

# ARTICLE V

## MODE OF AMENDMENT

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## MODE OF AMENDMENT

### ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

### AMENDMENT OF THE CONSTITUTION

#### Scope of the Amending Power

When Article V was before the Constitutional Convention, a motion to insert a provision that “no State shall without its consent be affected in its internal policy” was made and rejected.<sup>1</sup> A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the states a proposal to bar any future amendments which would authorize Congress to “interfere, within any State, with the domestic institutions thereof . . . .”<sup>2</sup> Three states ratified this article before the outbreak of the Civil War made it academic.<sup>3</sup> Members of Congress opposed passage by Congress of the Thirteenth Amendment on the

<sup>1</sup> 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 630 (rev. ed. 1937).

<sup>2</sup> 57 CONG. GLOBE 1263 (1861).

<sup>3</sup> H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, H. Doc. 353, pt. 2, 54th Congress, 2d Sess. (1897), 363.

basis that the amending process could not be used to work such a major change in the internal affairs of the states, but the protest was in vain.<sup>4</sup> Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution and that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment that involves the exercise or relinquishment of the sovereign powers of a state.<sup>5</sup> The Nineteenth Amendment was attacked on the narrower ground that a state that had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, *i.e.*, persons chosen by voters whom the state itself had not authorized to vote for Senators.<sup>6</sup> Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

### Proposing a Constitutional Amendment

Thirty-three proposed amendments to the Constitution have been submitted to the states pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none by the alternative convention method.<sup>7</sup> In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that “provision ought to be made for the amendment [of the Constitution] whensoever it shall seem necessary” without the agency of Congress being at all involved.<sup>8</sup> Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the states Congress was to call a convention for purpose of amending the Constitution.<sup>9</sup> Adopted,<sup>10</sup> the section was soon reconsidered on the motion of Framers of quite different points of view. Some worried that the provision would allow two-thirds of the states to subvert the others,<sup>11</sup>

<sup>4</sup> 66 CONG. GLOBE 921, 1424–1425, 1444–1447, 1483–1488 (1864).

<sup>5</sup> *National Prohibition Cases*, 253 U.S. 350 (1920).

<sup>6</sup> *Leser v. Garnett*, 258 U.S. 130 (1922).

<sup>7</sup> A recent scholarly study of the amending process and the implications for our polity is R. BERNSTEIN, *AMENDING AMERICA* (1993).

<sup>8</sup> 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (rev. ed. 1937), 22, 202–203, 237; 2 *id.* at 85.

<sup>9</sup> *Id.* at 188.

<sup>10</sup> *Id.* at 467–468.

<sup>11</sup> *Id.* at 557–558 (Gerry).

and some thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the states would mean that no alterations but those increasing the powers of the states would ever be proposed.<sup>12</sup> Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the states.<sup>13</sup> When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the states.<sup>14</sup>

**Proposals by Congress.**—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.<sup>15</sup> Instead, the House decided to propose them as supplementary articles, a method followed since.<sup>16</sup> It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.<sup>17</sup> In the *National Prohibition Cases*,<sup>18</sup> the Court ruled that, in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.<sup>19</sup> The approval of the President is not necessary for a proposed amendment.<sup>20</sup>

<sup>12</sup> *Id.* at 558 (Hamilton).

<sup>13</sup> *Id.* at 559

<sup>14</sup> *Id.* at 629–630. “Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the state as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided.”

<sup>15</sup> 1 ANNALS OF CONGRESS 433–436 (1789).

<sup>16</sup> *Id.* at 717.

<sup>17</sup> *Id.* at 430.

<sup>18</sup> 253 U.S. 350, 386 (1920).

<sup>19</sup> 253 U.S. at 386.

<sup>20</sup> In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court's brief opinion merely determined that the Eleventh Amendment was “constitutionally adopted.” *Id.* at 382. Apparently during oral argument, Justice Chase opined that “[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.” *Id.* at 381. *See*

**The Convention Alternative.**—Because it has never successfully been invoked, the convention method of amendment is surrounded by a lengthy list of questions.<sup>21</sup> When and how is a convention to be convened? Must the applications of the requisite number of states be identical or ask for substantially the same amendment, or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions, and others lurk to be revealed on deeper consideration.<sup>22</sup> This method has been close to being used several times. Only one state was lacking when the Senate finally permitted passage of an amendment providing for the direct election of senators.<sup>23</sup> Two states were lacking in a petition drive for a constitutional limitation on income tax rates.<sup>24</sup> The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one state of the required number, and a proposal for a balanced budget amendment has been but two states short of the requisite number for some time.<sup>25</sup> Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the states there will be a response by Congress.

