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THE LEGITIMACY OF CONSTITUTIONAL CHANGE: RETHINKING THE AMENDMENT PROCESS

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The conventional view of article V is that it leaves the task of resolving amendment process issues entirely to Congress. In this Article, Professor Dellinger contends that judicial abstention from involvement in amendment process disputes is dictated neither by the text of article V nor by actual congressional practice nor by the weight of relevant precedent and that it is subversive of the clarity and regularity essential to legitimate constitutional change. Professor Dellinger develops a model of judicial review of amendment process issues as an alternative to the orthodox vision and applies this model to several contemporary amendment process controversies.

I. INTRODUCTION:

CLEAR RULES AND LEGITIMATE CONSTITUTIONAL CHANGE

AMERICANS tend to take the legitimacy of their government for granted. There is a "sweet air of legitimacy," Charles L. Black, Jr., once observed, in a country whose citizens do not pause to question whether "*this* government is *the* government" or whether its actions, right or wrong, are the actions of legitimately constituted authority.¹ As Black noted, "a government cannot attain and hold a satisfactorily definite attribution of legitimacy if its actions as a government are not, by and large, received as authorized."²

That the American system of government traces its authority to a Constitution originally consented to by conventions elected by (a portion of) the people is one significant legitimating feature of the regime.³ In determining whether those purporting to exercise power are in fact "the government" and whether their actions are authorized,

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¹ C. BLACK, *THE PEOPLE AND THE COURT* 35 (1960).

² *Id.* at 37.

³ In every state, voters elected delegates to the conventions that ratified the Constitution. Suffrage was, by 1787, "fairly broad (and varied)." Young, *Conservatives, the Constitution, and the "Spirit of Accommodation,"* in *HOW DEMOCRATIC IS THE CONSTITUTION?* 117, 138 (R. Goldwin & W. Schambra eds. 1980) [hereinafter cited as *HOW DEMOCRATIC*]. New York, for example, had adopted universal male suffrage. *Id.* at 143. Significantly, however, women and slaves were not among those eligible to participate.

we look to this Constitution as it has been interpreted and amended. Without a viable process for changing the original governing norm, however, the Constitution would fail to provide a sufficient underpinning for the legitimacy of government. An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed.

If we are to agree on what the fundamental law is, we need to have an amendment process that operates with a fair degree of certainty. Substantial doubt about whether amendments had properly been adopted would be a matter of serious concern: it would leave us without an agreed-upon text to serve as the basic reference point from which to assess the legitimacy of government and its actions. For this reason, a satisfactory amendment process demands, at a minimum, that the rules for the adoption of an amendment be clearly understood.

Judged by such a standard, our amendment process is seriously flawed. During the past decade of debate over the equal rights amendment (ERA), we have learned how much we do not know about the process of amending the Constitution. We do not know, for example, the answers to questions as basic as whether Congress, having established a time limit for ratification, can extend that limit, and if so, whether such an extension can be accomplished by the vote of a simple majority. And we have no definitive answer to a question as crucial as whether a state legislature that has voted to ratify can subsequently rescind its action.

Under the most widely held view of article V,⁴ these and similar questions about the rules governing the amendment process are to be answered by Congress rather than the courts. Congress, in the exercise of its power to "promulgate" an amendment, must determine whether to "accept" any disputed state ratifications.⁵ This conception of the amendment process is, in my view, a disastrous rendering of article V. It is an approach centered upon the idea of continuing congressional control of the ratification process — control that culminates in a largely discretionary and ad hoc determination by the Congress that happens to be sitting when thirty-eight purported ratifications have been received. This approach is without basis in the text or the history of article V and without precedent in the earlier judicial interpretations of that provision, and it undercuts one of the fundamental goals of

⁴ Article V provides:

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

U.S. CONST. art. V.

⁵ See *infra* pp. 389-92.

an amendment process: certainty in the rules for changing the Constitution. Although *Coleman v. Miller*,⁶ the decision that established the principle of congressional promulgation, is a venerable case, and one that was recently cited approvingly by four Justices of the Supreme Court,⁷ it is nonetheless profoundly wrong, and it should no longer be followed.⁸

The thesis of this Article is that we should reconsider our generally accepted notions both about who should decide disputes over ratification of constitutional amendments and about how those issues should be resolved on the merits. The two questions are interdependent. The present designation of Congress as the principal institution for resolving ratification disputes is linked to the idea that amendment process decisions should advance certain policies immanent in article V — principally, the policy that ratifications, to be valid, should reflect a “contemporaneous consensus” in favor of adoption. Congress, the thinking goes, is better suited than are the courts to ascertain whether that consensus has been manifested by the process of ratification considered as a whole.

I am convinced that both tenets of this present understanding — that interpretations of article V should advance the goal of consensus

⁶ 307 U.S. 433 (1939).

⁷ See *Goldwater v. Carter*, 444 U.S. 996, 1002–03 (1979) (Rehnquist, J., concurring in the judgment).

⁸ Derived from *Coleman*, the “congressional promulgation” model for the resolution of amendment process disputes has dominated discussion of article V. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 114–15 (2d ed. 1983); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-6, at 50 n.7 (1978); *id.* § 3-16, at 76; *infra* pp. 394–96 (reviewing scholarly and official opinions presented to Congress in 1978); see also Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 925–26, 942 (1979) (concurring in dominance of congressional promulgation model, but noting that there might be judicial review following “first line decision by Congress”); Note, *Critical Details: Amending the United States Constitution*, 16 HARV. J. ON LEGIS. 763, 809 (1979) (suggesting congressional actions to regulate the amendment process).

A notable challenge to the assumption that *Coleman* properly resolved the question of Congress’ exclusive role in settling amendment process disputes has been issued by Professor Grover Rees, III, of the University of Texas, who has forcefully argued that “*Coleman* was a very bad decision when handed down, and the Court almost certainly would decide it differently today.” Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 887 (1980) (footnotes omitted) [hereinafter cited as Rees, *Throwing*]. Although I disagree with Rees’ conclusions about the validity of the ERA time extension and the efficacy of rescissions, his critique of *Coleman* in his *Texas Law Review* article and elsewhere, see Rees, *Rescinding Ratification of Proposed Constitutional Amendments — A Question for the Court*, 37 LA. L. REV. 896 (1977) [hereinafter cited as Rees, *Rescinding*], is powerful and persuasive.

Professor Charles Black has also questioned the vitality of *Coleman* and has argued that the validity of rescissions is a justiciable question. See *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 76, 87 (1977–1978) (testimony of Prof. Charles L. Black, Jr., Yale Law School) [hereinafter cited as *House Hearings*].

and that such interpretations should therefore be made by Congress — are deeply mistaken. Article V is more properly viewed as a provision establishing a fixed mechanism for recording assent to an amendment than as a directive mandating a quest for elusive policy goals. The uncertainty that currently afflicts the amendment process flows in part from the tendency to replace the formal test specified in article V — that an amendment is valid when ratified by the legislatures of three-fourths of the states — with an ill-defined search for contemporaneous consensus. Although the functions of constitutional law are generally not well served by an adherence to formalism, the process by which we amend the fundamental document may well be an exception.

My argument that the judiciary has a proper role to play in reviewing amendment process issues is critically intertwined with the suggestion that the resolution of many disputes about the amendment process could be rendered easier — more principled, if you will — were we to accept the notion that the expressly stated, formal requirements of article V are satisfactory. I do not mean to imply that judicial review is a panacea that will produce clear rules for the amendment process and remove all doubt about the validity of the adoption of amendments. Rather, I contend that judicial review is more likely to achieve such results than is a highly politicized, ad hoc judgment by the Congress sitting at the time that a proposed amendment receives its thirty-eighth state ratification.

II. "CONGRESSIONAL PROMULGATION": A MISGUIDED MODEL OF THE AMENDMENT PROCESS

A. *The Aberration of Coleman v. Miller*

In 1918, the Supreme Court in *Hammer v. Dagenhart*⁹ struck down an act of Congress that prohibited shipment in interstate commerce of goods made in factories employing young children. Four years later, in the *Child Labor Tax Case*,¹⁰ the Court invalidated a subsequent congressional effort to regulate child labor under the taxing power. In 1924, Congress responded by proposing to the states a constitutional amendment providing that "Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age."¹¹ After the House voted down proposed ratification time limits of five and seven years,¹² and the Senate rejected a pro-

⁹ 247 U.S. 251 (1918).

¹⁰ 259 U.S. 20 (1922).

¹¹ H.R.J. Res. 184, 68th Cong., 1st Sess., 43 Stat. 670 (1924).

¹² See 65 CONG. REC. 7288-89, 7293-94 (1924).

posed limit of five years,¹³ the amendment was sent to the states without any ratification deadline at all.

The amendment did not initially fare well in the state legislatures. Between 1924 and 1931, only six states ratified the amendment; the legislatures of nineteen other states passed resolutions "rejecting" the amendment. Kansas was one of the latter group of states: both houses of the state legislature passed resolutions of rejection in 1925.¹⁴ With the advent of the New Deal in 1933, and the accompanying renewal of support for the amendment at the national level, the prospects for the amendment improved. In the four-year period from 1933 to 1937, twenty-two more states ratified. These ratifications brought the total to twenty-eight, eight short of the thirty-six then necessary for adoption.¹⁵

Among the states that reconsidered the amendment after originally rejecting it was Kansas.¹⁶ In 1937, the Kansas House of Representatives voted to ratify the amendment. The Kansas Senate divided: twenty senators voted for ratification, and twenty voted against it. Over the protest of opponents of the amendment, the Lieutenant Governor cast a deciding vote in favor of ratification.¹⁷ The ratification came nearly thirteen years after the amendment had been proposed by Congress.

Twenty-four Kansas state representatives and senators attacked the validity of the ratification by bringing an original action for a writ of mandamus in the Kansas Supreme Court. The plaintiffs sought an order that would have forbidden the officers of the legislature from signing the resolution and would have prohibited Kansas' Secretary of State from authenticating and delivering the resolution to the Governor.¹⁸ The plaintiffs thereby sought to prevent the Governor from certifying the ratification to the Secretary of State of the United States.

The plaintiffs urged three principal grounds of invalidity: (1) that although the Lieutenant Governor was the presiding officer of the Senate, he was a member of the executive branch and not a part of the legislature for purposes of voting on constitutional amendments; (2) that Kansas' 1925 rejection of the amendment was a final and conclusive action that precluded subsequent ratification by the state; and (3) that the amendment, proposed nearly thirteen years before the Kansas legislature's reconsideration of it, had lapsed by passage of time and rejection by twenty-six states and was no longer open for

¹³ See *id.* at 10,141.

¹⁴ See *Coleman v. Miller*, 307 U.S. 433, 473 (1939).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.* at 436.

ratification. The Supreme Court of Kansas rejected all three claims and sustained the validity of the legislature's ratification.¹⁹

The case was appealed to the United States Supreme Court. In advance of any necessity for determining the validity of the Kansas legislature's action, and at the behest of parties with no genuine stake in the outcome, the Court decided an important constitutional issue that had not been raised in the courts below, in the briefs of any of the parties, or by the United States as *amicus curiae*. That issue was whether the matters before the Court were nonjusticiable political questions to be determined exclusively by Congress if and when the time came for promulgation of the amendment.

The Court refused to address the merits of any of the petitioners' three contentions. Although it found (over the objections of four Justices) that the petitioners had standing to bring the challenge,²⁰ the Court held that the issues of the timeliness of the Kansas ratification and the preclusive effect of the state's prior rejection were both nonjusticiable questions committed to "the ultimate authority in the Congress in the exercise of its control over the promulgation of the amendment."²¹

In a sweeping opinion, four members of the Court — Justices Black, Roberts, Frankfurter, and Douglas — declared that "[u]ndivided control of [the amendment] process has been given by the Article exclusively and completely to Congress."²² The congressional determination that an amendment had become a part of the Constitution was said to be "exclusive,"²³ "final,"²⁴ and "conclusive upon the courts."²⁵ In the view of these four Justices, judicial review could play no part in the amendment process, for that process "is 'political' in its entirety, from submission until an amendment becomes

¹⁹ See *id.* at 436-37.

²⁰ See *id.* at 437, 460.

²¹ *Id.* at 450; see *id.* at 454. In holding that Congress, rather than the courts, should decide the issue whether ratifications of the child labor amendment were still timely, the Court stated that the determination of what constituted a reasonable time was one that would often depend upon "an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice." *Id.* at 453. Congress, according to the Court, was the best judge of such factors. The Court essentially found "a lack of judicially discoverable and manageable standards" for resolving the timeliness issue. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the characteristics of a political question). As I argue in Part V of this Article, however, the Court would not in fact have had to consider "political, social and economic" conditions to pass upon the issue whether the Kansas ratification was timely. A proper interpretation of article V — one emphasizing the need for clear and formal rules — would have provided a suitable basis for judicial resolution of the issue.

²² *Coleman*, 307 U.S. at 459 (Black, J., concurring).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 457 (quoting *Leser v. Garnett*, 258 U.S. 130, 137 (1922)).

part of the Constitution, and is not subject to judicial guidance, control or interference at any point."²⁶

The opinion of Chief Justice Hughes, joined by Justices Stone and Reed, appeared to be more limited, and was designated the "Opinion of the Court." The Hughes opinion confined its express holding to the issues before the Court by declaring only that the questions of timeliness and of the effect of a prior rejection were nonjusticiable.²⁷ The underlying reasoning, however, goes well beyond this holding:²⁸ it would preclude judicial review of all issues concerning the validity of ratifications that might be considered and resolved by the Congress that decides whether to promulgate the amendment.²⁹

B. The Disutility of Congressional Promulgation

Congressional promulgation, assumed since *Coleman* to be the alternative to judicial review, is likely to be an unwieldy, uncertain, and unpredictable mechanism for resolving amendment disputes. Because the decisions of one Congress cannot bind a subsequent Congress,³⁰ the determination of a question through promulgation could hardly be expected to settle the issue for the future. In addition, the manner in which congressional decisions to promulgate are to be made

²⁶ *Id.* at 459.

