ARTICLE V

MODE OF AMENDMENT

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

AMENDMENT OF THE CONSTITUTION

Scope of the Amending Power

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

[1] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (New Haven: rev. ed. 1937), 630.

[2] 57 CONG. GLOBE 1263 (1861).

[3] H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History,* H. Doc. 353, pt. 2, 54th Congress, 2d sess. (Washington: 1897), 363.

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

Proposing a Constitutional Amendment

Thirty-three proposed amendments to the Constitution have been submitted to the States pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none, of course, by the alternative convention method.[7]

Correction # 1: The material presented in these corrections is presented by Friends of the Article V Convention (FOAVC). All the information can be found on the FOAVC website www.foavc.org. In turn, that information is based on federal public records which include the Congressional Record (CR) and United States Federal Court records including the Supreme Court of the United States (SCOTUS). These public records paint an entirely different picture of the reasons that there has never been a "proposed amendment...submitted to the States pursuant to...Article [V]" except by vote of Congress. The reason is Congress has deliberately, willfully, unconstitutionally, intentionally, illegally and criminally disobeyed the Constitution of the United States and refused to call a convention despite the 635 applications submitted by all 50 states for an Article V Convention.

In sum, the states have submitted *20 times* the number of applications required by Article V to cause Congress to call a convention. Each application concerns the same subject and a single, sole purpose: "...*on the application* of two-thirds of the state legislatures, [Congress] *shall call* a convention to propose amendments...." The clear, unequivocal language of the Constitution states the subject matter of the application is a *convention call* NOT any amendment issue that the state may choose to include in its request. Further, the public record demonstrates that on numerous occasions the federal government itself, including Congress, has stated that this is the single standard of determination of whether or not Congress must call an Article V Convention—a simple numeric count of applying states with no other terms, conditions or ca-

veats.

Congress has never bothered to catalogue, let alone properly count, the applications for an Article V Convention. As a result, some 17 additional amendment issues have been ignored. Critical amendments which, had Congress obeyed the Constitution and called an Article V Convention when required to, would certainly become part of our Constitution. Under the terms of the Constitution, Congress has no right to thwart or otherwise prevent a convention if the states apply. FOAVC has gathered the actual texts of the state applications for an Article V Convention for the first time in United States history. All are official public record contained in the Congressional Record. Using this official public record FOAVC will prove the reason for the above term "of course" is because the government believes it has an illegal, unconstitutional "right" to veto the law of the Constitution. In doing so, Congress has violated federal criminal law. Given these facts of public record, the term is condescending, at best.

The state Article V Convention applications, photographically reproduced from actual pages of the Congressional Record, may be viewed at: http://foavc.org/file.php/1/Amendments/index.htm. The gathering of these official public documents of state applications officially and formally submitted to Congress in compliance with the terms of Article V is an on-going project. As of the date of this correction, we currently have over 500 available for public review.

Where required, we provide endnotes for reference purposes as we present the needed corrections to this article regarding an Article V Convention. In order to avoid any confusion with the footnotes currently used in the article, our endnotes will be numbered with subscripts beginning with the capital letter "A". These endnotes can be viewed in the print layout view of Word.

In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that "provision ought to be made for the amendment [of the Constitution] whensoever it shall seem necessary" without the agency of Congress being at all involved. [8] Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the States Congress was to call a convention for purpose of amending the Constitution. [9] Adopted,[10] the section was soon reconsidered on the motion of Framers of quite different points of view, some who worried that the provision would allow two-thirds of the States to subvert

[4] 66 CONG. GLOBE 921, 1424-1425, 1444-1447, 1483-1488 (1864).
[5] National Prohibition Cases, 253 U.S. 350 (1920).
[6] Leser v. Garnett, 258 U.S. 130 (1922).
[7] A recent scholarly study of the amending process and the implications for our polity is R. BERNSTEIN, AMENDING AMERICA (1993).
[8] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (New Haven: rev. ed. 1937), 22, 202-203, 237; 2 id., 85.
s Id., 188.
10Id., 467-468.

the others[11] and some who thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the States would mean that no alterations but those increasing the powers of the States would ever be proposed. [12] Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the States.[13] When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the States.[14]

Correction #2: While brevity is important in any article, certain facts, in order to provide correct information, require footnoting or actual quotes. A concise, comprehensive examination of the events leading up to the passage of Article V at the 1787 Constitutional Convention is available in the 1990 Hamline Law Review article "A Lawful and Peaceful Revolution: Article V and Congress' Present Duty To Call A Convention for Proposing Amendments" (Hereafter Hamlin) co-written by the late Senior United States District Court Judge for the District of North Dakota, Bruce M. Van Sickle and Mr. Lynn M. Boughey, attorney at law. The article is on the FOAVC webpage at http://www.article-5.org/file.php/1/Articles/Articles.htm - LynnBoughey. A CRS report on the current state of an Article V Convention, the applications for such a convention and the obligation of Congress to call such a convention, must be accurate and complete; this requires inclusion and reference to this groundbreaking work.