**Ratification.**—In 1992, the nation apparently ratified a long-quiet 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its sub-

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Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), for extensive analysis of what *Hollingsworth's* delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. See *Hawke v. Smith* (No. 1), 253 U.S. 221, 229 (1920) (in *Hollingsworth*, “this court settled that the submission of a constitutional amendment did not require the action of the President”); *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth*, “the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . .”).

<sup>21</sup> The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* (1988).

<sup>22</sup> *Id.* See also *Federal Constitutional Convention: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 90th Congress, 1st Sess. (1967).

<sup>23</sup> C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957), 7, 89.

<sup>24</sup> *Id.* at 8–9, 89.

<sup>25</sup> R. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 73–78, 78–89 (1988).

ject matter, the effective date of congressional pay raises, the adoption of this provision has unsettled much of the supposed learning on the issue of the timeliness of pendency of constitutional amendments.

It has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven years.<sup>26</sup> All the earlier proposals had been silent on the question, and two amendments proposed in 1789, one submitted in 1810 and another in 1861, and most recently one in 1924 had gone to the states and had not been ratified. In *Coleman v. Miller*,<sup>27</sup> the Court refused to pass upon the question whether the proposed child labor amendment, the one submitted to the states in 1924, was open to ratification thirteen years later. This it held to be a political question that Congress would have to resolve in the event three-fourths of the states ever gave their assent to the proposal.

In *Dillon v. Gloss*,<sup>28</sup> the Court upheld Congress's power to prescribe time limitations for state ratifications and intimated that proposals that were clearly out of date were no longer open for ratification. Finding nothing express in Article V relating to time constraints, the Court nevertheless found evidence that strongly suggests that proposed amendments are not open to ratification for all time or by states acting at widely separate times.<sup>29</sup>

Three related considerations were put forward. "First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that

<sup>26</sup> Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments. Apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and in subsequent amendments included the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress for the District of Columbia.

<sup>27</sup> 307 U.S. 433 (1939).

<sup>28</sup> 256 U.S. 368 (1921).

<sup>29</sup> 256 U.S. at 374.

number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.”<sup>30</sup>

Continuing, the Court observed that this conclusion was the far better one, because the consequence of the opposite view was that the four amendments proposed long before, including the two sent out to the states in 1789 “are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable.”<sup>31</sup>

What seemed “untenable” to a unanimous Court in 1921 proved quite acceptable to both executive and congressional branches in 1992. After a campaign calling for the resurrection of the 1789 proposal, which was originally transmitted to the states as one of the twelve original amendments, enough additional states ratified to make up a three-fourths majority, and the responsible executive official proclaimed the amendment as ratified as both Houses of Congress concurred in resolutions.<sup>32</sup>

That there existed a “reasonable” time limit for ratification was strongly controverted.<sup>33</sup> The Office of Legal Counsel of the Department of Justice prepared for the White House counsel an elaborate memorandum that disputed all aspects of the *Dillon* opinion.<sup>34</sup> First, *Dillon’s* discussion of contemporaneity was discounted as dictum.<sup>35</sup> Second, the three “considerations” relied on in *Dillon* were deemed unpersuasive. Thus, the Court simply assumes that, because pro-

<sup>30</sup> 256 U.S. at 374–75.

<sup>31</sup> 256 U.S. at 375. One must observe that all the quoted language is dicta, the actual issue in *Dillon* being whether Congress could include a time limit in the text of a proposed amendment. In *Coleman v. Miller*, 307 U.S. 433, 453–54 (1939), Chief Justice Hughes, for a plurality, accepted the *Dillon* dictum, despite his opinion’s forceful argument for judicial abstinence on constitutional amendment issues. The other four Justices in the Court majority thought Congress had complete and sole control over the amending process, subject to no judicial review. *Id.* at 459.

<sup>32</sup> *Supra*, “Congressional Pay”; *infra*, “Twenty-Seventh Amendment.”