²⁷ Although Chief Justice Hughes' opinion expressly states that the efficacy of ratification by a state that has previously rejected an amendment should be "regarded as a political question," 307 U.S. at 450, the opinion curiously contains statements that approach a holding on the merits that neither prior rejection nor subsequent rescission invalidates a ratification. The opinion notes that "Article V, speaking solely of ratification, contains no provision as to rejection." *Id.* (footnote omitted). Moreover, the opinion leaves open the possibility that some article V issues might be justiciable. In his discussion of the nonjusticiability of the question of timeliness, Chief Justice Hughes noted that a "great variety of relevant conditions, political, social and economic," *id.* at 453, are involved in the question; this observation suggests that review might not be precluded for an article V issue that did not turn on such elusive factors.

²⁸ Indeed, Chief Justice Hughes stated that "attributing finality to the action of the political departments" is one of the dominant considerations in applying the political question doctrine. *Id.* at 454. The implication of this statement, and of the Chief Justice's discussion of the "historic precedent" of congressional promulgation, *id.* at 449-50, is that any issue that Congress is capable of resolving by declaring that an amendment has (or has not) been ratified is one that the courts are precluded from reviewing.

²⁹ *See id.* at 454. Notwithstanding the sweeping nature of the *Coleman* opinions, commentators have assumed that the Court would decline to give effect to an amendment that had obviously not been ratified in accordance with article V, but had nevertheless been "proclaimed" by Congress. *See, e.g.,* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534, at 308 (1975) (noting that "[a]lthough [the view supporting the nonjusticiability of amendment procedure issues] should pertain as to all questions that are at all likely to occur, it seems probable that the Court should retain authority to ignore an amendment that has not acquired the constitutionally defined number of even purported ratifications" (footnote omitted)).

³⁰ *See* Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191-94 (1972).

would almost surely fail to produce usable precedents. The Court and commentators have assumed, for example, that Congress would consider a range of what might be termed "legislative facts"³¹ in determining the propriety of promulgating a particular amendment. Indeed, Congress' ability to consider such facts was one of the proffered reasons for favoring legislative rather than judicial resolution of amendment disputes. To the extent that Congress would consider social, political, and economic factors pertaining to the ratification process for a particular amendment in reaching a decision that a "contemporaneous consensus" about that amendment had or had not been manifested, the decision would provide little guidance for determining future article V issues.

The process of congressional promulgation is itself undefined, and a number of puzzling dilemmas become apparent if one contemplates the actual operation of that process. The debates and hearings over the Equal Rights Amendment Extension Act provide a sobering glimpse of the complex issues that might arise if some future Congress were called upon to determine the validity of disputed ratifications of a closely contested amendment.³² In the hearings, scholars and Justice Department officials struggled to apply the promulgation model to the resolution of disputes that had arisen concerning the validity of ERA ratifications. Because similar disputes are likely to plague the ratification process of any future amendment proposed by Congress, the debates over ERA ratification demonstrate the crisis of legitimacy that threatens the amendment process.

At the end of the seven-year period initially set by Congress for consideration of the ERA by state legislatures, thirty-five of the necessary thirty-eight states had ratified.³³ Legislatures in five of those states had subsequently passed resolutions of rescission.³⁴ Congress voted by joint resolution to extend the time for consideration of the amendment by three years and three months.³⁵ In hearings on the extension resolution, both the power of Congress to extend the original time limit and the validity of state attempts to rescind were extensively debated. These issues were also litigated in federal district court by the State of Idaho, which sought a declaration that the time extension was invalid and that rescissions of ratifications were effective.³⁶

³¹ See *Coleman v. Miller*, 307 U.S. 433, 453-54 (1939).

³² See *Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Senate Hearings*]; *House Hearings*, *supra* note 8.

³³ See Appendix to Jurisdictional Statement at 4a, *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313).

³⁴ See *id.*

³⁵ H.R.J. Res. 638, 95th Cong., 2d Sess., 92 Stat. 3799 (1978).

³⁶ See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981), *vacated as moot sub nom. National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982).

In the opinion of many of those who testified before Congress or filed briefs in the litigation, the question whether rescissions should be recognized is a matter to be determined by Congress when, after thirty-eight states have voted for ratification, Congress must decide whether to promulgate the amendment.³⁷ According to a prominent variant of this argument, article V implies that ratifications are to reflect a "contemporaneous consensus."³⁸ One objective factor that the promulgating Congress could use in determining whether the "consensus" was "contemporaneous" would be the amount of time that had passed between the proposal of the amendment by Congress and the last ratification. The role that rescissions would play in this determination, however, is far from clear cut. A few representative comments from the hearings indicate the elusive nature of the decision to be entrusted to Congress.

Assistant Attorney General Wald, testifying for the Justice Department, presented the Department's position that the states have no automatic right to rescind ratification, but that "Congress, in assessing at the end of the process whether or not [a] reasonable period [of time] has passed, can at least take into account the fact that many States have changed their mind or that the direction [of ratifications and rescissions] is all going one way and not the other."³⁹ This position was echoed by the Office of Legal Counsel of the Justice Department, which stated that, although rescissions have no legally binding effect, Congress may "take[] into consideration" purported rescissions by one or more states in assessing whether ratifications reflect the contemporaneous judgment of the states.⁴⁰

Such an analysis provides no definite answer to the question whether a state may rescind. Professor Tribe, for instance, had the following opinion:

[T]he power to rescind is the power on the part of a State to advise the Congress that, in determining whether an amendment has been validly ratified, the State is no longer in favor of the amendment; how Congress treats that action by the most recent legislature is a matter

³⁷ See, e.g., Brief of the Honorable Thomas P. O'Neill, Jr., Speaker, and the Honorable Peter W. Rodino, Chairman of the Committee on the Judiciary, of the United States House of Representatives, as *Amici Curiae* in Support of Appeal from the United States District Court for the District of Idaho, Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit, and Motions for Expedited Treatment at 5-6, *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313).

³⁸ See *infra* pp. 394-96.

³⁹ *Senate Hearings*, *supra* note 32, at 65 (testimony of Patricia M. Wald, Assistant Attorney General).

⁴⁰ *Id.* at 105 (opinion letter of John M. Harmon, Assistant Attorney General).

of delicate congressional judgment, depending on a wide variety of facts and circumstances in each case.⁴¹

Professor Emerson sounded the same theme:

When 38 states have ratified, then the question will be: Is that a contemporaneous consensus, or do the rescissions withdraw the consensus? That decision cannot be made until that day arrives, until we know what has happened and how much time has expired and whether or not the second legislature really represented the people . . . and so on.⁴²

The amendment process thus approached becomes a wonderland of uncertainty. The views of the Justice Department and the scholars supporting the Department's position are as sensible as any that can be devised if *Coleman* is accepted as binding precedent; but for state legislatures that are considering ratification, they provide no indication of whether that action will be irreversible. Similarly, a state legislature considering whether to adopt a resolution of rescission can have no idea whether its action will have any legal effect. The second or third state to rescind will not know whether its rescission is a legally effective act until it sees how many additional states rescind and whether there are enough offsetting ratifications to blur the trend line. (And for purposes of congressional judgment about the existence of a "consensus," does a California rescission count for more than a Delaware rescission? Does a rescission passed by a large margin count for more than one narrowly passed?) Senator Bayh commented, with understandable confusion, "You leave me in an uncomfortable position here. Either they have the constitutional authority to [rescind], or they do not."⁴³

Moreover, the action of Congress on any one amendment would not definitively resolve these uncertainties for future amendments. A determination by one Congress would not bind another, and because the "delicate congressional judgment" would, according to Professor Tribe, depend on the "facts and circumstances in each case,"⁴⁴ no such determination would have precedential weight. In fact, the judgment of Congress concerning the validity of an amendment's adoption would not be binding even *for that amendment*: Professor Tribe suggested that the decision of one Congress not to promulgate an amendment (because, in the opinion of that Congress, the weight of the rescissions negated a consensus) could be reversed by the next Con-

⁴¹ *House Hearings*, *supra* note 8, at 45 (testimony of Prof. Laurence Tribe, Harvard Law School).

⁴² *Senate Hearings*, *supra* note 32, at 120 (testimony of Prof. Thomas Emerson, Yale Law School).

⁴³ *Id.* at 65 (statement of Sen. Bayh).

⁴⁴ *House Hearings*, *supra* note 8, at 45 (testimony of Prof. Laurence Tribe, Harvard Law School).

gress, which would be free to take a contrary view of the weight of the rescissions and to vote to promulgate the previously rejected amendment.⁴⁵

The more questions that are raised about a model of the amendment process centered on dispositive congressional approval at the time of promulgation, the more byzantine become the answers. Consider, for example, the issue of an "impasse" in the promulgating Congress. At hearings on the ERA Extension Act, Senator Bayh suggested the following scenario:

[L]et us assume the GSA Administrator is sitting there with 38 certifications and 4 rescissions [from among the thirty-eight states]. Let us say he submits the issue to Congress whereupon a resolution [to promulgate the amendment] is introduced in the House. It passes in the House by a significant majority.

Then it comes to the Senate. A filibuster ensues and it is impossible to get 60 Members of the U.S. Senate to shut off the filibuster.⁴⁶

"What position does that constitutional amendment get into then?" Senator Bayh asked.⁴⁷ One witness gave the following reply:

That would be an impasse. It seems to me that the Supreme Court is rather clearly saying that this is a question for Congress to decide. That includes the question of reasonableness of time and the contemporaneous consensus and the validity of rescission. *Coleman v. Miller* rather clearly indicated that all those questions would be for Congress and not for the courts or the President.

So, it is up to Congress. If Congress cannot act, then there is a total impasse and I simply do not know. It would be an unusual constitutional situation. I am not sure of what happens.⁴⁸

I submit that this scenario is nonsense, and I do so without intending to be critical of those who testified. Their answers simply demonstrate the inadequacy of the model of the amendment process bequeathed by *Coleman v. Miller*. Both the questions and the answers are predicated upon the assumption that an amendment does not become part of the Constitution unless and until Congress exercises its supposed authority to "promulgate" the adoption of the amendment. The concept of a congressional "impasse" and the notion that a later Congress can promulgate an amendment that has been resting in limbo since an earlier Congress declined to recognize the amendment's adoption are merely logical extensions of a view that reads into article V the additional step of congressional promulgation.

⁴⁵ See *id.* at 55 (testimony of Prof. Laurence Tribe, Harvard Law School) ("It sounds like a terribly unwise thing for that Congress to do, but I think they have that power.")

⁴⁶ *Senate Hearings, supra* note 32, at 131 (statement of Sen. Bayh).

⁴⁷ *Id.*

⁴⁸ *Id.* (testimony of Prof. Thomas Emerson, Yale Law School).

C. Congressional Promulgation Reconsidered

The linchpin of the law of article V from *Coleman* to the present has been the deference accorded the authority of the Congress — specifically, the Congress sitting when an amendment process is completed — to control the promulgation of an amendment. *Coleman* apparently refers almost all disputed amendment process issues to this Congress. But what was the basis for the Court's conclusion that there even was such a thing as "congressional promulgation of amendments"?

The principal historical incident relied upon by the Court was the action of the Reconstruction Congress in promulgating the fourteenth amendment. By July of 1868, twenty-nine states — one more than the twenty-eight then necessary — had ratified the fourteenth amendment. Responding to a congressional request for information about the status of the amendment, the Secretary of State enumerated for Congress the states that had ratified; but he observed that two of those, North Carolina and South Carolina, had previously rejected the amendment, and that two others, Ohio and New Jersey, had subsequently voted to rescind ratification. The Secretary noted that, if the Ohio and New Jersey ratifications were still effective despite those states' subsequent attempts to rescind, the amendment had been validly adopted.⁴⁹ (The earlier rejections by North and South Carolina were apparently not thought to raise even a serious question about the validity of those states' ratifications.) The following day, Congress adopted a joint resolution proclaiming that the amendment had been validly ratified; specifically listed among the ratifying states were Ohio, New Jersey, North Carolina, and South Carolina. The amendment was "hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."⁵⁰

The *Coleman* Court transformed the Reconstruction Congress' unprecedented action into a settled feature of article V, and congressional promulgation has been the focal point of analysis of amendment process issues ever since. The Court concluded that, "in accordance with this historic precedent," an issue concerning the efficacy of state ratifications "should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."⁵¹

The assumption that judicial review is precluded by the existence of the exclusive power of the promulgating Congress to determine the validity of ratifications is, in my view, wholly unwarranted. Neither

⁴⁹ 15 Stat. 706 app. no. 11, at 706-07 (1868).

⁵⁰ *Id.* at 708 app. no. 13, at 710.

⁵¹ *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

the text of the Constitution nor prior congressional practice nor judicial precedent supports this bestowal of exclusive power on Congress.

1. *The Text of Article V.* — Reliance on the congressional power to promulgate as a basis for precluding judicial review of amendment process issues would, under the terminology of recent political question cases, be appropriate if promulgation fell within the category of questions that are nonjusticiable because of a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁵² But no such textual basis for the nonjusticiability of these issues exists. Article V provides for a two-stage amendment process: an amendment is (1) proposed by Congress, and (2) “ratified by the Legislatures of three fourths of the several States,” at which point it “shall be valid to all Intents and Purposes, as Part of this Constitution.”⁵³ An amendment is valid “when ratified.”⁵⁴ There is no further step. The text requires no additional action by Congress or by anyone else after ratification by the final state. The creation of a “third step” — promulgation by Congress — has no foundation in the text of the Constitution.⁵⁵

It is precisely because article V contains no provision for congressional promulgation that so much confusion exists. Such a provision, had it been written into article V, *might* have said that “a proposed amendment that has been ratified by the legislatures of three-fourths of the states shall become valid as part of this Constitution *when accepted and promulgated by both Houses of Congress.*” Or the burden might have been reversed: “An amendment shall be valid as part of this Constitution when ratified by the legislatures of three-fourths of the states *unless it is rejected by majority vote of both houses of Congress* within one year of ratification.” But because there is in fact *no* provision for any congressional role at the end of the ratification process, there is no sensible way of defining the contours of the supposed power.