Another equally important work regarding an Article V Convention is that of Thomas E. Brennan, a co-founder of FOAVC and Former Chief Justice, State of Michigan, 1967 to 1973. The link to his historic article "Return to Philadelphia" is at: http://www.article-5.org/file.php/1/Articles/return_to_philadelphia.pdf.

In the Boughey-Van Sickle article, it is clear the general thoughts of the Founding Fathers were at first directed towards allowing amendments *only* by convention[A]. Indeed it was late in the process before the Founders even *considered* the possibility of Congress having any power of amendment whatsoever and then that it shall be bound to call a convention.[B] Hamilton later proposed Congress have the ability to propose amendments on September 10, 1787.[C] Further revisions of the language by the delegates followed all with the overriding theme that Congress shall call a convention.[D] On September 15, 1787, the Founders took up discussion of Article V, which by that time expressed that Congress proposed all amendments but that state legislatures could apply for an amendment.[E] Colonel Mason then spoke against the article as written from notes he wrote on back of his draft of the Constitution.[F] Madison recorded Mason's comments given on the floor of the convention.[G] As a result of this comments, the convention

unanimously agreed to the motion of Gouverneur Morris and Elbridge Gerry who "moved to amend the article so as to require a Convention on application of 2/3 of the sts..."[H] It is also significant that later a small minority of delegates attempted to remove the convention clause from Article V but were thwarted by the convention thus rendering the convention clause only clause of the Constitution to be reaffirmed *twice* by the delegates.[I]

In sum, the clear intent of the Founders was to provide that Congress was required to call a convention to propose amendments on the application of the state legislatures and that such action was obligatory on Congress. Further, at no time, did the Founders contemplate that such applications be same subject, contemporaneous or any other standard other than a simple numeric count of applying states.

Any further doubt regarding the intent of the Founders or the meaning of Article V, a simple numeric count of applying states, and the peremptory obligation to call a convention once that sole standard is satisfied is refuted by several sources. In Federalist 85 Alexander Hamilton wrote on the obligation of Congress to call an Article V Convention: "By the fifth article of the plan the congress will be obliged 'on the application of the legislatures of two-thirds of the states, (which at present amounts to nine) to call a convention for proposing amendments, which shall be valid to all intents and purposes, as part of the constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three-fourths thereof.' *The words of this article are peremptory*. [Emphasis added] The congress 'shall call a convention.' Nothing in this particular is left to the discretion of that body."[J]

Hamilton then stated, "If the foregoing argument is a fallacy, certain it is that I am myself deceived by it, for it is, in my conception, one of those rare instances *in which a political truth can be brought to the test of a mathematical demonstration*. [Emphasis added] Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption, as the most direct road to their own object."[K]

Further, the Congress itself has acknowledged by formal decision its peremptory obligation to call a convention and the fact it does not even have the authority to debate the matter. This was determined in1790 in connection with an application by the state of Virginia. The application and subsequent discussion by members of Congress can be viewed at:
http://foavc.org/file.php/1/Amendments/001_Annals_of_Congress_00258_1789_HL.JPG and at the following subsequent pages:
http://foavc.org/file.php/1/Amendments/001_Annals_of_Congress_00259_1789_HL.JPG and

http://foavc.org/file.php/1/Amendments/001_Annals_of_Congress_00261_1789_HL.JPG .

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Proposals by Congress.—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to.

Correction #3: Without belaboring the point, the fact is, numerous constitutional difficulties have "arisen" regarding Congress initiating constitutional change. Numerous federal lawsuits, many reaching the Supreme Court, have been filed on various issues of the matter. These include how many members of Congress must actually vote on a proposed amendment in each house before the two-thirds requirement is satisfied, whether and under what terms ratification can occur and who actually determines when ratification has occurred. These are but a few questions lurking beneath the surface of congressional proposal of amendments. As these subjects are discussed at length in this article and as several alternative answers are provided leaving no concrete, single answer, we will not comment on these problems further.

As to why the Article V Convention has not been "successfully resorted to", the reason, as our evidence shows, is obvious and undeniable: Congress has unconstitutionally vetoed the Constitution and refused to obey it. There is no question an Article V Convention is *not* a secondary or inferior means of proposing amendments to the Constitution. Indeed, the actions of the Founders at the convention lead to the opposite conclusion: that it was to be the *primary* means of amendment proposal and congressional action *secondary*. The sole reason this intent by the Founders is reversed is that Congress has vetoed the Constitution.