<sup>33</sup> Thus, Professor Tribe wrote: “Article V says an amendment ‘shall be valid to all Intents and Purposes, as part of this Constitution’ when ‘ratified’ by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court’s suggestion, no speedy ratification rule may be extracted from Article V’s text, structure or history.” Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL STREET JOURNAL, May 13, 1992, A15.

<sup>34</sup> 16 Ops. of the Office of Legal Coun. 102 (1992) (prelim. pr.).

<sup>35</sup> *Id.* at 109–110. *Coleman’s* endorsement of the dictum in the Hughes opinion was similarly pronounced dictum. *Id.* at 110. Both characterizations, as noted above, are correct.



posal and ratification are steps in a single process, the process must be short rather than lengthy; the argument that an amendment should reflect necessity says nothing about the length of time available, in that the more recent ratifying states obviously thought the pay amendment was necessary; and the fact that an amendment must reflect consensus does not so much as intimate contemporaneous consensus.<sup>36</sup> Third, the OLC memorandum argued that the proper mode of interpretation of Article V was to “provide a clear rule that is capable of mechanical application, without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored.”<sup>37</sup> The rule ought to be, echoing Professor Tribe, that an amendment is ratified when three-fourths of the states have approved it.<sup>38</sup> The memorandum vigorously pursues a “plain-meaning” rule of constitutional construction. Article V says nothing about time limits, and elsewhere in the Constitution when the Framers wanted to include time limits they did so. The absence of any time language means there is no requirement of contemporaneity or of a “reasonable” period.<sup>39</sup>

Now that the Amendment has been proclaimed and has been accepted by Congress, where does this development leave the argument over the validity of proposals long distant in time? One may assume that this precedent stands for the proposition that proposals remain viable forever. It may, on the one hand, stand for the proposition that certain proposals, because they reflect concerns that are as relevant today, or perhaps in some future time, as at the time of transmission to the states, remain open to ratification. Certainly, the public concern with congressional pay made the Twenty-seventh Amendment particularly pertinent. The other 1789 proposal, relating to the number of representatives, might remain viable under this standard, whereas the other proposals would not. On the other hand, it is possible to argue that the precedent is an “aberration,” that its acceptance owed more to a political and philosophical argument between executive and legislative branches and to the defensive posture of Congress in the political context of 1992 that led to an uncritical acceptance of the Amendment. In that latter light, the development is relevant to but not dispositive of the controversy. And, barring some judicial interpretation, that is likely to be where the situation rests.

<sup>36</sup> *Id.* at 111–112.

<sup>37</sup> *Id.* at 113.

<sup>38</sup> *Id.* at 113–116.

<sup>39</sup> *Id.* at 103–106. The OLC also referenced previous debates in Congress in which Members had assumed this proposal and the others remained viable. *Id.*

Nothing in the status of the precedent created by the Twenty-seventh Amendment suggests that Congress may not, when it proposes an amendment, include a time limitation either in the text or in the accompanying resolution, simply as an exercise of its necessary and proper power.

Whether Congress may extend a ratification period without necessitating new action by states that have already ratified embroiled Congress, the states, and the courts in argument with respect to the proposed Equal Rights Amendment.<sup>40</sup> Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress's power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of states, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the states, had put the matter beyond changing by passage of a simple resolution, that states had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.<sup>41</sup>

Litigation followed and a federal district court, finding the issue to be justiciable, held that Congress did not have the power to extend, but before the Supreme Court could review the decision the extended time period expired and mooted the matter.<sup>42</sup>

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether, once a state had rati-

<sup>40</sup> See *Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 95th Congress, 2d Sess. (1978); *Equal Rights Amendment Extension: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights*, 95th Congress, 1st/2d Sess. (1977-78).

<sup>41</sup> H.J. Res. 638, 95th Congress, 2d Sess. (1978); 92 Stat. 3799.

<sup>42</sup> *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho, 1981), *prob. juris. noted*, 455 U.S. 918 (1982), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

fied, it could thereafter withdraw or rescind its ratification, precluding Congress from counting that state toward completion of ratification. Four states had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit.<sup>43</sup> The issue was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,<sup>44</sup> the governments of those states were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State<sup>45</sup> to report on the number of states ratifying the proposal, and the Secretary's response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 states, including the two that had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent.<sup>46</sup> He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 states, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed.<sup>47</sup> The Secretary of State then proclaimed the Amendment as part of the Constitution.