A significant congressional role in determining the validity of state ratifications is, moreover, particularly difficult to harmonize with the existence of the alternative method of proposing amendments by a national constitutional convention. Article V provides that “Congress

⁵² *Powell v. McCormack*, 395 U.S. 486, 518 (1969) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Arguably, another reason for avoiding judicial review of amendment process issues might be the absence of “judicially manageable standards” for resolving such questions. See *Baker*, 369 U.S. 186, 217 (1962) (offering various formulations of the political question doctrine). In Part V of this Article, I attempt to show that judicially manageable standards for resolving amendment process issues may indeed be formulated. See *infra* pp. 419–27.

⁵³ U.S. CONST. art. V; see also *House Hearings*, *supra* note 8, at 86–87 (testimony of Prof. Charles L. Black, Jr., Yale Law School) (expressing doubt about congressional authority to promulgate amendments free of judicial review).

⁵⁴ U.S. CONST. art. V.

⁵⁵ See *Rees*, *Throwing*, *supra* note 8, at 898–99.

. . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments."⁵⁶ Amendments proposed by a national constitutional convention, like those proposed by Congress, "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."⁵⁷ Because Congress has never called a convention for proposing amendments, most analyses of the amendment process give little attention to this alternative method. The convention provision, however, sheds substantial light upon the text of article V.

The notion, central to *Coleman*, that after ratification by the last necessary state some further step must be taken before an amendment becomes valid cannot easily be reconciled with the Constitution's provision for the proposal of amendments at a national convention. Who would "promulgate" the ratification of an amendment that had been proposed by such a convention? The convention itself would no longer be in existence. And surely Congress should not have the power to pass judgment upon the validity of state ratifications of amendments proposed by conventions. As I have attempted to show elsewhere, a principal reason for including in article V the convention method of proposing amendments was to provide a means of bypassing Congress⁵⁸ when Congress itself was either in need of reform or for other reasons unwilling or unable to propose needed amendments. It would appear inconsistent with this purpose to confer plenary power on Congress to assess the validity of ratifications of an amendment proposed by a constitutional convention. More generally, the suggestion of Justices Black, Roberts, Frankfurter, and Douglas that article V "grants power over the amending of the Constitution to Congress alone" and that "[u]ndivided control of that process has been given by the Article exclusively and completely to Congress"⁵⁹ not only has no basis in the text of article V, but also is squarely contrary to the deliberate conferral of amendment-proposing power on a national convention provided as an *alternative* to Congress.

There may be functional arguments for granting Congress final authority to judge the validity of ratifications of amendments it has proposed, while denying Congress that power with respect to amendments proposed by a convention. Such a distinction, however, finds no support in the text of article V. The article provides identically that amendments proposed by a convention and those proposed by Congress "shall be valid . . . when ratified" by three-fourths of the

⁵⁶ U.S. CONST. art. V.

⁵⁷ *Id.*

⁵⁸ See Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623, 1625-26 (1979).

⁵⁹ *Coleman v. Miller*, 307 U.S. 433, 459 (1939) (Black, J., concurring).

states.⁶⁰ The text does not condition the adoption of any amendment, however proposed, on promulgation by Congress.

2. *Prior Congressional Practice.* — Developing an idea subsequently echoed by many scholars, the Supreme Court in *Coleman* wrote of “congressional promulgation” as if it were a fixture of constitutional practice, the traditional last step of the process of ratifying an amendment.⁶¹ Curiously, only one congressional promulgation has been the focus of judicial and scholarly discussion — the Reconstruction Congress’ promulgation of the fourteenth amendment despite attempted state rescissions. What of the other amendments? To trace the evolution of congressional promulgation practices, I undertook to review promulgations of other amendments. As it turned out, I had little reviewing to do: there have been no other congressional promulgations.

During the period in which the first ten amendments were adopted, the President informed Congress from time to time of ratifications of pending amendments.⁶² Other than the enactment of a recordkeeping statute,⁶³ there is no indication of any involvement by Congress in the process of ascertaining the validity of, or promulgating, any of the first thirteen amendments. The action of the Reconstruction Congress with respect to the fourteenth amendment was literally unprecedented. And it was taken without any floor discussion of the basis for the assumed congressional power to determine whether an amendment had been properly ratified. The resolution proclaiming ratification was accompanied by little debate and was adopted by a voice vote in the Senate.⁶⁴

This “historic precedent” of Congress’ exercise of its “ultimate authority . . . over the adoption” of amendments retained practical

⁶⁰ U.S. CONST. art. V.

⁶¹ See *supra* note 8.

⁶² See 2 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 71, 73-74, 76, 78, 110-11, 113-15 (1896). When the President reported the last two ratifications (those of Virginia and Vermont), he made no mention of the fact that a sufficient number had been gathered. See *id.* at 114-15. The President did not notify Congress of the adoption of the 11th amendment until nearly three years after ratification by the last necessary state. This time lapse has generated confusion about the actual date of ratification. On February 7, 1795, North Carolina’s legislature became the 12th to ratify the amendment. See C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 67, 180 n.96 (1972). But not until January 8, 1798, did the President report that ratification had occurred. As Professor Orth notes, even Professor Goebel was misled when he wrote that “[d]espite the uproar precipitated by the *Chisholm* decision, it was close to four years before a sufficient number of states had ratified to put the Eleventh Amendment into effect.” Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423, 428 n.41 (quoting 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 737 (1971)).

⁶³ See *infra* note 70.

⁶⁴ A very brief debate is recorded in CONG. GLOBE, 40th Cong., 2d Sess. 453 (1868). The resolution was passed by voice vote in the Senate, see *id.* at 4266, and by an overwhelming majority of the House (127 for, 33 against), see *id.* at 4296.

significance for less than two years. As the process of ratifying the fifteenth amendment drew to a close, the Senate inconclusively debated the validity of the ratifications by Ohio (which had rejected the amendment before ratifying it) and New York (which had voted to rescind its ratification).⁶⁵ A resolution to promulgate the adoption of the fifteenth amendment was introduced but was never voted out of the Judiciary Committee.⁶⁶ Although the House eventually passed a resolution approving of the Secretary of State's publication (and consequent signalling of the adoption) of the amendment,⁶⁷ the Senate never took any action. Nor did Congress undertake to promulgate any of the ensuing eleven amendments to the Constitution. The precedent of congressional promulgation thus consists of nothing more than the extraordinary act of the Reconstruction Congress.

Since 1818, Congress has provided a statutory mechanism for keeping a record of state ratifications and for publishing ratified amendments. Upon receipt of official notice that an amendment "has been adopted," an executive official (originally, the Secretary of State; currently, the Administrator of General Services) must "cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted and that the same has become valid . . . as a part of the Constitution of the United States."⁶⁸ The requirement was originally part of the Act of April 20, 1818,⁶⁹ which provided for publication, by the Secretary of State, of acts of Congress, treaties, and constitutional amendments.⁷⁰

This statutory provision is an appropriate exercise of congressional authority under the "necessary and proper" clause of article I, section eight.⁷¹ It does not purport to assert congressional authority to determine the validity of ratifications. Nor does it confer final authority on the Administrator of General Services to resolve disputes concerning the constitutional validity of an amendment's ratifications. Admittedly, the Administrator must decide whether to publish an amend-

⁶⁵ See CONG. GLOBE, 41st Cong., 2d Sess. 1477-81 (1870).

⁶⁶ *Id.* at 1477.

⁶⁷ See *id.* at 5441.

⁶⁸ 1 U.S.C. § 106(b) (1982).

⁶⁹ Ch. 80, 3 Stat. 439.

⁷⁰ Confusion over the effective date of the 11th amendment may have been the impetus behind the Act of April 20, 1818, which provided:

[W]henever official notice shall have been received, at the Department of State, that any amendment . . . has been adopted, according to the provisions of the constitution, it shall be the duty of the . . . Secretary of State forthwith to cause the said amendment to be published in the said newspapers . . . with his certificate, specifying the states by which the same may have been adopted

Id. § 2, 3 Stat. at 439. These functions have since been transferred to the Administrator of General Services; the provision for newspaper publication has been omitted. See 1 U.S.C. § 106(b) (1982).

⁷¹ U.S. CONST. art. I, § 8, cl. 18.

ment. The assumption since *Coleman* has been that an uncertain administrator would refer to Congress any question concerning the validity of ratifications. But why was that consultation thought appropriate in 1868, and why now? An administrator uncertain about the lawful exercise of one of her responsibilities is normally expected to refer the question to the Attorney General for an opinion and then act in accordance with that opinion.⁷² Administrators generally do not ask Congress to determine by joint resolution how a statute or constitutional provision should be construed. In any event, the certification of an amendment by the Administrator of General Services, like congressional promulgation, is neither necessary nor sufficient to make an amendment part of the Constitution. Certification of a ratified amendment is a useful administrative action; but just as official publication of an act of Congress does not determine that the act is constitutionally valid, certification and publication of ratified amendments does not authoritatively determine that the amendments have been adopted in accordance with the Constitution.

In making congressional promulgation a critical step in the amendment process, the *Coleman* Court ignored an earlier unanimous Supreme Court decision holding that the process of ratification is complete when the last necessary state ratifies. In *Dillon v. Gloss*,⁷³ the date upon which the eighteenth amendment had become part of the Constitution was critical to the government's prosecution of Dillon for violating the National Prohibition Act.⁷⁴ The eighteenth amendment provided that "[a]fter one year from the ratification of this article the . . . sale . . . of intoxicating liquors is . . . prohibited."⁷⁵ The National Prohibition Act, which made transporting liquor a federal crime, was thus scheduled to go into effect exactly one year after adoption of the eighteenth amendment.⁷⁶

Dillon was arrested while transporting liquor on January 17, 1920.⁷⁷ The last three necessary states had all ratified on January 16, 1919.⁷⁸ The Secretary of State, however, had not certified the adoption of the amendment until January 29, 1919.⁷⁹ Dillon argued that the amendment had not become part of the Constitution until the day of the Secretary's proclamation and that transportation of wine had therefore not become a criminal offense until January 29, 1920. Tak-

⁷² That indeed was the course of action contemplated by the General Services Administration during the Carter administration. See *Senate Hearings*, *supra* note 32, at 109 (testimony of James E. O'Neill, Deputy Archivist, National Archives and Records Service, General Services Administration).

⁷³ 256 U.S. 368 (1921).

⁷⁴ Ch. 85, 41 Stat. 305 (1919) (repealed 1933).

⁷⁵ U.S. CONST. amend. XVIII, § 1.

⁷⁶ National Prohibition Act, ch. 85, tit. III, § 21, 41 Stat. 305, 322 (1919) (repealed 1933).

⁷⁷ See *Dillon*, 256 U.S. at 370, 377.

⁷⁸ See *id.* at 376.

⁷⁹ See *id.*

ing judicial notice of the fact that the final three state ratifications had occurred on January 16, 1919, a year and a day before Dillon's arrest, the Court rejected Dillon's claim. According to the Court, the Secretary of State's promulgation was immaterial; the process had been fully consummated by the final state ratification.⁸⁰

In holding that there could be no judicial review of the validity of constitutional amendments because that function had been allocated to Congress, the *Coleman* Court largely manufactured the anticipated event of congressional promulgation to which it was deferring. Moreover, the Court ignored a rich history of judicial review of amendment process issues.

3. *Judicial Antecedents.* — Judicial review of the amendment process is in a sense older than judicial review itself. The first Supreme Court decision on the validity of an amendment came in 1798 in *Hollingsworth v. Virginia*,⁸¹ five years before the Court formally articulated the doctrine of judicial review in *Marbury v. Madison*.⁸² The eleventh amendment, which precludes the commencement or prosecution in federal court of certain suits against a state,⁸³ was adopted while Hollingsworth's suit against Virginia was pending in the Supreme Court, and on the basis of the amendment Virginia sought to dismiss the case. Hollingsworth responded that the amendment had not been properly adopted, because the congressional resolution proposing the amendment had not been submitted to the President for his signature as was arguably required by the veto clause of article I.⁸⁴ Stating that "[t]he negative of the President applies only to the ordinary cases of legislation,"⁸⁵ the Court expressly held that the amendment had been "constitutionally adopted."⁸⁶ The Court did not suggest that the question of the President's role in the amendment process was one for the political departments rather than the Court.

It was not until the 1920's that the Court was again called upon to resolve disputes concerning the validity of constitutional amendments. Two of the amendments of the Populist/Progressive era — the nineteenth (women's suffrage)⁸⁷ and the eighteenth (prohibition)⁸⁸ — were the subjects of litigation that produced six Supreme Court decisions resolving a dozen disputed article V issues. The prohibition amendment was singularly productive of litigation. Along with its

⁸⁰ *See id.*

⁸¹ 3 U.S. (3 Dall.) 378 (1798).

⁸² 5 U.S. (1 Cranch) 137 (1803); *see Currie, The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981).

⁸³ *See* U.S. CONST. amend. XI.

⁸⁴ *See id.* art. I, § 7, cl. 3.

⁸⁵ 3 U.S. (3 Dall.) at 381 n.(a).

⁸⁶ *Id.* at 382.

⁸⁷ *See* U.S. CONST. amend. XIX.

⁸⁸ *See id.* amend. XVIII.

implementing legislation, the amendment virtually closed down a major industry.⁸⁹ The enormous sums of money at stake made it worthwhile to challenge the amendment's validity on every conceivable ground. And enforcement of the amendment through federal criminal prosecutions provided actual cases and controversies in which the amendment's validity could be contested.

Litigation over the eighteenth amendment resulted in four major Supreme Court decisions. In *Hawke v. Smith (Hawke I)*,⁹⁰ the Court held that a state cannot subject the ratification of an amendment by the state legislature to a subsequent referendum by voters.⁹¹ In the *National Prohibition Cases*,⁹² the Court held that: (1) Congress, in proposing an amendment, need not expressly state that it deems the amendment "necessary";⁹³ (2) a two-thirds vote of a quorum of each house (rather than two-thirds of the entire membership) is sufficient to propose an amendment;⁹⁴ and (3) prohibition was a proper subject of amendment under article V.⁹⁵ In *Dillon v. Gloss*,⁹⁶ the Court held that Congress, when it proposes an amendment, has the power to set a reasonable time limit on ratification, and that seven years is a reasonable limit.⁹⁷ And in *United States v. Sprague*,⁹⁸ the Court rejected the claim that amendments granting the federal government new, direct powers over the people may properly be ratified only by the people themselves acting through conventions,⁹⁹ and held that the mode of ratification is completely dependent on congressional discretion.¹⁰⁰

Adoption of the nineteenth amendment led to two additional Supreme Court decisions concerning amendment process issues. In *Hawke v. Smith (Hawke II)*,¹⁰¹ the Court dismissed a challenge to the nineteenth amendment and reaffirmed its earlier holding that, because a state legislature is exercising a federal function when it ratifies an amendment, a state may not subject its legislature's ratification or rejection to a referendum.¹⁰² Two years later, in *Leser v. Garnett*,¹⁰³ the Court rejected the claim that an addition to a state's

⁸⁹ See M. TILLIT, *THE PRICE OF PROHIBITION* 41 (1932).