* * * *

When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.[15] Instead, the House decided to propose them as supplementary articles, a method followed since.[16] It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals. [17] In the *National Prohibition Cases*,[18] the Court ruled that in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.[19] The approval of the President is not necessary for a proposed amendment.[20]

Correction #3: While there is no question that a vote by Congress is based on a vote of the membership assuming a quorum, the fact is the first SCOUTS case to address the issue was Missouri Pacific Ry. Co. v State of Kansas, 248 U.S. 276 (1919). It is significant in that the court directly discusses the issue of Article V in this ruling.

The court said, “The identity between the provision of article 5 of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto makes the practice as to the one applicable to the other.”

* * * *

The Convention Alternative.—Because it has never successfully been invoked, the convention method of amendment is sur-

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" Id., 557-558 (Gerry).

1[2] Id., 558 (Hamilton).

is Id., 559

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

1[5]1 ANNALS OF CONGRESS 433-436 (1789).

[16]Id., 717.

i[7]Id., 430.

i[8]253 U.S. 350, 386 (1920).

[19] Ibid.

[2O]Hollingsworth v. Virginia, 3 Dall. (3 U.S.) 378 (1798).

rounded by a lengthy list of questions.[21] When and how is a convention to be convened? Must the applications of the requisite number of States be identical or ask for substantially the same amendment or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions and others lurk to be revealed on deeper consideration.[22]

Correction #4: Clearly, this article is incorrect in even presenting the above questions as a basis to imply that an Article V Convention should, can, or must be ignored. The questions are bogus created merely to provide excuses to those opponents and those in Congress bent on violating the Constitution by refusing to call an Article V Convention. The evidence is plain and irrefutable. Congress must call a convention. The trigger for such a call is a numeric count of applying states with no other terms or conditions. Any other issues regarding the convention will be resolved either by the states or by the convention. The Constitution does not say, "Congress shall call a convention unless there is a bunch of questions no body can figure out about it in which case they can ignore this clause." It states Congress shall call. It is peremptory.[L] Therefore is nothing "lurking" about an Article V Convention except in the minds of those who desire to veto the Constitution.

Besides the already referred to language of the Founders and the members of in Congress, the states in their applications as well as the Supreme Court have spoken on this issue. In addition, in a recent federal lawsuit to the Supreme Court, the government itself again reaffirmed the numeric requirement. Our corrections will discuss each of these sources and references in turn.

Ignoring the massive evidence of 633 applications from all 50 states viewable at: http://foavc.org/file.php/1/Amendments/index.htm, there are seven applications from the states which *specifically* refer to the fact that a convention call is a *numeric count of applying states*. Of course, Congress has ignored all 633 applications leaving an overriding constitutional question lurking unanswered until recently: Does Congress have the right to veto the law of the Constitution and refuse to obey it? The seven state applications are as follows:

- **CR 042 Pg 00164 Yr 1907**-**NJ**-Direct Election of Senators
- **CR 043 Pg 02667 Yr 1909**-**SD**-General Call for an Article V Convention (continued: **Pg 02688**)
- **CR 045 Pg 07117 Yr 1910**-**NJ**-Direct Election of Senators
- **CR 045 Pg 07119 Yr 1910**-**WI**-General Call for an Article V Convention (continued: **Pg 07120**)

- **CR 045 Pg 07119 Yr 1910**-**UT**-Direct Election of Senators
- **CR 071 Pg 03369 Yr 1929**-**WI**-General Call for an Article V Convention
- **CR 071 Pg 03856 Yr 1929**-**WI**-General Call for an Article V Convention

> The Supreme Court has stated on four separate rulings (with no dissent from any justice) that the basis of a convention call is a numeric count of applying states and that Congress must call an Article V Convention. Just as significantly, the court has also stated that Congress has neither option nor authority to "interpret" or otherwise thwart Article V, thus affirming Hamilton's Federalist 85 statements as well as those made by the Founders and members of Congress themselves.

In Dodge v. Woolsey the Court stated**:**

> "The departments of the government are legislative, executive and judicial. They are coordinate in degree to the extent of the powers delegated to each of them. Each, in the exercise of its powers, is independent of the other, but all, rightfully done by either, is binding upon the others. The constitution is supreme over all of them, because the people who ratified it have made it so; consequently, any thing which may be done unauthorized by it is unlawful. … It is supreme over the people of the United States, aggregately and in their separate sovereignties, because they have excluded themselves from any direct or immediate agency in making amendments to it, and have directed that amendments should be made representatively for them, by the congress of the United States, when two thirds of both houses shall propose them; *or where the legislatures of two thirds of the several States shall call a convention for proposing amendments*, which, in either case, become valid, to all intents and purposes, as a part of the constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths of them, as one or the other mode of ratification may be proposed by congress."