In *Coleman v. Miller*,<sup>48</sup> the congressional action was interpreted as going directly to the merits of withdrawal after ratifica-

<sup>43</sup> Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieutenant Governor, acting as Governor, citing grounds that included a state constitutional provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration. South Dakota was the fifth state.

<sup>44</sup> 14 Stat. 428.

<sup>45</sup> The Secretary was then responsible for receiving notices of ratification and proclaiming adoption.

<sup>46</sup> 15 Stat. 706, 707.

<sup>47</sup> 15 Stat. 709.

<sup>48</sup> 307 U.S. 433, 488–50 (1939) (plurality opinion). For an alternative construction of the precedent, see Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 27 NOTRE DAME LAW. 185, 201–204 (1951). The legislature of New

tion and of ratification after rejection. “Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification.”

Although rescission was hotly debated with respect to the Equal Rights Amendment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress’s power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to suggest that resolution is a political question committed to Congress, but the issue is not settled.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification.<sup>49</sup> There is no necessary conflict, because the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an “aberration.”<sup>50</sup> That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum, as it addressed an issue not before the Court.<sup>51</sup> On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the states, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past prac-

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York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying states, noted the withdrawal resolution, there were ratifications from three-fourths of the states without New York. 16 Stat. 1131.

<sup>49</sup> F. R. Doc. 92–11951, 57 Fed. Reg. 21187; 138 CONG. REC. (daily ed.) S6948–49, H3505–06.

<sup>50</sup> 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim. pr.).

<sup>51</sup> Id. at 118–121.

tice, in which all but the Fourteenth Amendment were certified by an executive officer, was noted as supporting a decision against a congressional role.<sup>52</sup>

What would be the result of adopting one view over the other?

First, finding that resolution of the question is committed to Congress merely locates the situs of the power and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, because, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be “political” in the sense of being committed to one or to both of the “political” branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review, so the decisionmaker need not be troubled with the prospect of being overruled. But both legislators and executive are bound by oath to observe the Constitution,<sup>53</sup> and consequently the search for an answer must begin with the original document.

It may be, however, that the Constitution does not speak to the issue. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, Congress may be free to make a determination solely as a policy matter, restrained only by its sense of propriety or wisdom or desirability. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the con-

<sup>52</sup> *Id.* at 121–126.

<sup>53</sup> Article VI, para. 3. “In the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.” *United States v. Nixon*, 418 U.S. 683, 703 (1974).

text of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman*.<sup>54</sup>

Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that, as written, the provision contains only language respecting ratification and that, inexorably, once a state acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind,<sup>55</sup> nor can Congress even authorize a state to rescind.<sup>56</sup> This conclusion is premised on Madison's argument that a state may not ratify conditionally, that it must adopt "*in toto* and *for ever*."<sup>57</sup> Although the Madison principle may be unexceptionable in the context in which it was stated, one may doubt that it transfers readily to the significantly different issue of rescission.

A more pertinent principle seems to be that expressed in *Dillon v. Gloss*.<sup>58</sup> In that case, the action of Congress in fixing a seven-year period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless concluded that the fair implication of Article V is "that the ratification must be

<sup>54</sup> *Coleman v. Miller*, 307 U.S. 433, 450, 453 (1939) (plurality opinion). Thus, considering the question of ratification after rejection, the Chief Justice found "no basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a state's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the state before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of what Congress could look to in fixing a reasonable time, *id.* at 453–54, is overwhelmingly policy-oriented. On this approach generally, see Henkin, *Is There a 'Political Question' Doctrine?*, 85 *YALE L.J.* 597 (1976).

<sup>55</sup> See, e.g., the debate between Senator Conkling and Senator Davis on this point in 89 *CONG. GLOBE* 1477–1481 (1870).

<sup>56</sup> *Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment*, Memorandum of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in *Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 95th Congress, 2d sess. (1978), 80, 91–99.

<sup>57</sup> During the debate in New York on ratification of the Constitution, it was suggested that the state approve the document on condition that certain amendments the delegates thought necessary be adopted. Madison wrote: "The Constitution requires an adoption *in toto* and *for ever*. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must vitiate the ratification." 5 *THE PAPERS OF ALEXANDER HAMILTON* 184 (H. Syrett ed., 1962).