⁹⁰ 253 U.S. 221 (1919).

⁹¹ See *id.* at 231.

⁹² 253 U.S. 350 (1920).

⁹³ See *id.* at 386.

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ 256 U.S. 368 (1921).

⁹⁷ See *id.* at 375-76.

⁹⁸ 282 U.S. 716 (1931).

⁹⁹ See *id.* at 730, 732.

¹⁰⁰ See *id.* at 720, 730.

¹⁰¹ 253 U.S. 231, 232 (1920).

¹⁰² See *id.*

¹⁰³ 258 U.S. 130 (1922).

electorate as great as that effected by the nineteenth amendment would impermissibly destroy the autonomy of any state that did not specifically assent to the amendment. The women's suffrage amendment, the Court held, was an appropriate exercise of the amending power.¹⁰⁴

All seven of the pre-1939 Supreme Court decisions construing article V and passing on the validity of ratifications of amendments are inconsistent with the subsequent understanding that Congress has exclusive power to determine such issues. The Court in *Coleman* made no effort to distinguish the earlier exercise of judicial review in *Hollingsworth v. Virginia*, *Hawke I*, *Hawke II*, the *National Prohibition Cases*, *Dillon v. Gloss*, *Leser v. Garnett*, and *United States v. Sprague*. In all but the first of these cases, the Court's exercise of review followed an amendment's certification by the Secretary of State.¹⁰⁵ In none was certification considered a basis for disposing of the case. In *Hawke I*, *Hawke II*, and the *National Prohibition Cases*, moreover, the argument that the validity of ratifications was a political question was explicitly and strenuously urged by the parties seeking to sustain the amendments. The petitioners in *Hawke I*, for example, maintained that

Constitution making is a political question and inheres in the political departments of the Government of the United States — the legislative and executive departments — and where the legislative department has designated an agency to ascertain and proclaim the fact of ratification, the courts, to avoid conflict, refrain from any act looking to the overthrow of the decision and action of such department.¹⁰⁶

Despite this argument, the Court determined the merits of the issues in *Hawke I*.

In sum, congressional authority to proclaim the adoption of amendments and thereby to determine the validity of ratifications is unsupported by the text of article V, contrary to settled judicial precedent before 1939, and without antecedents, except for the self-serving declaration of the Reconstruction Congress, in actual congressional practice. Such congressional authority is also dysfunctional and responsible for much of the uncertainty surrounding the amendment process.¹⁰⁷

¹⁰⁴ See *id.* at 136.

¹⁰⁵ See, e.g., *id.* at 137; *Dillon*, 256 U.S. at 376; *Hawke I*, 253 U.S. at 225.

¹⁰⁶ Petitioner's Brief at 62, *Hawke I* (No. 582).

¹⁰⁷ I do not mean to suggest that Congress is constitutionally forbidden to pass a resolution stating that an amendment has been ratified. (Congress may pass any joint resolution it wishes.) My arguments are, first, that such a resolution is not a necessary condition of an amendment's becoming effective, and second, that such a resolution should not preclude an independent judicial determination of questions concerning the constitutional validity of an amendment's adoption if such questions arise in the course of litigation.

III. PROPOSING THE CONTENT OF AMENDMENTS: AN ALTERNATIVE SOURCE OF CONGRESSIONAL AUTHORITY

There must, of course, be some mechanism for resolving disputes about the validity of an amendment's adoption. One obvious alternative to committing such disputes to the exclusive judgment of the "promulgating Congress" would be to permit courts to settle them in litigation in which one party seeks to rely upon an amendment as a cause of action or defense and the opposing party claims that the amendment has not been properly adopted. A number of issues concerning the interpretation of article V were settled in just this fashion between 1798 and 1931.¹⁰⁸ I will argue below that we should return to the previous understanding that such questions are suitable for judicial resolution. But judicial review is not without its vices, and before we draw any conclusions about its advisability, we should consider whether Congress has the capacity to reduce the number of potential disputes by establishing, at the outset of the ratification process, rules that will resolve questions such as the validity of rescissions and the amount of time permitted for ratification.

The extensive discussion of the supposed authority of the "promulgating" Congress to resolve amendment disputes at the end of the ratification period has deflected attention from a power that Congress has been expressly given by article V: the power to propose the texts of amendments. Congress has on occasion used this power to incorporate time limits on ratification into an amendment's text. But Congress has apparently never fully considered how a textual time limit works, or how it differs from a time limit merely included in the resolution proposing an amendment. An examination of the theoretical basis of congressional power to place time limits in an amendment's text suggests that a textual time limit may stand on a firmer foundation than one merely included in the proposing resolution. It also suggests that we should consider whether Congress may incorporate other rules governing ratification of an amendment into the text of the amendment itself.

Commentators have generally assumed that a time limit included in a proposed amendment's text cannot be varied or extended and that the expiration of the limit will validly terminate consideration of the amendment. Congress has not always been sure of its authority in this area, however, and it voted to begin writing time limits into the texts of amendments only after substantial debate over the propriety and constitutionality of doing so.¹⁰⁹

¹⁰⁸ See *supra* pp. 403-05.

¹⁰⁹ The first suggestion that a time limit be placed on a proposed amendment was apparently made in connection with the 14th amendment. Senator Buckalew, an opponent of the amendment, sought unsuccessfully to add a final section to the text of the amendment providing that

The eighteenth amendment was the first to contain a time limit: the last section of the amendment provides that "[t]his article shall be inoperative unless it shall have been ratified as an amendment to the Constitution . . . within seven years from the date of the submission hereof to the States by the Congress."¹¹⁰ Some supporters of prohibition doubted the constitutionality of the time limit and feared that the clause was a "trick" perpetrated by the amendment's opponents to cause the eventual invalidation of the entire amendment. Senator Brandegee, a supporter of prohibition, warned that "when the matter is taken to the Supreme Court the Supreme Court may hold that Congress, by attempting to prescribe an unconstitutional condition to the machinery by which the amendment must be approved . . . , has exceeded its authority, and the whole amendment may fail."¹¹¹ Senator Norris did not think it "fair to attach to any particular amendment such a provision. That ought to be, I should think, an independent, separate amendment, and become part of our Constitution so that it would apply to all amendments."¹¹² Other senators voiced the objection that it was unconstitutional to vary the terms of article V by a provision that applied to the ratification of the very amendment under consideration. Senator Borah was the most outspoken:

[W]hen the States vote upon this question they will be voting on it under the Constitution of the United States as it now exists. We having submitted it to the States, it is in the possession of the States, and we cannot control it. They have a perfect right to say, "We shall ratify this now" or "We will ratify it in 10 years from now," and when they shall ratify it they will have acted in accordance with the provisions of the Constitution of the United States.¹¹³

Borah and other opponents of the textual time limit argued that article V placed no time limit on ratification and that a provision in a proposed amendment would still be merely a proposal, rather than part of the Constitution, during the ratification process. Senator Cummins doubted that Congress had any authority to propose a provision that would control the ratification process: "From what part of the Constitution do we get the power to attach a condition to an amendment which we submit to the States for ratification? Our authority is exhausted when we declare that an amendment shall be proposed to the States."¹¹⁴

The time limit included in the eighteenth amendment was, as

no ratification would be valid "if made after three years from the passage of this resolution." CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866).

¹¹⁰ U.S. CONST. amend. XVIII, § 6.

¹¹¹ 55 CONG. REC. 5650 (1917) (statement of Sen. Brandegee).

¹¹² *Id.* at 5557 (statement of Sen. Norris).

¹¹³ *Id.* at 5649 (statement of Sen. Borah).

¹¹⁴ *Id.* at 5652 (statement of Sen. Cummins).

Senator Brandegee predicted, attacked in the courts. After ratification by three-fourths of the states within the specified time, opponents of prohibition attacked the amendment by arguing that Congress had no power to limit the time within which ratification could occur. In *Dillon v. Gloss*,¹¹⁵ the Supreme Court rejected this argument¹¹⁶ in a curious opinion that makes no mention of the fact that the time limit was part of the text of the amendment itself. The Court held that Congress, pursuant to its power to designate the mode of ratification, could restrict the amount of time available for consideration of the amendment.¹¹⁷

Congress has never fully explored the source of its authority to stipulate the time within which amendments must be ratified.¹¹⁸ Because the Court in *Dillon* had not relied on the placement of the time limit in the text, Congress — apparently without giving the matter much further thought — began, with the twenty-third amendment, to omit the time limit from the text and include it instead only in the joint resolution proposing the amendment. The purpose of this change in methodology was to avoid cluttering up the Constitution with time limit provisions such as those incorporated in the eighteenth, twentieth, twenty-first, and twenty-second amendments.¹¹⁹ Because Congress never completely understood how textual time limits “worked,” it was willing to dispense with them.¹²⁰ But this development was

¹¹⁵ 256 U.S. 368 (1921).

¹¹⁶ See *id.* at 375-76.

¹¹⁷ See *id.*

¹¹⁸ After the 19th amendment had been proposed without a time limit, Congress addressed the issue once more in considering the 20th amendment. Congressman Celler offered an amendment to the proposing clause providing that the amendment would be valid when ratified “within seven years from the date of submission to the States.” 75 CONG. REC. 3856 (1932) (statement of Rep. Celler). Congressmen Jeffers and Ramsayer both objected that a time limit set forth in the proposing clause rather than in the text of the amendment itself “would be of no avail.” *Id.* (statements of Rep. Jeffers and Rep. Ramsayer). Celler agreed to make the limit part of the text of the proposed amendment, see *id.* (statement of Rep. Celler), and the amendment was eventually submitted in that form. The 21st and 22d amendments were also sent to the states with seven-year limits incorporated in their texts.

¹¹⁹ *House Hearings*, *supra* note 8, at 34 (letter from Prof. Noel Downing, Columbia Law School).

¹²⁰ Moving the time limit from the text to the proposing resolution led to one of the most curious questions to arise recently under article V: could Congress, having placed a time limit only in the resolution proposing an amendment, validly extend that time by a subsequent joint resolution? Following the formula it had utilized for the preceding four amendments, Congress proposed the ERA in 1972 with a joint resolution providing that “the following article is proposed as an amendment to the Constitution . . . which shall be valid . . . when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.” The text of the proposed amendment followed. H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972). The amendment itself contained no provision stating that the amendment would be inoperative if not ratified within the seven-year period.

As I have noted above, congressional power to establish a time limit in the text is based, quite simply, upon the plenary authority of Congress to propose the texts of amendments. It is

problematic, because the effectiveness of a time limit may depend on its incorporation in the text of the amendment.

Suppose that the text of a proposed amendment provides that "this article shall be inoperative unless it shall have been ratified . . . within seven years" (the language of the eighteenth amendment). And suppose that, by the end of the seven-year period, only thirty-seven of the requisite thirty-eight states have ratified the amendment. Opponents of the time limit in the eighteenth amendment argued that such a limit could not have legal effect at the end of the seventh year, because it was not yet "law," but only part of a *proposed* amendment.¹²¹ But assuming that this argument is correct, what happens when an additional legislature ratifies after the expiration of the seven-year period? The amendment (if one chooses to look at it this way) is now ratified — and it self-destructs. Because the amendment has now been adopted, the portion of the amendment expressly providing that "this article shall be inoperative unless ratified within seven years" has the force of law. A time limit placed in the text thus accomplishes its objective — ensuring that the amendment will not become an *operative* provision of the Constitution unless ratified within the set time.

Before proposing additional amendments, Congress might also explore its power to resolve other amendment process issues through the

far less clear that Congress has the power to set such a limit merely by making a statement in the joint resolution proposing an amendment. Article V says simply that amendments shall be valid "when ratified." The congressional power to choose the "mode of ratification" is the power to decide *who* shall ratify (legislatures or conventions); it does not necessarily include the authority to tell the states *when* ratification must occur. The power of Congress to do more than propose amendments is dubious at best. A time limit contained only in the resolution proposing an amendment thus rests upon a very uncertain basis.

The move to extend the ERA by joint resolution revealed this uncertainty. Those who argued against the validity of the 1978 extension tended to treat the original seven-year time limit as if it had been etched in stone. Former Solicitor General Griswold, for example, argued that "Congress lost the power to change the Joint Resolution when it was formally communicated to the States. If Congress were to undertake to change it now, this would amount to a new resolution which would have to be submitted to, and acted upon by, all of the States." *House Hearings, supra* note 8, at 105 (testimony of Dean Erwin N. Griswold, Harvard Law School). To change this fixed rule six years after submission of the ERA to the states, he suggested, was "a little like extending the time of a football game after fourteen minutes in the final quarter, with the score tied, and one team on the other's one-yard line." *Id.* at 107.

What was odd about the debates over congressional authority to extend the time for ERA ratification was the absence of serious discussion concerning congressional authority to set a time limit "rule" in the first place. If the initial joint resolution requiring the states to ratify within a certain time is of doubtful legal effect, one cannot easily maintain that the original time limit is a firm and unalterable rule of the process. The argument that the first expiration date is unextendible presupposes simultaneously that Congress (1) has the wholly implied, nontextual power to set a time limit, but (2) lacks the implicit power to extend that time. Moreover, the argument that state legislatures "ratified" the original time limit will not wash: the states are asked to ratify only amendments, not the contents of joint congressional resolutions. State legislatures cannot convert into constitutional text something that is not.