Dodge v. Woolsey, 59 U.S. 331 (1855.) (Footnotes Deleted.) (Emphasis added.)

In Hawke v. Smith, the Supreme Court said**:**

> "The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article.
>
> This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress or *on application of the Legislatures of two-thirds of the states*; thus securing deliberation and consideration before any change can be proposed. …
>
> The fifth article is a grant of authority by the people to Con-

> gress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by the action of the Legislatures of three-fourths of the states, or conventions in a like number of states. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. *The language of the article is plain, and admits no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed*."

Hawke v. Smith, 253 U.S. 221 (1920.) (Footnotes omitted.) (Emphasis added.)

In *Dillon v. Gloss*, the Court reaffirmed its previous interpretations of Article V saying**:**

> "An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Passing a provision long since expired, it subjects this power to only two restrictions: one that the proposal shall have the approval of two-thirds of both houses, and the other excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the senate. *A further mode of proposal—as yet never invoked—is provided, which is, that on the application of two thirds of the states Congress shall call convention for the purpose*."

Dillon v. Gloss 256 U.S. 368 (1921.) (Footnotes omitted.) (Emphasis added.)

The final Supreme Court case is United States v. Sprague where the Court said**:**

> "The United States asserts that article 5 is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them."

United States v. Sprague, 282 U.S. 716 (1931.) (Footnotes omitted.) (Emphasis added.)

These decisions obviously reinforce the interpretation of Article V expressed by Hamilton in Federalist 85.

More importantly, however, the timeline of these decisions indicates a significant fact: A clear interpretation of the action of Congress vis-à-vis the convention call was specified by the Court *prior* to there being sufficient states to compel Congress to call a convention to propose amendments (Dodge v Woolsey). After there were sufficient states applying to

compel such a call, the Court addressed the matter in an identical fashion three more times. Congress has, of course, ignored all Supreme Court rulings leaving an overall constitutional question lurking in the background: Does Congress (and presumably other branches of the government such as the executive branch) has the right to ignore Supreme Court rulings when those rulings are based on direct text of the law of the Constitution? The actions of Congress would indicate this to be so.

Finally, there is the matter of two recent federal lawsuits, Walker v United States (2000) and Walker v Members of Congress (2004) appealed to the Supreme Court of the United States in 2006. We will address the effect of these lawsuits on Article V and on other constitutional questions lurking in the background later in our corrections.

* * * *

> This method has been close to utilization several times. Only one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators. [23]

> **Correction #5:** As FOAVC has photographic evidence of the actual texts of the state applications; we will simply refute these statements in turn. While FOAVC has only recently come into existence beginning in 2007, the record of these applications, and hence the information as to how many applications had been made by the states and on what amendment issues was easily available to the CRS as early as 1990 some fifteen years before this article was written. The reason the Van Sickle-Boughey article is so "groundbreaking" is, for the first time in history, the article lists the actual location in the Congressional Record of all applications known to exist at that time. The only problem with the article is that it was incomplete; FOAVC has located over a hundred more applications submitted by the states than is listed in the Van Sickle-Boughey article and has, or is gathering, photographic copies of the actual texts of all of them. The link article is: http://www.article-5.org/file.php/1/Articles/Articles.htm -LynnBoughey.
>
> Further, the entire premise of these "factual" references is hyperbole. They imply the amendment issue of the application is the basis upon which applications is judged. As has been proven, it is a numeric count of applying states with the amendment issue, whatever it may be, having no bearing whatsoever on whether the two-thirds numeric count of applying states has been satisfied.
>
> As to the specific "factual" statement made that "[o] nly one State was lacking when the Senate finally permitted passage of an amendment providing for the direct election of Senators" the texts of the applications prove this is entirely false. The fact is on the specific amendment issue of direct election of senators, 38 states submitted 50 applications to Congress between 1883 and 1911. The year 1911 is significant. Not

only is the statement made in the CRS article inaccurate but if it were *accurate* the statement would still be false. In 1911, there were only 46 states in the union. Thus, the 31 states noted in the reference the article cites were sufficient to cause Congress to call a convention, as two-thirds of 46 is 31.

In either case, Congress was obligated to call an Article V Convention and its action of proposing its own amendment did not relieve it of its constitutional duty to do so. Further, any suggestion there would be no difference between an amendment proposed by convention and the one proposed by Congress is defeated by the text of the applications. In several of the applications, in addition to the direct election of senators, the direct election of the president and vice president was also proposed meaning a convention amendment proposal may have eliminated the electoral college along with state legislatures appointing senators.

