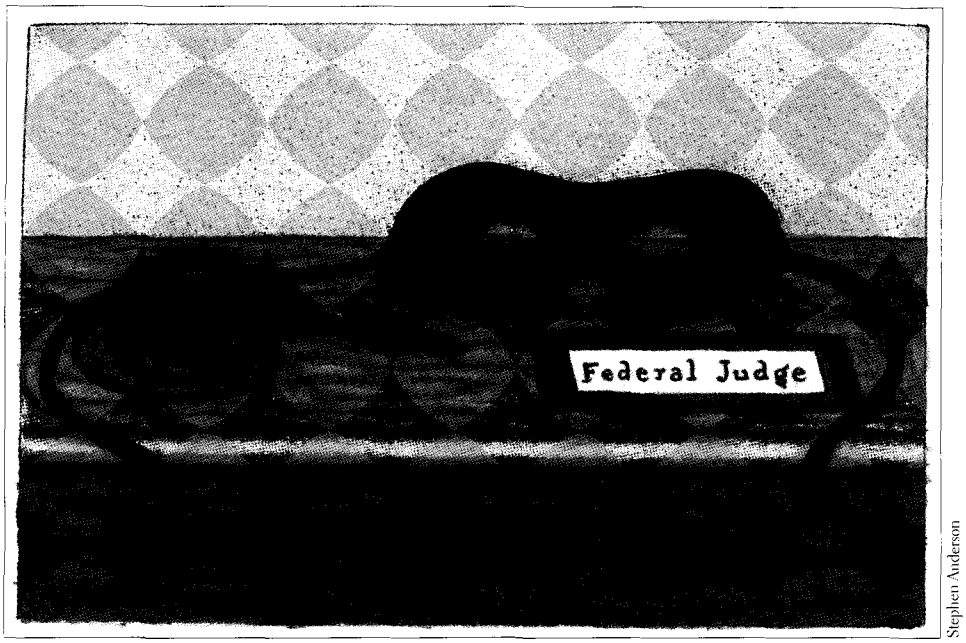
by Richard Moore

I've often heard the Ferris wheel's
cacophony of female squeals
and, also interesting, have then
observed a gang of clever men
pulling the stupid thing apart,
heedless of beauty and of art.

Judicial Taxation

The States Respond

by John R. Stoeffler



Stephen Anderson

The Madison Forum was founded in 1993 by Missouri State Senator Walt Mueller and me for three reasons. First, we wanted to respond to the Supreme Court's claim in *Missouri* v. *Jenkins* (1990) that the federal judiciary has the authority to levy or increase taxes. We believe this constitutionally baseless assertion by the Court poses a direct threat to our democracy.

The second reason concerned the federal judiciary's "attitude problem." This "attitude," reflected in the Court's decision in *Jenkins*, was made clear to us in a 1994 meeting we had with Federal District Judge Russell G. Clark, who oversaw the *Jenkins* case for over ten years and levied the controversial tax which nearly doubled the property taxes in Kansas City, Missouri. Clark had no patience with the argument that the authority to tax is vested in the legislative branch alone, saying that if the Supreme Court declares the judiciary's right to tax, then this power is constitutional, period. When I said that he would have us believe that the Court could declare a rainy day to be sunny, Clark replied: "It may be raining outside, but if the Court says the sun is shining, then the sun is shining. What you believe makes no difference."

The third reason has to do with Congress. In *Federalist* 33, Hamilton stated: "What is the power of laying and collecting taxes, but a legislative power?" And in *Federalist* 81, he pointed out that it was an impeachable offense for the judiciary to usurp a legislative power. But Congress, being fully cognizant of the Court's decision in *Jenkins*, has neglected or refused to address this usurpation and exercise of what has been by custom, history, and tradition a legislative function.

In his defense of *McCulloch* v. *Maryland*, Chief Justice John Marshall observed that the exercise of the judicial power to decide all questions "arising under the Constitution and laws" of the United States "cannot be the assertion of a right to change that instrument." Former Chief Justice of Missouri Robert T. Donnelly narrowed that perspective further when he stated: "If, in fact, the United States Supreme Court is exercising powers without the consent of the governed—the people—then the rights it purports to secure in their name are counterfeit—its benevolence a fraud."

We contend that in *Jenkins* the Court committed what amounts to judicial fraud by declaring that the District Court did "satisfy equitable and constitutional principles governing the District Court's power." This usurpation of power by the judiciary is even more staggering when one remembers that it took the 16th Amendment to the Constitution to empower even the *legislative branch* to tax the people.

The Madison Forum has therefore asked each state to petition Congress for an amendment to the Constitution which would check this usurpation of power by the federal judiciary. To date, the following states have sent Congress such a request: Missouri, Tennessee, New York, Colorado, Louisiana, Alaska, Massachusetts, Arizona, South Dakota, Nevada, and Michigan. In addition, the American Legislative Exchange Council adopted a model resolution which will be forwarded to the states this year.

Proposing a constitutional amendment may seem like

John R. Stoeffler writes from St. Louis, Missouri. A version of this article was presented at a Heritage Foundation conference on judicial taxation.