¹²¹ See 55 CONG. REC. 5659 (1917).

inclusion of provisions in the texts of proposed amendments. Could Congress, at the outset of an amendment process, provide a definitive answer to the question whether ratifications of that amendment could be rescinded? Suppose that Congress were to include the following provision as the final section of the text of an amendment proposed in 1984:

Section 2. This amendment shall be inoperative unless it is ratified by the legislatures of three-fourths of the states before June 30, 1991. This amendment shall also be inoperative if at any time before the final adoption of the amendment the ratification of any state necessary for adoption is withdrawn by the same process required for initial ratification.

This rescission provision would “work” in the same way that a textual time limit works. If Congress has the power to declare, when it proposes an amendment, that ratifications will not count if they come too late, why does it not also have the power to declare that ratifications will not count if they have been reconsidered? The logic of this analogy — which I find persuasive — suggests that Congress, by including in the text of an amendment a provision rendering the amendment “inoperative” if its adoption depends upon rescinded ratifications, may at the outset of the ratification process make a definitive judgment that rescissions will be effective.

But there is more to the law than logic. The technique of defining ratification procedures in the text of an amendment has about it the air of a trick, and it may further politicize the amendment process by resulting in the specification of different procedures for each proposed amendment. Instead of simplifying and clarifying the ratification process, the technique may provide yet another ground for debate and dispute.

One additional, critical shortcoming of any congressional effort to clarify the amendment process by building rules governing ratification into the texts of amendments is that such an effort can resolve questions only by rendering the process more difficult. The hypothetical provision I have drafted, for instance, would make the article V ratification process harder (if it changed that process at all) rather than easier. The difficulty inheres in the logic by which such a provision would work. An amendment containing such a provision could not take effect unless a core of thirty-eight unrescinded ratifications occurred within a seven-year period. By contrast, textually incorporated amendment provisions that purported to specify ratification procedures easier than those provided in article V could have no legal effect whatsoever, because such provisions would violate the express requirements of article V. For example, an amendment that provided that it would be valid when ratified by the legislatures of thirty states could not become operative as an amendment to the

Constitution under article V, for it would not have been adopted by the thirty-eight states required by the Constitution that was in effect before the amendment.

There is, moreover, no recognizable limit to the argument that Congress can resolve potential disputes through textual declarations that an amendment shall be inoperative unless ratified in accordance with requirements not specified by article V. If Congress can effectively permit rescissions by declaring an amendment inoperative unless ratified by thirty-eight states in addition to any rescinding states, could it also include a provision that an amendment would be inoperative unless approved by forty-five states? Or by thirty-eight states *and* the President of the United States? Or by thirty-eight states and Saudi Arabia?

Textual time limits on ratification, although they rest upon the same logical foundation as the examples mentioned above, have a far sounder footing in tradition and judicial precedent.¹²² Additional resort to the device of placing conditions on ratification in the texts of amendments seems ill advised. Moreover, resort to this device would by no means fully clarify the amendment process. Textual conditions could be used only to make the process more difficult; they would be of no use at all in resolving issues unanticipated by Congress when it proposed an amendment.

IV. THE CASE FOR JUDICIAL REVIEW

The power of Congress to propose the texts of constitutional amendments is thus unlikely to provide a basis for resolving in advance many questions that will arise concerning the validity of ratifications of those amendments. In addition, I have argued, entrusting the final resolution of disputes about ratifications to the judgment of the Congress that is sitting when the thirty-eighth purported state ratification occurs is both unwarranted and unwise. The capacity of judicial review to provide the full measure of certainty and predictability that the amendment process needs is a matter about which I have some doubts and to which I will turn shortly. Before addressing that question, however, I would note that whether or not judicial review of article V issues would materially advance larger goals of the amendment process, such review is justified as an initial matter by the same considerations that have made judicial review an accepted part of the constitutional system since *Marbury v. Madison*.¹²³ The Constitution is positive law — law that may be invoked in court by litigants. In fulfilling its role as a resolver of legal disputes, a court must interpret and apply all of the law applicable to the cases before

¹²² See *Dillon v. Gloss*, 256 U.S. 368 (1921); *supra* p. 408.

¹²³ 5 U.S. (1 Cranch) 137 (1803).

it, including the law of the Constitution.¹²⁴ The provisions of article V are fully a part of that law.¹²⁵

The strained procedural posture of *Coleman v. Miller* may have obscured these simple observations and contributed significantly to the cavalier way in which the Court dispensed with judicial review. *Coleman* itself was hardly a real case. The standing of Kansas legislators to seek vindication of their vote was dubious at best.¹²⁶ And because far fewer than three-fourths of the states had ratified the amendment,¹²⁷ a good argument could have been made that the case was not ripe for adjudication.

It would have been much more difficult for the Court to dispense with judicial review in a clearly genuine case or controversy such as that presented to the federal district court in *Dillon v. Gloss*.¹²⁸ J.J. Dillon had been charged with criminally violating the National Prohibition Act by transporting a cask of wine through San Francisco. He filed a petition for federal habeas corpus in which he alleged, among other things, that the eighteenth amendment (upon which the Act was predicated) had not been ratified by the requisite number of states.¹²⁹

Dillon's petition noted that one of the states whose ratification was essential to the adoption of the eighteenth amendment in time to make Dillon's act a crime was Ohio, a state that had recently added to its constitution a provision subjecting its legislature's ratifications to referendum. After the legislature's vote to ratify, interested parties filed a timely and proper petition invoking a referendum for the next general

¹²⁴ See C. BLACK, *supra* note 1, at 6-7.

¹²⁵ I will argue that no sound reason exists for generally treating questions arising under article V as nonjusticiable political questions. See *infra* pp. 414-17. I do not mean to imply, however, that no issues arising under article V could ever properly be considered political questions. Professor Edward Cooper of the University of Michigan Law School has suggested to me that a question might arise, similar to that involved in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), regarding which of two state legislatures was the legislature entitled to ratify an amendment. The Supreme Court held in *Luther* that a federal court could not independently decide which state government was in power; I assume that the result would be the same, and rightly so, if the issue were to arise in a dispute over ratification and if, as in *Luther*, any attempt by the court to determine which government to recognize would pose insurmountable evidentiary problems.

Similarly, if a dispute were to arise regarding the actual wording of an amendment proposed by Congress, the Court might properly defer to authoritative certification by the responsible congressional officials. Cf. *Field v. Clark*, 143 U.S. 649 (1892) (judiciary must accept, as a congressional enactment, the language of a bill that responsible officials of Congress have duly authenticated).

¹²⁶ Indeed, four Justices argued that the legislators had no standing. See *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring in the result).

¹²⁷ See *id.* at 473-74 (Butler, J., dissenting).

¹²⁸ 256 U.S. 368 (1921).

¹²⁹ See Brief for Appellant at 1-2, *Dillon* (No. 251).

election. The voters of Ohio rejected the legislature's ratification of the amendment.¹³⁰

Article V demands ratification by "the legislature" of each state. Dillon argued that this term referred to the legislative process of each state and was broad enough to encompass ratification — or refusal to ratify — by referendum.¹³¹ The Court was willing, and properly so, to address arguments such as Dillon's on the merits. One function of judicial review is to provide a buffer between the political branches of government and the individual citizen. When a court is faced with the question whether it may impose upon a defendant a sanction based on a particular constitutional provision, and when one of the defendant's defenses is that the provision in question is not in fact part of the Constitution, it hardly seems consistent with *Marbury v. Madison*¹³² for the court to withhold consideration of the claim and to convict and sentence the defendant on the authority of an amendment that the states have not validly ratified. This consideration alone, in my view, justifies judicial review.

Whether the return to judicial review of article V issues would also serve the ends of making the amendment process more certain and predictable and of enhancing the legitimacy of contested amendments is a more difficult issue. Although the answer is not wholly free from doubt, I believe that judicial review would serve those ends better than would resolution of ratification disputes by the promulgating Congress.

Congressional promulgation is a strikingly inadequate mechanism for resolving ratification controversies. It is likely to be strongly influenced by congressional opinion about the merits of the amendment in question. I do not mean to suggest that courts are unaffected by political considerations; surely they are not. But despite contemporary cynicism about judicial capacity for detached judgment, there is still force to the observations of an earlier era that the requirement of written opinions justifying results reached, the doctrine of *stare decisis*, and the judiciary's relative disinterestedness in the ebb and flow of momentary public opinion all tend to give the courts an institutional advantage in establishing and applying fundamental norms.¹³³

Congress, on the other hand, need not and probably would not even provide reasons for its resolution of a dispute about the interpretation of article V. Its decision is apt to be, as the decision of the

¹³⁰ See *National Prohibition Cases*, 253 U.S. 350, 360 (1920) (argument of appellant in *Kentucky Distilleries & Warehouse Co. v. Gregory* (No. 752)).

¹³¹ See *Dillon*, 256 U.S. at 370. Dillon was forced to abandon the argument when the Court ruled, in another case, that the Ohio referendum had no legal effect. See *National Prohibition Cases*, 253 U.S. at 386.

¹³² 5 U.S. (1 Cranch) 137 (1803).

¹³³ See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

Reconstruction Congress was, a decision simply to promulgate the amendment or not to do so.¹³⁴ The process would thus be ad hoc; decisions reached with regard to a disputed issue would neither facilitate the resolution of other issues nor even control resolution of the same issue if it were to arise in the context of a future amendment.

Perhaps the most serious objection to judicial review of the validity of ratifications is that such review would provide the Court with the opportunity to invalidate amendments designed to overturn decisions of the Court. This point was made most recently by Justice Powell, who wrote approvingly of *Coleman* in his concurring opinion in *Goldwater v. Carter*.¹³⁵

The proposed constitutional amendment at issue in *Coleman* would have overruled decisions of this Court Thus, judicial review of the legitimacy of a State's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the Judicial Branch of Government to step aside.¹³⁶

This argument is not without force, and it has particular pertinence to the circumstances of *Coleman*. The Supreme Court's invalidation of the Child Labor Act in *Hammer v. Dagenhart*¹³⁷ was widely regarded as a decision bordering on the lawless, the work of Justices driven by ideological opposition to regulation of labor conditions. Many observers would have questioned whether a Court that could hand down such a decision was capable of a disinterested assessment of the validity of an amendment restoring the federal government's power to regulate child labor. Justice Butler's *Coleman* dissent¹³⁸ (joined by Justice McReynolds), which argued that the child labor amendment had lapsed in the thirteen years since Congress had submitted it to the states without a time limit, suggests that such doubts might have been well founded.

Most amendments, however, have not been designed to "overrule" decisions of the Court. Professor Choper, in *Judicial Review and the National Political Process*,¹³⁹ counts only four amendments that were intended to "overcome the Court's view": the eleventh, section one of the fourteenth, the sixteenth, and the twenty-sixth.¹⁴⁰ Justice Powell's suggestion that amendments may "overrule[] decisions of [the] Court"¹⁴¹ is not, strictly speaking, an apt description of the effect

¹³⁴ See 15 Stat. 706 app. no. 11 (1868) (proposing the 14th amendment without explanation).

¹³⁵ 444 U.S. 996 (1979).

¹³⁶ *Id.* at 1001 n.2 (Powell, J., concurring in the judgment).

¹³⁷ 247 U.S. 251 (1918).

¹³⁸ See *Coleman v. Miller*, 307 U.S. 433, 470-74 (Butler, J., dissenting).

¹³⁹ J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

¹⁴⁰ *Id.* at 49 & n.133.

¹⁴¹ *Goldwater*, 444 U.S. at 1001 n.2 (Powell, J., concurring in the judgment).

even of these four amendments; Professor Choper's careful phrasing seems much closer to the truth. Only under the most nakedly result-oriented view of the Court's work could one say, for example, that the adoption of the twenty-sixth amendment "overruled" the Court's decision in *Oregon v. Mitchell*.¹⁴² The Court in *Mitchell* held that the equal protection clause of the fourteenth amendment did not prohibit the states from limiting the franchise to persons over twenty-one years of age.¹⁴³ Nothing in the twenty-sixth amendment in any way repudiated that interpretation of the fourteenth amendment.¹⁴⁴ Nor did the members of Congress who proposed the twenty-sixth amendment necessarily think that the *Mitchell* Court was in error in its construction of the fourteenth amendment. No evidence suggests that the Justices that decided *Mitchell* were thereby advancing a personal policy of opposition to allowing eighteen- to twenty-year-olds to vote, and hence nothing indicates that these Justices could not have been trusted to adjudicate fairly any issues that might have arisen out of the adoption of the twenty-sixth amendment. Even the eleventh amendment's rejection of the result in *Chisholm v. Georgia*¹⁴⁵ — perhaps the classic example of an amendment's "overruling" a Court decision — serves to counter the claim that the Court is not to be trusted to pass upon the validity of an amendment directed against one of its decisions: five years after *Chisholm*, confronted with an important question concerning the validity of the amendment's adoption, the Court summarily and unanimously sustained the amendment.¹⁴⁶

By any reckoning, the adoption of amendments has only rarely been "the . . . constitutional process used to reverse Supreme Court decisions."¹⁴⁷ At most, Justice Powell's argument suggests that the Court should refrain from adjudicating issues concerning the ratification of amendments that are intended (in some sense) to "overrule" Supreme Court decisions. It is possible that our future will bring more such amendments than has our past. The current political agenda already contains several amendments, including amendments to forbid abortions¹⁴⁸ and permit prayer in public schools,¹⁴⁹ that are aimed at nullifying recent decisions of the Court. Also on the agenda for possible proposal by Congress or a national convention, however,

¹⁴² 400 U.S. 112 (1970).

¹⁴³ See *id.* at 124-25 (Black, J.); *id.* at 154 (Harlan, J., concurring in part and dissenting in part).

¹⁴⁴ See U.S. CONST. amend. XXVI.

¹⁴⁵ 2 U.S. (2 Dall.) 419 (1793).

¹⁴⁶ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798).

¹⁴⁷ *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (Powell, J., concurring in the judgment).

¹⁴⁸ S.J. Res. 110, 97th Cong., 1st Sess. (1981); S.J. Res. 19, 97th Cong., 1st Sess. (1981); S.J. Res. 18, 97th Cong., 1st Sess. (1981); S.J. Res. 17, 97th Cong., 1st Sess. (1981).