Two States were lacking in a petition drive for a constitutional limitation on income tax rates. [24]

Correction #6: Again the actual texts of the applications prove this "factual" statement entirely false. According to the actual texts of the applications, 37 states applied for repeal of federal income tax between the years 1939 and 1989, five states more than is needed to compel Congress to call an Article V Convention.

The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one State of the required number,

Correction #7: Again, the actual texts of the applications prove a false statement made in this article. Between the years 1963 and 1969, Congress received 78 applications from 35 states for an apportionment amendment proposed by an Article V Convention.

and a proposal for a balanced budget amendment has been but two States short of the requisite number for some time. [25]

Correction #8: Perhaps the most egregious example of all is this final "factual" reference. The texts of the applications demonstrate beginning in 1901, 104 applications from 37 states were submitted to Congress.

Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the States there will be a response by Congress.

Correction #9: This statement clearly reveals Congress did not count all the petitions submitted by the states in each of the examples the CRS cites. There are several problems with this statement. The first is the statement implies Congress has the authority to refuse to "count" some of the applications submitted to it by the states for an Article V Convention and, for undisclosed reasons, can reject them.

The second problem is there is no record whatsoever in the Congressional Record or in any other public document of Congress ever having counted any application by the states regardless of any "argument" against doing so. Therefore, on its face, the statement is false. There is no citation whatsoever giving the dates, results, CR location or any other verification information about these so-called "counts" by Congress. If Congress had conducted such a count of applications, at the least, it would have compiled the applications into a single record in order to conduct the count. Obviously, such a record would have been recorded in the Congressional Record or at least at the National Archives. Extensive research by members of FOAVC with the National Archives reveals that no such compilation exists. Therefore, the statement is entirely false.

Finally, given the overwhelming number of applications including several amendment issues, *each of which by themselves, is constitutionally sufficient to cause a convention call*, it is clear the suggestion that an "authentic national movement" would cause Congress to act is totally bogus. The applications prove that numerous "authentic national movement[s]" have submitted more than enough applications for a convention call and Congress has done nothing except ignore them. To suggest that any future "authentic national movement" would be treated differently is total nonsense.

* * * *

Ratification.—In 1992, the Nation apparently ratified a long-quiescent 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its subject matter, the effective date of congressional pay raises, the adoption of this provision has unsettled much of the supposed learning on the issue of the timeliness of pendency of constitutional amendments.

It has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven

[3] The matter is treated comprehensively in C. Brickfield, *Problems Relating to*

a Federal Constitutional Convention, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP—AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988).

[22] Ibid. See also *Federal Constitutional Convention*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 90th Congress, 1st sess. (1967).

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

[24] Id., 8-9, 89.

[25] R. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP—AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988), 73-78, 78-89.

years. [26] All the earlier proposals had been silent on the question, and two amendments proposed in 1789, one submitted in 1810 and another in 1861, and most recently one in 1924 had gone to the States and had not been ratified. In *Coleman v. Miller*, [27] the Court refused to pass upon the question whether the proposed child labor amendment, the one submitted to the States in 1924, was open to ratification thirteen years later. This it held to be a political question which Congress would have to resolve in the event three fourths of the States ever gave their assent to the proposal.

Correction #10: The Supreme Court went much further than this statement indicates. A simple examination of some of the quotes from the Coleman decision substantiates this statement. As this single decision formed the basis for decision by the court in later federal lawsuits, it is important that it be discussed fully. A full examination of these statements is at: http://foavc.org/file.php/1/Articles/Coleman.htm.

The most important point is the Supreme Court in Coleman gave "exclusive" control of the amendatory "process" rather than an amendment "proposal" to Congress alone. This, despite the fact Article V clearly separates the amendatory process between the states and Congress. It then further separates it into two processes, one proposal with two distinct processes of amendment proposal and ratification with two distinct processes of ratification each with assigned powers to Congress and assigned powers to the states. The Supreme Court in Coleman removed all these checks and balances and replaced them with "exclusive" control by Congress.

Even more significant is the fact the Supreme Court stated any opinions the federal courts may issue regarding Article V are advisory opinions meaning such opinions have no legal force or weight whatsoever. The court said, "Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court... Neither State nor federal court can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an advisory opinion, given wholly without constitutional authority." Thus, any future federal court ruling on the amendatory process must be regarding as an advisory opinion. The court however, did not nullify or void any of its earlier decisions such as United States v Sprague, 282 U.S. 716 (1931) regarding the obligation of Congress to call an Article V Convention.

