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MAY AN AMENDMENT TO THE CONSTITUTION BE UNCONSTITUTIONAL?

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If the provision[1] of the Constitution of the United States prescribing the amendatory process were not complied with, the purported amendment would not be unconstitutional for the reason that it had not been integrated into the Constitution and, therefore, had not become an amendment. However, a proposed amendment which has been effectuated in pursuance of the specified amendatory process might be unconstitutional if it contravened, in the words of Mr. Justice Story in *Terrett v. Taylor*[2] in 1815, "the spirit. . .of the Constitution of the United States." The same jurist referred to the "spirit of the Constitution" in *Martin v. Hunter's Lessee*[3] the following year. In his concurring opinion in the Martin case Mr. Justice Johnson spoke of "the spirit, intent, or meaning of the Constitution" and of "the true spirit of the Constitution." Three years later Mr. Cheif Justice Marshall mentioned "the general spirit of the instrument" (the Constitution) in *Trustees of Dartmouth College v. Woodward.*[4]

Let us assume that a hypothetical twenty-second amendment abolished the doctrine of the limited powers of the United States and of the residual powers of the several States. Such an amendment would be repugnant to the two articles of amendment[5] which expressly announce such doctrine and to all the original seven articles and to the other nineteen articles of amendment which impliedly do so. Or let us assume that a future amendment abrogated the doctrine of the tripartite division of federal jurisdiction. Such an amendment would be contrary to the three articles[6] which expressly provide for such doctrine and to the other four original articles and to all the preceding twenty-one articles of amendment which impliedly do so. Either amendment is incompatible with the manifest spirit of the Constitution. Either amendment must be considered either unconstitutional or as embodying a new constitution supplanting the present Constitution of the United States, circumventing the honest and legitimate method of promulgating and adopting a new constitution by convention.

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1 U.S. Const., Art. V.
2 9 Cranch 43, 52, 3 S. Ct. 249, 256.
3 1 Wheat. 304, 351, 3 S. Ct. 562, 579.
4 4 Wheat. 518, 643, 4 L. Ed. 629, 661.
5 U.S. Const., Arts. IX, X.
6 U.S. Const., Arts. I, II, III.

Three real property concepts which are employed in constitutional law in ascertaining whether a body politic possesses the attribute of sovereignty are escheat, eminent domain, and adverse possession. If property escheats to a body politic, if such body politic possesses the power of condemnation, and if adverse possession cannot be asserted against such body politic, the body politic constitutes a sovereignty. In reconciling a conflict between provisions in a deed, resort is had first to the cardinal rule of contract law to the effect of looking to the intention of the parties and, if that test proves insufficient, then to the real property rule to the effect that the former provision should govern. In recounciling a conflict between stipulations in a will, if application of the paramount rule of contract law proves inconclusive, then resort is had to the law of wills rule to the effect that the latter stipulation should govern.

Since concepts of real property, and not those of the law of wills, are applied in Constitutional Law in determining sovereignty, the real property rule of construction applied in the event of conflicting provisions in a conveyance might be carried over for application to the Constitution of the United States, if resort to the primary rule of contract law proves non-determining, in the event of a conflict between a hypothetical future amendment and the spirit which permeates the present Constitution.