¹⁴⁹ S.J. Res. 73, 98th Cong., 1st Sess. (1983).

is an amendment — the balanced budget amendment — that would “reverse” prior congressional practice.¹⁵⁰

Is there reason to single out the judiciary for special distrust? Professor Scharpf, commenting favorably upon *Coleman* some years ago, suggested that “judicial review in a democracy remains defensible only to the extent that the Court itself will be defenseless against the processes through which the community may assert and enforce its own considered understanding of its basic code.”¹⁵¹ One might question Professor Scharpf’s assumption that we know whether a particular amendment’s purported ratifications in fact reflect “the community’s . . . own considered understanding.” What constitutes the community’s considered understanding is never evident until some referee resolves disputed issues and decides whether, for example, the state legislature or the referendum voters speak for Ohio. A more basic, though concededly not dispositive answer to the suggestion that the Court would arbitrarily invalidate an amendment changing the result of one of the Court’s prior decisions is that the Court may be disinclined to risk its most valuable resource — the persuasiveness of its judgments — in the cause of saving one particular prior holding. The public may, of course, perceive the Court to be biased in any case involving an amendment that would change the effect of one of the Court’s previous holdings. In the end, however, there is simply no escape from the fact that *any* institution entrusted with the responsibility of passing judgment upon amendment procedures might in some instance be perceived to have an institutional interest in the outcome of the process.

A powerful argument may be made that the timing of judicial review, despite its potential value in providing some temporal distance from the heat of the debate over the merits of an amendment, may well add to, rather than diminish, uncertainty. If the determination of the validity of an amendment is delayed until the Supreme Court has resolved a case involving litigants with a genuine stake in the outcome, some period of substantial legal uncertainty must be endured. Over the long term, however, this uncertainty will be at least partially offset by the creation of judicial precedents controlling the future resolution of particular ratification disputes.

The Court’s success in adjudicating article V issues during the years before *Coleman* provides some support for such an expectation. From *Hollingsworth v. Virginia*¹⁵² in 1798 through *United States v. Sprague*¹⁵³ in 1931, the Court proved quite capable of resolving issues

¹⁵⁰ S.J. Res. 58, 97th Cong., 2d Sess., 128 CONG. REC. S9777-78 (daily ed. Aug. 4, 1982).

¹⁵¹ Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 589 (1966).

¹⁵² 3 U.S. (3 Dall.) 378 (1798).

¹⁵³ 282 U.S. 716 (1931).

arising under article V.¹⁵⁴ The conclusions the Court reached during this period retain their vitality and continue to lend a substantial measure of certainty to the ratification process. The question, for example, whether the President had authority to veto congressional resolutions proposing constitutional amendments was a difficult one, but the Court's conclusion in *Hollingsworth* that the President's signature was not required has been accepted as a dispositive ruling even by those who disagree with it.¹⁵⁵ At least half a dozen additional issues that might have continued to haunt the amendment process were clearly resolved by judicial decisions before the *Coleman* Court declared an end to judicial review of such issues.¹⁵⁶

That a resumption of judicial review would lead to similar results in the future is by no means certain. As Gerald Gunther noted in commenting upon an earlier version of this Article, "[n]othing is gained in terms of clarity, and little is gained in terms of predictability, if the Court itself were to use an ad hoc, multi-factor-balancing approach" similar to the one that some observers have suggested as the proper basis for congressional promulgation decisions.¹⁵⁷ If such an impressionistic, ad hoc, and political approach were the only one possible, the contention that ratification issues are better suited for congressional resolution than for judicial determination would be strengthened. As I argue below, however, the process of rethinking article V should lead the Court to apply a more formal analysis to the resolution of amendment process issues.

V. THE MODEL OF JUDICIAL REVIEW APPLIED

A. *Rules Versus Standards in the Resolution of Amendment Process Disputes*

Legal directives may be located along a continuum of degrees of specificity. At one end of the continuum are "fixed" rules whose application involves relatively little discretion. At the other end are legal norms stated as principles or standards that require for their application assessments of policies and values. The two principal benefits of relatively fixed rules are certainty and the restraint of official arbitrariness. But the cost of utilizing rules rather than more flexible standards is sacrifice of the full realization of the policy objectives that underlie the rules.¹⁵⁸

¹⁵⁴ See *supra* pp. 403-05.

¹⁵⁵ See Black, *Correspondence on Article I, Section 7, Clause 3 — and the Amendment of the Constitution*, 87 YALE L.J. 896, 898-99 (1978).

¹⁵⁶ See *supra* pp. 403-05.

¹⁵⁷ G. Gunther, Remarks at the Constitutional Law Program, Annual Meeting of the Association of American Law Schools (Jan. 7, 1983).

¹⁵⁸ See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976) (summarizing conventional 20th century view).

The amendment process is an area of the law in which procedural directives stated in the form of rules that can be applied with relative certainty offer particular advantages. To the extent that we can avoid open-ended disputes over the ratification process, we strengthen the Constitution's claim to continuing legitimacy.

Article V analysis since *Coleman* has largely overlooked the advantages of adhering to explicit, formal steps in the amendment process. Principal attention has been given instead to resolving disputes by reference to a policy thought to be immanent in article V: the ascertainment of a "contemporaneous consensus" in favor of an amendment. As Professor Rees put it, "The Supreme Court has recognized that consensus, and not a series of formalities, is the essence of the amending process" ¹⁵⁹ I would suggest that the Court has it exactly backwards: article V is in essence a series of formalities, and for very good reason. Attention to those formalities is more likely to provide clear answers than is a search for the result that best advances an imputed "policy" of "contemporaneous consensus."

It is undoubtedly true that the procedures specified by article V were designed to ensure that there would be widespread approval before an amendment became part of the Constitution. The article, however, sets forth a very precise mechanism for validating an amendment: proposal by a two-thirds majority of Congress and a formal act of ratification by the legislatures of three-fourths of the states. It is actual compliance with these steps, and not the existence of some congressionally ascertained "consensus," that renders an amendment valid. Indeed, in some instances literal compliance with the directives of article V may only imperfectly serve the goal of consensus. An amendment that is ratified by the legislatures of the thirty-eight smallest states will have been approved by states with only forty-one percent of the national population. ¹⁶⁰ And yet such an amendment would undoubtedly be a valid part of the Constitution.

The goal of consensus is sufficiently served by the explicit requirement that amendments be proposed by two-thirds of both houses of Congress. The additional requirement that at some time before a proposed amendment becomes effective there be a formal act of acceptance by thirty-eight state legislatures both serves the ends of

¹⁵⁹ Rees, *Throwing*, *supra* note 8, at 880 n.20.

¹⁶⁰ Similarly, an amendment opposed by the 12 smallest states — states that in 1980 contained 3.8% of the national population — will not be valid unless it is approved by all the other 38 states with 96% of the national population. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REP. NO. 363, POPULATION OF THE UNITED STATES: 1980, at table 6 (1981). Population variations in 1787 were similar: some amendments could be ratified with the support of states that together accounted for less than half the national population, and others could fail even though supported by states that together accounted for over 90% of the population. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790, at 8 (1908); Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, LAW & CONTEMP. PROBS., Autumn 1982, at 283, 288.

federalism and aids in the ascertainment of consensus. Thus, although article V does manifest concern with ensuring that a consensus exists in favor of an amendment, this concern is adequately addressed by the procedures article V designates as the exclusive means of amending the Constitution. Any further attempts to advance the policy of consensus — for example, by judicial or congressional determination of whether ratifications are sufficiently timely, or by disallowance or discounting of formal ratification because of prior rejection or subsequent rescission — introduce unnecessary uncertainty and ambiguity into the process.

The *Coleman* Court's repudiation of judicial review rested in part on a two-step argument in which the Court first suggested that judging the timeliness of ratifications involved a determination of whether a contemporaneous consensus had been achieved (a determination requiring exploration of social and political conditions), and then found that making such a determination was a task to which the courts were ill suited.¹⁶¹ It is true that numerous issues arising under article V are difficult, and the spare language of the article provides few explicit instructions. Nonetheless, courts would be presented with many materials upon which to draw in resolving amendment issues, particularly if they concentrated their attention upon the formal mechanisms set forth in the text of article V rather than upon the elusive quest for "contemporaneous consensus." To explicate this argument further, we may find it useful to consider how a court might properly resolve the merits of the amendment process issues raised in *Coleman* and in more recent ratification disputes.

B. Prior Rejections, Subsequent Rescissions, and Untimely Ratifications

Neither prior rejections nor subsequent rescissions nor the suggested untimeliness of ratifications should preclude an amendment from becoming a part of the Constitution. An amendment that has met the expressly stated conditions of article V has overcome significant hurdles: it has been proposed as an amendment by a two-thirds vote of Congress, and it has been officially agreed to by both houses of the legislatures of three-fourths of the states. The Constitution requires nothing more.

The notion that the ratifying states must manifest contemporaneous consensus through nearly simultaneous accord originated in *Dillon v. Gloss*,¹⁶² in which the Court invoked the consensus concept — unnecessarily — to sustain congressional power to place a time

¹⁶¹ See *Coleman v. Miller*, 307 U.S. 433, 453 (1939).

¹⁶² 256 U.S. 368, 375 (1921).

limit in the text of a proposed amendment.¹⁶³ This extraconstitutional insistence on contemporaneous consensus has since come to dominate discussion of such issues as the validity of rescissions and the timeliness of ratifications.¹⁶⁴ If one were to redraft article V, one might choose to facilitate the pursuit of consensus by requiring that all ratifications occur within five years of an amendment's proposal or by providing explicit mechanisms by which a state could withdraw ratification. One might also choose to incorporate offsetting changes, such as a reduction in the requisite number of ratifying states, in order to avoid making the adoption of amendments too difficult. But the amendment article we now have does not require that there be simultaneous accord on an amendment. Attempts to "improve" article V by imposing additional conditions (such as the absence of a prior rejection or a subsequent disapproval, or the timeliness of ratification) introduce uncertainty into the process while only marginally advancing a goal of consensus that is already adequately served by the stringent steps for which article V expressly calls.

The specific issues involved in *Coleman* and in the disputes over the validity of ratifications of the ERA were widely and intensely debated. I do not mean to suggest that easy and obvious answers to those disputes flow inevitably from the "plain meaning" of article V. I do think, however, that there are judicially ascertainable standards for resolving each issue and that reading article V as an enactment of a specific conception of the mechanics of an amendment process rather than as the embodiment of a policy of consensus facilitates the determination of each issue.

1. *Prior Rejections.* — The *Coleman* Court declined to determine whether a state's rejection of an amendment precluded subsequent ratification; instead, the Court held that such questions could be answered only by the Congress in session at the end of the ratification process.¹⁶⁵ I am at a loss to understand why this issue — a question of the proper interpretation of article V — should not be answered by a court in a case brought at a proper time by a litigant with a genuine stake in the outcome.

Nothing in article V, which declares that an amendment shall be valid "when ratified" by three-fourths of the state legislatures, suggests that a previous rejection should prevent a legislature from subsequently choosing to ratify. The very difficulty of deciding what would constitute a "prior rejection" cuts strongly against giving preclusive effect to actions so described. Would ratification by one house and passage of a resolution of "rejection" by the other constitute a prior

¹⁶³ See *id.* The concept was unnecessary in *Dillon* because the time limit was part of the text of the amendment itself. See *supra* p. 408.

¹⁶⁴ See *supra* pp. 394-96 & note 8.

¹⁶⁵ See *Coleman v. Miller*, 307 U.S. 433, 449-50 (1939).

rejection? Would passage in one or both houses of a motion to table a resolution of ratification constitute a prior rejection?

The principal argument advanced in *Coleman* for the dispositive effect of a prior rejection was based on an analogy to the convention mode of ratification.¹⁶⁶ If Congress submitted an amendment to ratification by conventions, the petitioners argued, and a state's convention voted not to ratify and then adjourned, "[i]t would hardly be contended . . . that the state could assemble another convention and take another action."¹⁶⁷ The premise of this argument is questionable: the petitioners made no attempt to explain why a state could not call a second ratifying convention after a first convention had failed to ratify. In fact, a convention in North Carolina ratified the Constitution itself two years after an earlier convention had met and voted against doing so.¹⁶⁸ The Court could have — and should have — resolved the prior-rejection issue on the merits and held that there was no basis in article V for invalidating Kansas' ratification on the ground that an earlier legislature had failed to ratify.

2. *Subsequent Rescissions*. — Any candid discussion of the question of rescission should begin by acknowledging the absence of any clear answer to the question whether article V permits states to withdraw ratifications. As Professor Black once noted, "some juristic actions are rescindable, others are not."¹⁶⁹ Nothing said at the Constitutional Convention is of any real value in determining the category into which the ratification of an amendment should fall. The framers probably thought (if they paused to consider the question at all) that the issues of timeliness and rescission were not *likely* to arise. There were only thirteen states, and the legislative agendas of their assemblies were not as crowded as those of modern legislatures. The framers doubtless expected a reasonably prompt response from ten states. A ratification process involving fifty legislatures and requiring affirmative action by thirty-eight is more complex than anything foreseen by the framers in 1787.

Nor does history provide a conclusive answer. Much has been made of the "precedent" set when Congress, in promulgating the fourteenth amendment, listed among the ratifying states two that had passed resolutions attempting to withdraw earlier ratifications. Some scholars have argued that the receipt by the House of Representatives of a telegram reporting Georgia's ratification rendered the point moot, because ratification by that state made the two disputed ratifications superfluous.¹⁷⁰ Others have responded that the Georgia telegram was

¹⁶⁶ See U.S. CONST. art. V.

¹⁶⁷ Petition for Writ of Certiorari at 15, *Coleman v. Miller*, 307 U.S. 433 (1939) (No. 7).

¹⁶⁸ See C. WARREN, *THE MAKING OF THE CONSTITUTION* 820 (1929).

¹⁶⁹ *House Hearings*, *supra* note 8, at 80 (testimony of Prof. Charles L. Black, Jr., Yale Law School).