In Coleman, the Supreme Court has removed itself to an advisory capacity only and, despite direct constitutional text to the contrary, assumed the power to rewrite the Constitution by judicial

decree. In Coleman the Court assigned all control of the amendatory process exclusively to Congress. If so, this raises another yet another constitutional question. Can Congress simply skip the entire amendatory process laid out in Article V, and "propose", and "ratify" amendments, as it feels necessary?

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In *Dillon v. Gloss,* [28] the Court upheld Congress' power to prescribe time limitations for state ratifications and intimated that proposals which were clearly out of date were no longer open for ratification. Granting that it found nothing express in Article V relating to time constraints, the Court yet allowed that it found intimated in the amending process a "strongly suggest[ive]" argument that proposed amendments are not open to ratification for all time or by States acting at widely separate times.[29]

Correction #11: While in Coleman the Supreme Court "disapproved" of its earlier decision in Dillon, the court did restate that "on the application of two-thirds of the states, Congress shall a convention for that purpose" in Dillon. Unlike all other Court rulings regarding Article V, nowhere in Coleman did the court present the actual language of Article V. An Article V Convention wasn't even mentioned. In any event, as discussed below in the article the entire question became mute with the passage of the 27th Amendment.

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Three related considerations were put forward. "First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do." [30]

Continuing, the Court observed that this conclusion was the far better one, because the consequence of the opposite view was that the four amendments proposed long before, including the two sent out to the States in 1789 "are still pending and in a situation where their ratification is some of the States many years since by

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

[27] 307 U.S. 433 (1939).

[28] 256 U.S. 368 (1921).

[29] Id., 374.

so Id., 374-375.

representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable."[31]

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

That there existed a "reasonable" time period for ratification was strongly controverted. [33] The Office of Legal Counsel of the Department of Justice prepared for the White House counsel an elaborate memorandum that disputed all aspects of the *Dillon* opinion. [34] First, *Dillon's* discussion of contemporaneity was discounted as dictum. [35] Second, the three "considerations" relied on in *Dillon* were deemed unpersuasive. Thus, the Court simply assumes that, since proposal and ratification are steps in a single process, the process must be short rather than lengthy, the argument that an amendment should reflect necessity says nothing about the length of time available, inasmuch as the more recent ratifying States obviously thought the pay amendment was necessary, and the fact that an amendment must reflect consensus does not so much as intimate contemporaneous consensus.[36] Third, the OLC memorandum argued that the proper mode of interpretation of Article V was to "provide a clear rule that is capable of mechanical application,

[31] Ibid. One must observe that all the quoted language is dicta, the actual issue in *Dillon* being whether Congress could include in the text of a proposed amendment a time limit. In Coleman v. Miller, 307 U.S. 433, 453-454 (1939), Chief Justice Hughes, for a plurality, accepted the *Dillon* dictum, despite his opinion's forceful argument for judicial abstinence on constitutional-amendment issues. The other four Justices in the Court majority thought Congress had complete and sole control over the amending process, subject to no judicial review. Id., 459.

[32] *Supra*, p. 126-127; *infra*, p. 1997.

[33] Thus, Professor Tribe wrote: "Article V says an amendment 'shall be valid to all Intents and Purposes, as part of this Constitution' when 'ratified' by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court's suggestion, no speedy ratification rule may be extracted from Article V's text, structure or history." Tribe, *The 27th Amendment Joins the Constitution*, Wall Street Journal, May 13, 1992, A15.

[34] 16 Ops. of the Office of Legal Coun. 102 (1992) (prelim.pr.).

[35] Id., 109-110. *Coleman's* endorsement of the dictum in the Hughes opinion was similarly pronounced dictum. Id., 110. Both characterizations, as noted above, are correct.

[36] Id., 111-112.

without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored."[37] The rule ought to be, echoing Professor Tribe, that an amendment is ratified when three-fourths of the States have approved it. [38] The memorandum vigorously pursues a "plain-meaning" rule of constitutional construction. Article V says nothing about time limits, and elsewhere in the Constitution when the Framers wanted to include time limits they did so. The absence of any time language means there is no requirement of contemporaneity or of a "reasonable" period.[39]

Correction #12: This position is supported with two Supreme Court decisions. Hawke v Smith 253 U.S. 221 (1920) in which the court stated, “The language of the article [Article V] is plain and admits of no doubt in its interpretation. It is not the function of the courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.” The second ruling, United States v Sprague, 282 U.S. 716 (1931), contains several quotes in which the Supreme Court makes it abundantly clear Article V must be interpreted so that there is “no resort to rules of construction.”[M]

As the Supreme Court did not exclude the Article V Convention method of amendatory proposal from this “plain” rule, it follows it intended in both decisions to include this part of the amendatory process under the terms of this rule. Therefore, when Article V states Congress must call on the application of two-thirds of the state legislatures, it can mean no more than a simple numeric count of applying states. Two-thirds when applied to Congress has been interpreted as a simple numeric count of voting members of Congress in each house of Congress. Yet, the same word, two-thirds when referring to applying state legislatures for an Article V Convention, suddenly acquires all kinds of terms, conditions and caveats.