<sup>58</sup> 256 U.S. 368 (1921). Of course, we recognize, as indicated at various points above, that *Dillon*, and *Coleman* as well, insofar as they discuss points relied on here, express dictum and are not binding precedent. They are discussed solely for the persuasiveness of the views set out.

within some reasonable time after the proposal.”<sup>59</sup> Three reasons underlay the Court’s finding of this implication and they are suggestive on the question of rescission.<sup>60</sup>

Although addressing a different issue, the Court’s discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment’s adoption should be “sufficiently contemporaneous” in the requisite number of states “to reflect the will of the people in all sections at relatively the same period,” it would raise a large question were the ratification process to count one or more states that were acting to withdraw their expression of judgment that amendment was necessary at the same time other states were acting affirmatively. The “decisive expression of the people’s will” that is to bind all might well be found lacking in those or similar circumstances. But employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite “contemporaneous” “expression of the people’s will” was not undermined by the action.

And employment of this analysis would still seem, under these precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress’s power to fix a time limit, the Court in *Dillon v. Gloss* observed that Article V left to Congress the authority “to deal with subsidiary matters of detail as the public interest and changing conditions may require.”<sup>61</sup> And, in *Coleman v. Miller*, Chief Justice Hughes went further in respect to these “matters of detail” being “within the congressional province” in the resolution of which the decision by Congress “would not be subject to review by the courts.”<sup>62</sup>

<sup>59</sup> 256 U.S. at 375.

<sup>60</sup> 256 U.S. at 374–75, quoted supra.

<sup>61</sup> 256 U.S. at 375–76. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying “[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt” and noting later than no question existed that the seven-year period was reasonable. *Id.*

<sup>62</sup> 307 U.S. 433, 452–54 (1939) (plurality opinion). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black’s concur-

Thus, it may be that, if the *Dillon v. Gloss* construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if these precedents reviewed above are adhered to and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

Adoption of the alternative view, that Congress has no role but that the appropriate executive official has the sole responsibility, would entail different consequences. That official, now the Archivist, appears to have no discretion but to certify once he receives state notification.<sup>63</sup> The official could, of course, request a Department of Justice legal opinion on some issue, such as the validity of rescissions. That is the course advocated by the executive branch, naturally, but it is one a little difficult to square with the ministerial responsibility of the Archivist.<sup>64</sup> In any event, there would seem to be no support for a political question preclusion of judicial review under these circumstances. Whether the Archivist certifies on the mere receipt of a ratification resolution or does so only after ascertaining the resolution's validity, it would appear that it is action subject to judicial review.<sup>65</sup>

Congress has complete freedom of choice between the two methods of ratification recognized by Article V: by the legislatures of the states or by conventions in the states. In *United States v. Sprague*,<sup>66</sup> counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the states and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government;

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rence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the *Dillon v. Gloss* "reasonable time" construction be disapproved. *Id.* at 456, 458.

<sup>63</sup> *United States ex rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920), *aff'd mem.* 257 U.S. 619 (1921); *United States v. Sitka*, 666 F. Supp. 19, 22 (D. Conn. 1987), *aff'd*, 845 F.2d 43 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988). See 96 CONG. REC. 3250 (Message from President Truman accompanying Reorg. Plan No. 20 of 1950); 16 Ops. of the Office of Legal Coun. 102, 117 (1992) (prelim. pr.).

<sup>64</sup> 16 Ops. of the Office of Legal Coun. at 116–118. Thus, OLC says that the statute "clearly requires that, before performing this ministerial function, the Archivist must determine whether he has received 'official notice' that an amendment has been adopted 'according to the provisions of the Constitution.' This is the question of law that the Archivist may properly submit to the Attorney General for resolution." *Id.* at 118. But if his duty is "ministerial," it seems, the Archivist may only notice the fact of receipt of a state resolution; if he may, in consultation with the Attorney General, determine whether the resolution is valid, that is considerably more than a "ministerial" function.

<sup>65</sup> No doubt under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, although there may well be questions about one possible exception—the "committed to agency discretion" provision. *Id.* at § 701(a)(2).