¹⁷⁰ See, e.g., *id.* at 72.

of doubtful authenticity and that Congress therefore could not properly promulgate the amendment without counting the rescinding states.¹⁷¹ On any reading of the facts, however, the existence of this "precedent" seems to me largely beside the point. Congress promulgated the amendment without any clear authorization in article V and without any significant discussion of the merits of the rescission issue.¹⁷² The joint resolution proclaiming adoption was quickly passed by a Congress determined to declare the amendment adopted at the first plausible opportunity.¹⁷³

Scholars have carried on a lively policy debate over whether an ideal amendment process would be better served by the allowance of rescissions or by the accordance of finality to ratifications. Those who favor permitting states to rescind argue that the goal of ascertaining a "contemporaneous consensus" requires recognition of a state's most recent expression of opinion. The longer the period for considering an amendment, the more telling this point becomes. As Charles Black asked, "How could it be right that States that had for, say, ten years been on record as being against an amendment be counted as being for it?"¹⁷⁴

Deeming ratifications to be final, however, has the advantage of providing "a fixed terminus to the amendment process in each state";¹⁷⁵ permitting rescissions might lead to legislative battles over rescission following the initial battles over ratification and followed by further battles over reratification. Moreover, as William Van Alstyne suggests, states might take the process of ratification lightly if the possibility of rescission existed:

I think that [permitting rescission would be] profoundly ill-advised constitutional policy No State ought to consider an amendment to the Constitution under the misimpression from [Congress] that it may do it with some sort of celerity or spontaneity because it will always have this interval of additional years while other States are looking at it to reconsider. That, in my view, is an atrocious way to run a Constitution. The policy that the States may consider [ratification] at several times, . . . but that when done, it is done irrevocably, is terribly important, it seems to me, to the integrity of the role of Congress and the States.¹⁷⁶

¹⁷¹ See, e.g., Rees, *Rescinding*, *supra* note 8, at 906.

¹⁷² See CONG. GLOBE, 40th Cong., 2d. Sess. 453, 4296 (1868).

¹⁷³ See *id.*

¹⁷⁴ *House Hearings*, *supra* note 8, at 69 (testimony of Prof. Charles L. Black, Jr., Yale Law School).

¹⁷⁵ 124 CONG. REC. S32,612 (daily ed. Sept. 29, 1978) (letter of Prof. Herbert Wechsler, Columbia Law School).

¹⁷⁶ *House Hearings*, *supra* note 8, at 138 (testimony of Prof. William Van Alstyne, Duke Law School).

The arguments from policy may well be in equipoise; if one were redesigning an amendment process, there would be much to commend either view of rescission. And surely other aspects of the process being designed — such as the length of time during which proposed amendments would be open for consideration — would influence the drafter's decision about whether to permit withdrawals of ratifications.

Under article V as it is currently written, however, no explicit provision for rescission exists. I do not suggest that the text of the amendment provides a definitive answer. It does not: the express authority to ratify might be read to encompass an entitlement to rescind ratification. Yet the failure of the text to mention rescission leaves the right to rescind so uncertain that attempted rescissions occur under a cloud of illegitimacy. The very existence of widespread doubt about the efficacy of rescission is an argument against giving legal effect to such actions. I, for one, find the argument persuasive.

Legislative rescissions of the ERA, for example, occurred in circumstances that cast doubt upon the seriousness of the legislative actions involved. The treatise writers and scholars of the nineteenth and twentieth centuries had assumed that ratification was final and rescission ineffective.¹⁷⁷ Moreover, although the promulgation of the fourteenth amendment is not firm precedent for the invalidity of rescissions, nearly 200 years of experience under article V — years that had seen ratification of twenty-six constitutional amendments — had produced no instances in which an authorized decisionmaker had given effect to a purported rescission. And in its discussion of rescission in *Coleman*, the Supreme Court had come close to suggesting that ratification was the only action authorized by article V.¹⁷⁸

Scholarly opinion and the dictum of *Coleman* in turn influenced the state attorneys general who were called upon to issue opinions regarding the efficacy of rescissions. Every state legislature that passed a resolution rescinding a prior ratification of the ERA did so under the cloud of an express opinion that such an action would be a legal nullity.¹⁷⁹ The Idaho Constitution, for example, provides that ratification of an amendment must be by a two-thirds vote of both houses of the state legislature;¹⁸⁰ there is no provision for rescission.

¹⁷⁷ See, e.g., C. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* 43-44 (1922); J. JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS* 631-32 (4th ed. Chicago 1887) (1st ed. n.p. 1866); 2 D. WATSON, *THE CONSTITUTION OF THE UNITED STATES* 1313-18 (1910); see also Fasteau & Fasteau, *May a State Legislature Rescind Its Ratification of a Pending Constitutional Amendment?*, 1 HARV. WOMEN'S L.J. 27, 37 n.45 (1978) (collecting authorities).

¹⁷⁸ See *Coleman v. Miller*, 307 U.S. 433, 449-51 (1939); *supra* note 27.

¹⁷⁹ See Fasteau & Fasteau, *supra* note 177, at 39-40 & nn.51-54 (collecting opinions of attorneys general of Michigan, Kansas, Kentucky, and Ohio); see also Appellant's Jurisdictional Statement at 24 n.25, *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313) (citing opinion letter of Idaho Attorney General).

¹⁸⁰ See *Idaho v. Freeman*, 529 F. Supp. 1107, 1150 (D. Idaho 1981), *vacated as moot sub nom.* *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982).

The ERA was ratified in Idaho by the required two-thirds vote. Idaho's Attorney General ruled that a subsequent attempt to repeal that ratification "would be of no legal effect."¹⁸¹ Both houses nonetheless proceeded to pass a resolution withdrawing the earlier legislature's ratification.¹⁸² Given the contemporary discounting of the force of rescissions, legislators in Idaho and elsewhere may well have viewed their vote as a mere symbolic gesture.¹⁸³

It is thus hardly accurate to maintain that these "rescinding" states were on "firm record" against the amendment. Because there exists no authoritative precedent that rescissions are valid, and because a considerable body of official opinion declares that they are not, we should hesitate before giving legal effect to actions that might have been considered a "message to Washington" when adopted. The least satisfactory solution to the problems raised by rescissions is that suggested by Professor Tribe — allowing Congress, in the course of its decision about whether to promulgate an amendment, to make a "delicate judgment" concerning the appropriate "weight" to be accorded particular rescissions. An amendment process that conditions adoption of an amendment proposed by Congress on affirmative acts of assent by thirty-eight legislatures is stringent enough. We need not make the adoption of amendments still more difficult by extending official recognition to resolutions of rescission.

3. *Untimely Ratifications.* — The most difficult issue presented in *Coleman* was whether Kansas' ratification in 1937 of the child labor amendment — proposed by Congress in 1924 without a time limit — came too late to be valid. Declining to adjudicate this issue, the Court held that such questions are within the exclusive jurisdiction of the Congress that must decide whether to promulgate the amendment.¹⁸⁴ The principal difficulty with a judicial determination of timeliness,

¹⁸¹ Appellant's Jurisdictional Statement at 24 n.25, *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313).

¹⁸² See *Idaho v. Freeman*, 529 F. Supp. 1107, 1113-14 (D. Idaho 1981), *vacated as moot sub nom. National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982). If a rescission could not be valid unless accomplished by the same process required for ratification, the Idaho rescission, lacking a two-thirds vote, would not count. Legislation introduced by Senators Hatch and Helms provides that a state may rescind its ratification "by the same processes by which it ratified the proposed amendment." S. 1710, 96th Cong., 1st Sess. § 13(a) (1979); S. 3, 96th Cong., 1st Sess. § 13(a) (1979). Both bills are discussed in *Constitutional Convention Procedures: Hearing on S. 3, S. 520, and S. 1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

¹⁸³ This point was made by Professor Tribe in hearings on the ERA Extension Act. See *Senate Hearings, supra* note 32, at 250 (testimony of Prof. Laurence Tribe, Harvard Law School); see also Fasteau & Fasteau, *supra* note 177, at 39-42 (discussing reliance by citizens and legislators on official statements that ratification votes could not be rescinded).

¹⁸⁴ See *Coleman v. Miller*, 307 U.S. 433, 456 (1939).

according to the Court, was the absence of "satisfactory criteria for a judicial determination."¹⁸⁵ The Court asserted that "the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice."¹⁸⁶

The Court may also have been concerned with the problems inherent in judicial line-drawing. If a twelve-year, eight-month period between congressional proposal and state ratification is not too long, what about a fourteen-year, four-month period? The Court assumed that there had to be some time limit, for otherwise the amendments proposed in 1791,¹⁸⁷ 1810,¹⁸⁸ and 1861,¹⁸⁹ and never ratified, would still be open for consideration. But if a line had to be drawn, the promulgating Congress, and not the Court, was the proper branch of government to determine where to draw it. The challenge to the Kansas ratification was thus declared a nonjusticiable political question.

I believe that the Court could have reached a defensible determination on the merits that the Kansas ratification was not time barred. The text of article V places no time limit on ratifications, but if Congress wishes to limit the time within which an amendment may be considered, it may do so by placing a limit within the text of the proposed amendment. When Congress does not act in this fashion, the time for ratification is simply not limited by article V.

The notion that amendments must be ratified within some reasonable time in order to reflect a contemporaneous consensus was first asserted by the Court in *Dillon v. Gloss*.¹⁹⁰ As I have contended above, the rigorousness of the formal requirements of article V argues against the need for an additional requirement of roughly simultaneous agreement.¹⁹¹ But even if the Court cannot conceive of allowing amendments proposed without ratification deadlines to remain perpetually open for consideration, it does not follow that the line-drawing problems are insurmountable. The amendments proposed in 1789, 1810, and 1861 raise no problems: they simply died. A court troubled by the existence of amendments proposed over a hundred years ago could invoke a doctrine of desuetude and declare the amendments dead. No such need, however, is likely to arise.

Moreover, even if the supposed need to ensure timeliness of ratifications called for a significant exercise of discretion, the *Coleman*

¹⁸⁵ *Id.* at 454-55.

¹⁸⁶ *Id.* at 453.

¹⁸⁷ See S. Doc. No. 82, 92d Cong., 2d Sess. 51 (1972).

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 52.

¹⁹⁰ 256 U.S. 368, 375 (1921).

¹⁹¹ See *supra* pp. 418-19.

Court would still have been justified in holding that ratification of the child labor amendment was not time barred after thirteen years. First, the absence of a time limit in the child labor amendment was not an oversight: Congress had considered and rejected time limits of five and seven years.¹⁹² Though the amendment did not initially meet wide acceptance (only five states ratified it in the first three years after its proposal), it was clearly still viable in 1931, when Colorado became the sixth state to ratify.¹⁹³ The fact that Congress rejected a seven-year limit when proposing the child labor amendment in 1924 comes close to establishing this point.

Colorado's 1931 ratification was followed in 1933, the next year in which most legislatures met, by fourteen ratifications. President Roosevelt, former President Hoover, and congressional leaders all urged state legislatures to ratify.¹⁹⁴ Eight more states ratified between 1933 and 1937.¹⁹⁵ At no time between 1924 and 1937 could the amendment have been said to be dormant: it was introduced and debated in several legislatures in every legislative year between its proposal and the Kansas ratification.

The Court should have addressed the merits and recognized that any requirement of "contemporaneous consensus" was not to be tightly construed, but was merely a judicial gloss on article V. Although the timeliness issue in *Coleman* was not a simple one, the Court surely had the institutional capacity to deal with it. The Court could have held that, although the amendments from 1789, 1810, and 1861 might have been dormant, nothing in article V precluded further legislative consideration of the child labor amendment.¹⁹⁶ The question of the

¹⁹² See 65 CONG. REC. 7288, 7293, 10,141 (1924).

¹⁹³ See *Coleman v. Miller*, 307 U.S. 433, 473-74 (1939) (Butler, J., dissenting) (chronology of child labor amendment).

¹⁹⁴ Brief for United States as Amicus Curiae at 31, *Coleman v. Miller*, 307 U.S. 433 (1939) (No. 7).

¹⁹⁵ See *Coleman*, 307 U.S. at 473-74 (Butler, J., dissenting) (chronology of child labor amendment).

¹⁹⁶ The third issue presented to the Court in *Coleman* was a challenge to the validity of the Kansas ratification based upon the fact that the Kansas Senate had deadlocked 20-20 on ratification and the Lieutenant Governor had broken the tie. The challengers contended that article V provides for ratification by the "legislatures" of the states and that this term does not include the Lieutenant Governor. The Supreme Court was evenly divided on whether this issue was a political question. See 307 U.S. at 447.

In fact, the issue would have been easily amenable to resolution on the merits by the Court. It was a difficult question for the Kansas Supreme Court, but once that court resolved the issue as a matter of Kansas law, very little was left for the Supreme Court of the United States to decide. In an elaborate opinion, the Kansas Supreme Court found it necessary to construe and harmonize several provisions of state law in order to determine that the Lieutenant Governor was entitled to cast a tie-breaking vote on concurrent resolutions. See *Coleman v. Miller*, 146 Kan. 390, 392-99, 71 P.2d 518, 519-24 (1937). As a matter of state law and practice, the determination by the Kansas Supreme Court constituted the authoritative resolution of this issue of the internal processes of the Kansas legislature. The only remaining federal question was

timeliness of ratifications, like the issues of prior rejection and rescission, is amenable to judicial resolution.

C. Is the Amendment Process Too Easy?

All of the positions I have criticized — the suggestions that a prior rejection precludes a state from ratifying, that a rescission vitiates an earlier ratification, that proposed amendments lapse after the passage of a certain amount of time — are arguments that additional hurdles should supplement the expressly stated requirements of article V. Each of those arguments, as well as the overarching notion that thirty-eight ratifications are not sufficient unless they manifest a “contemporaneous consensus,” may reflect an unstated assumption that permitting changes in the Constitution “merely” on the strength of a two-thirds vote of Congress and thirty-eight state ratifications (ratifications valid whenever occurring and notwithstanding prior or subsequent expressions of contrary opinion) would render amendment of the Constitution too easy. Although any judgment about whether the amendment process is sufficiently difficult cannot avoid being subjective, a brief review of the history of the amendment process lends support to the argument that amending the Constitution is not so easy that courts should infer additional, nontextual requirements from article V.