One cannot be intellectually consistent nor honest if they advance in one part of an article all sorts of limitations, questions and problems addressing one word of a single sentence in the Constitution then later in the same article state the same word in another part of that same sentence be interpreted without any questions, limitations or problems. Only if the premise that Congress possesses the authority to ignore entirely the law of the Constitution and proceed as it pleases is accepted, can it be stated such an intellectual postulation is valid. This article holds Congress is bound by constitutional “principle”. Presumably, this phrase was intended to mean Congress must obey the Constitution meaning this article rejects the only premise on which can be founded a duel interpretation of the same word used in a single sentence.

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Now that the Amendment has been proclaimed and has been accepted by Congress, where does this development leave the argument over the validity of proposals long distant in time? One may

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

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

Whether once it has prescribed a ratification period Congress may thereafter extend the period without necessitating action by already-ratified States embroiled Congress, the States, and the courts in argument with respect to the proposed Equal Rights

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[37] Id., 113. [38] Id., 113-116.

[39] Id., 103-106. The OLC also referenced previous debates in Congress in which Members had assumed this proposal and the others remained viable. Ibid.

Amendment.[40] Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress' power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of States, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the States, had put the matter beyond changing by passage of a simple resolution, that States had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.[41]

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

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether once a State had ratified it could thereafter withdraw or rescind its ratification, precluding Congress from counting that State toward completion of ratification. Four States had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit.[43] The issue

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[40] See *Equal Rights Amendment Extension,* Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978); *Equal Rights Amendment Extension,* Hearings before the House Judiciary Subcommittee on Civil and Constitutional Rights, 95th Congress, 1st/2d sess. (1977-78).

[41] H.J. Res. 638, 95th Congress, 2d sess. (1978); 92 Stat. 3799.

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

[43] Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieutenant Governor, acting as Governor, citing grounds that included a state constitutional

was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,[44] the governments of those States were reconstituted and the new legislatures ratified.

Correction #13: If one is accurate then it should be noted that the three state legislatures were replaced by action of the federal military for their refusal to ratify the 14th Amendment. Thus, it was Congress that established the right to use the military force to overthrow state legislatures should they ratify or refuse to ratify a constitutional amendment proposal. While these three state legislatures had rebelled against the United States, there is no way that a state legislature rejecting an amendment proposal which has been submitted to them for their consideration and thus leaving it to the legislature to determine whether it will or will not ratify the proposed amendment, can be considered an act of rebellion. The legislatures simply chose to exercise their constitutional option *not* to ratify a proposed amendment. Therefore the constitutional question still lurks: Can Congress use the military to overthrow state legislatures, replace them with new members of Congress' choosing and then dictate a ratification vote that Congress desires? The Coleman would seem to indicate an affirmative answer.

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Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State [45] to report on the number of States ratifying the proposal and the Secretary's response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 States, including the two that had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent.[46] He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 States, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed.[47] The Secretary of State then proclaimed the Amendment as part of the Constitution. In *Coleman v. Miller*,[48] the congressional action was interpreted as going directly to the merits of withdrawal after ratification and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification." Although rescission was hotly debated with respect to the Equal Rights Amendment, the failure of ratification meant that nothing definitive

provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration. South Dakota was the fifth State.

[44] 14Stat. 428.

[45] The Secretary was then responsible for receiving notices of ratification and proclaiming adoption.

[46] 15Stat. 706, 707.

[47] 15Stat. 709.

[48] 307 U.S. 433, 488-450 (1939) (plurality opinion). For an alternative construction of the precedent, see Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 27 Notre Dame Law. 185, 201-204 (1951). The legislature of New York attempted to withdraw its ratification of the 15th Amendment; although the Secretary of State listed New York among the ratifying States, noted the withdrawal resolution, there were ratifications from three-fourths of the States without New York. 16 Stat. 1131.

emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress' power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to appear to say, but not without doubt, that resolution is a political question committed to Congress.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification.[49] There is no necessary conflict, inasmuch as both the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an "aberration." [50] That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum since it addressed an issue not before the Court.[51] On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the States, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past practice, in which all but the Fourteenth Amendment were certified by an executive officer, was noted as supporting a decision against a congressional role. [52]

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

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

[49] F.R.Doc. 92-11951, 57 FED. REG. 21187; 138 CONG. REC. (daily ed.) S 6948-49, H 3505-06.