<sup>66</sup> 282 U.S. 716 (1931).



delegation of the latter required action of the people through conventions in the several states. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

The term “legislatures” as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several states. It does not comprehend the popular referendum, which has subsequently become a part of the legislative process in many of the states. A state may not validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.<sup>67</sup> In the words of the Court: “[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.”<sup>68</sup>

**Authentication and Proclamation.**—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, “being certified by his proclamation, [was] conclusive upon the courts” as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.<sup>69</sup> This function of the Secretary was first transferred to a functionary called the Administrator of General Services,<sup>70</sup> and then to the Archivist of the United States.<sup>71</sup> In *Dillon v. Gloss*,<sup>72</sup> the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth state, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Archivist.

### Judicial Review Under Article V

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the

<sup>67</sup> *Hawke v. Smith*, 253 U.S. 221, 231 (1920).

<sup>68</sup> *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

<sup>69</sup> Act of April 20, 1818, § 2, 3 Stat. 439. The language quoted in the text is from *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

<sup>70</sup> 65 Stat. 710–711, § 2; Reorg. Plan No. 20 of 1950, § 1(c), 64 Stat. 1272.

<sup>71</sup> National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

<sup>72</sup> 256 U.S. 368, 376 (1921).

several states was conclusive upon the courts,<sup>73</sup> it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in *Coleman v. Miller*.<sup>74</sup> This case came up on a writ of *certiorari* to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the states, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement on the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process “is ‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”<sup>75</sup> In an opinion reported as “the opinion of the Court,” but in which it appears that only two Justices joined Chief Justice Hughes who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations enter-

<sup>73</sup> *Leser v. Garnett*, 258 U.S. 130 (1922).

<sup>74</sup> 307 U.S. 433 (1939). *Cf.* *Fairchild v. Hughes*, 258 U.S. 126 (1922), in which the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

<sup>75</sup> *Coleman v. Miller*, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, *id.* at 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, *dicta*. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in *Coleman* “refused to accept that position.” *Dyer v. Blair*, 390 F. Supp. 1291, 1299–1300 (N.D.Ill. 1975) (three-judge court). *See also* *Idaho v. Freeman*, 529 F. Supp. 1107, 1125–26 (D. Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

ing into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination “has been accepted.”<sup>76</sup> But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.<sup>77</sup> However, the unexplained decision by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant governor’s vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.<sup>78</sup>

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratification of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them.<sup>79</sup> But to what extent the political question

<sup>76</sup> *Coleman v. Miller*, 307 U.S. 433, 447–56 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

<sup>77</sup> Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. 307 U.S. at 456. Although all nine Justices joined the rest of the decision, *see id.* at 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one Justice did not participate in deciding the issue of the lieutenant governor’s participation; apparently, Justice McReynolds was the absent Member. Note, 28 *Geo. L. J.* 199, 200 n.7 (1940). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

<sup>78</sup> The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 *TEX. L. REV.* 875, 886–901 (1980), and his student note, Comment, *Rescinding Ratification of Proposed Constitutional Amendments: A Question for the Court*, 37 *LA. L. REV.* 896 (1977). Two perspicacious scholars of the Constitution have come to opposite conclusions on the issue. Compare Delinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *HARV. L. REV.* 386, 414–416 (1983) (there is judicial review), with Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *HARV. L. REV.* 433, 435–436 (1983). Much of the scholarly argument, up to that time, is collected in the ERA-time-extension hearings. *Supra*. The only recent judicial precedents directly on point found justiciability on at least some questions. *Dyer v. Blair*, 390 F. Supp. 1291 (N.D.Ill., 1975) (three-judge court); *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

<sup>79</sup> In *Baker v. Carr*, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* “held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.” Both characteristics were features that the Court in *Baker*, 369 U.S. at 217, identified as elements of political questions,

doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive.

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*e.g.*, “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards or resolving it.” Later formulations have adhered to this way of expressing the matter. *Powell v. McCormack*, 395 U.S. 486 (1969); *O’Brien v. Brown*, 409 U.S. 1 (1972); *Gilligan v. Morgan*, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may say, what it did, particularly in *Powell* but also in *Baker*, largely drains the political question doctrine of its force. See *Uhler v. AFL–CIO*, 468 U.S. 1310 (1984) (Justice Rehnquist on Circuit) (doubting *Coleman’s* vitality in amendment context). *But see* *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon *Coleman* to find an issue of treaty termination nonjusticiable). Compare *id.* at 1001 (Justice Powell concurring) (viewing *Coleman* as limited to its context).