Since 1789, over 5000 bills proposing amendments to the Constitution have been introduced in Congress.¹⁹⁷ Of these, only thirty-three received the necessary two-thirds vote of both houses of Congress and proceeded to the states for ratification. Twenty-six were ratified,¹⁹⁸ six failed,¹⁹⁹ and one is still pending before the states.²⁰⁰ With only a few exceptions, the amendments proposed by Congress have

whether a body in which the lieutenant governor is permitted by state law to cast a tie-breaking vote is so alien to the concept of “legislature,” as the term is used in article V, that the Kansas ratification was not ratification by “the legislature.” The tie-breaking authority of lieutenant governors is clearly not so inappropriate that one can conclude as a matter of federal law that a legislature in which the lieutenant governor is permitted to vote is not a “legislature” within the meaning of article V. The question was thus essentially one of state law, and the state’s construction was not inconsistent with article V. The judgment of the Kansas Supreme Court on this point could easily have been sustained on the merits.

¹⁹⁷ See S. REP. NO. 724, 95th Cong., 2d Sess. (1977).

¹⁹⁸ U.S. CONST. amends. I–XXVI.

¹⁹⁹ The six amendments proposed by Congress but rejected by the states were: an amendment, proposed in 1791, regulating the number of representatives in Congress, see S. Doc. No. 82, 92d Cong., 2d Sess. 51 (1972); an amendment, proposed in 1791, preventing any law varying the compensation of senators and representatives from taking effect until after an intervening election of the House of Representatives, see *id.*; an amendment, proposed by the 11th Congress, revoking the citizenship of any person accepting a title of nobility from a foreign sovereign, see *id.*; an amendment, proposed in 1861, prohibiting any future amendment abolishing slavery, see *id.* at 52; the child labor amendment, proposed in 1924, see *id.*; and the ERA, proposed in 1972.

²⁰⁰ This amendment would provide representation for the District of Columbia in the Senate and House of Representatives. See H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978).

come in clusters; virtually all of them arose during four brief amendment periods.

The first of these periods ran from 1789 to 1804 and produced what may loosely be called the "anti-Federalist amendments"²⁰¹ — the Bill of Rights²⁰² and the eleventh²⁰³ and twelfth amendments²⁰⁴ — each of which was, in part, a concession to anti-Federalist or Jeffersonian interests.²⁰⁵ More than half a century passed before the Constitution was again amended. In 1865, sixty-one years after adoption of the twelfth amendment,²⁰⁶ Congress proposed and the states ratified the thirteenth amendment,²⁰⁷ the first of the three Reconstruction amendments. The adoption of the fourteenth and fifteenth amendments followed in 1868 and 1870.²⁰⁸ A gap of almost another half-century intervened between the Reconstruction amendments and the next four amendments, which grew out of the Populist and Progressive Movements²⁰⁹ and provided for federal income taxation (the sixteenth amendment, ratified in 1913),²¹⁰ direct election of senators (the seventeenth amendment, ratified in 1913),²¹¹ prohibition (the eighteenth amendment, ratified in 1919),²¹² and women's suffrage (the nineteenth amendment, ratified in 1920).²¹³ Together, these first three periods of constitutional amendment accounted for all but three of the amendments adopted before 1960.²¹⁴

A fourth period of amendment activity lasted from 1961 to 1978. During these years, Congress proposed six amendments, four of which were adopted. The recent adoption of four amendments may create an impression that amending the Constitution is fairly easy. Each of the amendments adopted, however, enacted relatively uncontroversial propositions. The twenty-third amendment provided three electoral

²⁰¹ For a general discussion of the history of amendments to the Constitution, see A. GRIMES, *DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION* (1978).

²⁰² U.S. CONST. amends. I-X.

²⁰³ *Id.* amend. XI.

²⁰⁴ *Id.* amend. XII.

²⁰⁵ A. GRIMES, *supra* note 201, at 3, 24.

²⁰⁶ U.S. CONST. amend. XII.

²⁰⁷ *Id.* amend. XIII.

²⁰⁸ *Id.* amends. XIV-XV.

²⁰⁹ A. GRIMES, *supra* note 201, at 65-101.

²¹⁰ U.S. CONST. amend. XVI.

²¹¹ *Id.* amend. XVII.

²¹² *Id.* amend. XVIII.

²¹³ *Id.* amend. XIX. A fifth Progressive amendment, the child labor amendment, was proposed in 1924 but was not ratified. See S. DOC. NO. 82, 92d Cong., 2d Sess. 52 (1972).

²¹⁴ The only amendments that did not fall into one of these clusters were the 20th, which limits the lame-duck session of Congress and was adopted in 1933; the 21st, which repealed prohibition and was adopted in 1933; and the 22d, which limits the President to two terms in office and was adopted in 1951. See U.S. CONST. amends. XX-XXII. The 20th amendment was originally suggested in 1923 as one of the Progressive reforms, but Congress did not propose it until 1932. See A. GRIMES, *supra* note 201, at 108.

votes for the District of Columbia.²¹⁵ The twenty-fourth provided for abolition of the poll tax for federal elections;²¹⁶ at the time of the amendment's adoption, only five states still imposed such a tax.²¹⁷ The twenty-fifth amendment,²¹⁸ providing rules for presidential disability and succession, was widely approved as a useful technical change in the Constitution.²¹⁹ The twenty-sixth amendment²²⁰ lowered the voting age to eighteen for both state and federal elections; although such a change might have been controversial at an earlier time, the Supreme Court's 1970 decision sustaining an act that lowered the voting age to eighteen in federal elections,²²¹ and the attendant administrative difficulties that would have faced any state seeking to maintain a different voting age for state elections,²²² facilitated the ratification of the amendment in three and one-half months.²²³ The ease of passage of these four amendments thus does not support the conclusion that it is a simple matter to adopt an amendment that significantly changes our constitutional framework.

The difficulty of effecting amendments providing for major constitutional change is best illustrated by the Roosevelt administration's decision not to seek amendments that would have ensured the constitutionality of the New Deal program.²²⁴ In the 1936 election, President Roosevelt carried forty-six of the forty-eight states — the greatest electoral mandate in our history.²²⁵ The Roosevelt administration seriously considered using the amendment process to neutralize previous and anticipated Supreme Court decisions limiting the economic powers of the national government.²²⁶ Notwithstanding the huge margin of victory Roosevelt had enjoyed in the 1936 election, he and his principal advisers reluctantly concluded that ratification of such amendments would be too difficult.²²⁷ In his personal correspondence, Roosevelt wrote that a lawyer could "make five million dollars as easy as rolling off a log by undertaking a campaign to prevent the ratification by one house of the Legislature . . . in thirteen states for the next four years."²²⁸ Tom Corcoran, one of Roosevelt's advisers, as-

²¹⁵ U.S. CONST. amend. XXIII.

²¹⁶ *Id.* amend. XXIV.

²¹⁷ See A. GRIMES, *supra* note 201, at 134.

²¹⁸ U.S. CONST. amend. XXV.

²¹⁹ See A. GRIMES, *supra* note 201, at 140-41.

²²⁰ U.S. CONST. amend. XXVI.

²²¹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

²²² See A. GRIMES, *supra* note 201, at 143.

²²³ See S. DOC. NO. 82, 92d Cong., 2d Sess. 44 n.18 (1972).

²²⁴ For an intriguing account of the Roosevelt administration's consideration of constitutional proposals, see Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

²²⁵ See *id.* at 380.

²²⁶ See *id.* at 378.

²²⁷ See *id.* at 384.

²²⁸ *Id.* (quoting Letter from Franklin D. Roosevelt to Charles C. Burlingham, Feb. 23, 1937).

serted that he could name thirteen states "that would naturally be against a broadening amendment or in which money could be used to defeat it."²²⁹ Only after concluding that the amendment process was too difficult a gauntlet to run did the administration turn to the ill-fated court-packing plan.²³⁰

I do not wish to overstate the lessons to be drawn from this brief glimpse at the history of the amendment process. Whether amending the Constitution is too easy remains a question for individual judgment. Our historical experience does not persuade me of the necessity for requirements that would supplement the process explicitly set forth in article V. I do not believe that we have been ill served by a process that recognizes the validity of amendments proposed by two-thirds of both houses of Congress and formally agreed to — at some time — by both houses of the legislatures of thirty-eight states. These are difficult and substantial hurdles, even if we ignore earlier legislative disapprovals, subsequent attempts to rescind, and the lapse of time between proposal and ratification. Under article V as it is currently written, an amendment will not become part of the Constitution if, in thirteen states, one house of the legislature simply fails to act.

VI. CODA

The amendment article of the Constitution was drafted at a moment in history when the notion that charters of government were permanent and unalterable had only recently been rejected.²³¹ In keeping with the spirit of the times, several state constitutions of 1776 had boldly asserted the right of the people to revolt against the established order.²³² The idea of revolution, in the unsettled aftermath of the War of Independence, provided theoretical justification for the ferment of citizens with grievances against governments they deemed inadequate. Judge Jameson later observed the following:

The doctrine of the Revolution, that governments were founded by the people, and could be amended by them as they should think fit,

²²⁹ *Id.* (quoting 2 SECRET DIARY OF HAROLD L. ICKES 33-34 (1953)).

²³⁰ *See id.*

²³¹ *See* R. Traynor, *The Amending System of the U.S. Constitution* 39 (Jan. 1927) (unpublished Ph.D. thesis on file in University of California at Berkeley Library).

²³² Section 3 of the Virginia Constitution of 1776, for example, provided that "whenever any government shall be found inadequate . . . 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." VA. CONST. of 1776, art. I, § 3, *reprinted in* 7 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 3813 (1909); *see also* W. ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 137-44 (1980) (several of the state constitutions of this period affirmed the right of the governed to resist the government and, by peaceful means, to amend their constitution); 5 F. THORPE, *supra*, at 3081 (same, specifically regarding Pennsylvania Constitution).

was erroneously understood to warrant tumultuous assemblages of citizens, without legal authority, to dictate to the government not only current policy, but amendments of the fundamental law.²³³

The constitutional draftsmen meeting in Philadelphia in 1787 perceived the need to reconcile the principles of the Revolution with the desire for stable government. Early in the Convention, George Mason of Virginia spoke of the role an amendment article would play in cabining the revolutionary spirit. "Amendments therefor, will be necessary," he argued, "and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence."²³⁴

The formal amendment process set forth in article V represents a domestication of the right to revolution. Article V maintains the spirit of 1776 — the right of the people to alter or abolish an inadequate government. But the manner of the right's exercise is circumscribed. Change is permitted, but only through the modes specifically sanctioned in the charter of government itself. Article V is thus a very conservative rendering of the right of revolution.²³⁵

The amendment process established by article V has not been the only mechanism for constitutional change.²³⁶ That process nonetheless plays a unique and critical role in the constitutional system. Formal amendment, when it is possible, has the capacity to override the informal avenues of constitutional change. The existence of a formal

²³³ J. JAMESON; *supra* note 177, at 548.

²³⁴ I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 202-03 (M. Farrand ed. 1937).

²³⁵ Those who view the Constitution as an elitist document designed to maintain private property rights by "preserving the existing undemocratic class structure under the legitimizing cloak of democratic forms," Parenti, *The Constitution as an Elitist Document*, in HOW DEMOCRATIC, *supra* note 3, at 47 n.18, may see the amendment process as an integral part of a system intended to make "sweeping popular actions nearly impossible," *id.* at 46. According to this view, the framers "contrived an elaborate and difficult process for amending the Constitution" as part of a system "designed to fragment power without democratizing it." *Id.*

²³⁶ Judicial review has obviously played a prominent role in the transformation of the fundamental law of the society. Extraconstitutional developments, such as the rise of political parties and the growth of the role of the presidency, have also had a profound impact on the basic structure of government. In addition, certain practices not specified by the written Constitution have gained such complete acceptance that they might be considered morally binding "conventions of the constitution" — for example, the understanding that members of the electoral college will cast votes based not on their personal preferences, but rather on the popular vote in their home state.

"[C]onventions of the constitution" are aptly defined by Thomas C. Grey as "norms limiting government that are generally considered at the same time constitutional in status and yet lacking in legal force." Grey, *Constitutionalism: An Analytic Framework*, in NOMOS XX: CONSTITUTIONALISM 192 (J. Pennock & J. Chapman eds. 1979). The concept is more familiar in British constitutionalism, see A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 417-73 (10th ed. 1959). For a discussion of the role of "conventions of the constitution" in Canada, see Dellinger, *supra* note 160, at 294.

method of amendment is, moreover, vital to the continuing legitimacy of a regime based upon the consent of the governed.

The spare language of article V leaves open critical questions that threaten to preclude widespread agreement on the validity of future amendments. There are no easy answers to these questions. Judicial review, though not without its hazards, offers a better possibility for bringing clarity and predictability to the amendment process than do our present, muddled doctrines of congressional promulgation and political question.

In construing article V, the courts should recognize that the provision only imperfectly achieves policy objectives such as the ascertainment of contemporaneous consensus, and that clear standards for changing the fundamental law are of central importance to the integrity of constitutional government. Unlike open-textured provisions of the Constitution, article V should be viewed as a set of formal rules rather than as the embodiment of vague policy objectives.

As this Article was being written, the first equal rights amendment failed,²³⁷ and the District of Columbia representation amendment was becalmed.²³⁸ Amendments regarding school prayer, abortion, and budget balancing, as well as a renewal of the ERA, may lie ahead. We have reached an interlude in the amendment process. It is thus an appropriate time for disinterested debate about the law of article V — debate free of the distracting pressures associated with the states' consideration of a viable amendment. As we approach the Constitution's bicentennial, we need to reassess our understanding of the process by which it can be amended.

²³⁷ Only 35 states had ratified — three short of the necessary 38 — when the ratification period expired on June 30, 1982. Memorandum for the Administrator of General Services Suggesting Mootness at 3-4, *National Org. for Women, Inc. v. Idaho*, 103 S. Ct. 22 (1982) (Nos. 81-1282, 81-1283, 81-1312 & 81-1313).

²³⁸ The amendment would provide congressional representation for the District of Columbia. The proposal was adopted by Congress in August 1978; it contains seven-year time limits in both the proposing clause and § 4 of the amendment. See H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978). As of February 23, 1983, only 12 states had ratified. See 1 U.S.C.A. 1 (West Supp. June 1983).