[50] 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim.pr.).

[51] Id., 118-121.

[52] Id., 121-126.

cision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be "political" in the sense of being committed to one or to both of the "political" branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review. So that the prospect of court overruling is not one with which the decision maker need trouble himself. But both legislators and executive are bound by oath to observe the Constitution,[53] and consequently it is with the original document that the search for an answer must begin.

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

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, in its resolution Congress may be restrained only by its sense of propriety or wisdom or desirability, i.e., may be free to make a determination solely as a policy matter. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman.* [54]

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[53] Article VI, parag. 3. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974).

[54] Coleman v. Miller, 307 U.S. 433, 450, 453 (1939) (plurality opinion). Thus, considering the question of ratification after rejection, the Chief Justice found "no basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a State's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the State before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of

Correction #13: But what "if the Constitution" does "impose standards to govern or control the reaching of that decision" and what if Congress is not "restrained only by its sense of propriety or wisdom or desirability"? What if instead Congress is guided by a sense of raw political power and the maintaining of the same. As Hamilton observed in Federalist 85: **"**In opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed." What if Congress is "disinclined to yield up any portion of the authority of which they...possess." What if Congress refuses to recognize the most fundamental principle of the law of the Constitution, one so obvious, so intrinsic to the entire function of the Constitution, that to ignore, veto or otherwise thwart this principle defeats the entire document—that it must be obeyed. Can it still be argued a branch of government, say Congress, that were to be so guided and act in such a manner that it simply refuses to obey the terms and conditions the document where they are plainly spelled out in that document, has the immunity of the political question doctrine? Suppose the Founders were to present language, say in Article V, so firm and plain as to command to assent, yet Congress refused to assent. Can Congress simply resort to the political question doctrine and at every turn simply veto the law of the Constitution as it pleases? In what principle of law would this choice to disobey the law of the Constitution by those the law of the Constitution intends to regulate, reside? Therefore it would appear that while a political question doctrine may *assign the task as to what branch of government will effectuate the law of the Constitution*, such assignment *does not* justify that branch disobeying that law.

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> Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that as written the provision contains only language respecting ratification and that inexorably once a State acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind, [55] nor can Congress even authorize a State to rescind. [56] This conclusion is premised on Madison's argument that a State may not ratify conditionally, that is, it must adopt *"in toto* and *for ever."* [57] While the Madison principle may be unexceptionable in the context in which it was stated, it may be doubted that it transfers readily to the significantly different issue of rescission.
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> A more pertinent principle would seem to be that expressed in *Dillon v. Gloss.* [58] In that case, the action of Congress in fixing a seven-year-period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless thought it "reasonably implied" therein "that the ratification must be within some reasonable time after the proposal." Three reasons underlay the Court's finding of this implication and they are suggestive on the question of rescission. [59]
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> Although addressed to a different issue, the Court's discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single

endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment's adoption should be "sufficiently

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what Congress could look to in fixing a reasonable time, id., 453-454, is overwhelmingly policy-oriented. On this approach generally, see Henkin, *Is There a "Political Question" Doctrine?,* 85 Yale L.J. 597 (1976).

[55] See, e.g., the debate between Senator Conkling and Senator Davis on this point in 89 CONG. GLOBE 1477-1481 (1870).

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

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

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

[59] Quoted *supra,* text at n. 30.

contemporaneous" in the requisite number of States "to reflect the will of the people in all sections at relatively the same period," it would raise a large question were the ratification process to be one in which there was counted one or more States which at the same time other States were acting affirmatively were acting to withdraw their expression of judgment that amendment was necessary. The "decisive expression of the people's will" that is to bind all might well in those or similar circumstances be found lacking. Employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite "contemporaneous" "expression of the people's will" was not undermined by the action.

And employment of this analysis would still seem, under these precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress' power to fix a time limit, the Court in *Dillon v. Gloss* observed that Article V left to Congress the authority "to deal with subsidiary matters of detail as the public interest and changing conditions may require."[60] And in *Coleman v. Miller,* Chief Justice Hughes went further in respect to these "matters of detail" being "within the congressional province" in the resolution of which the decision by Congress "would not be subject to review by the courts."[61]

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

Adoption of the alternative view, that Congress has no role but that the appropriate executive official has the sole responsibility, would entail different consequences. That official, now the Archivist, appears to have no discretion but to certify once he receives

[60] Id., 375-376. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying "[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt" and noting later than no question existed that the seven-year period was reasonable. Ibid.

[61] 307 U.S. 433, 452-454 (1939) (plurality opinion). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black's concurrence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the Dillon v. Gloss "reasonable time" construction be disapproved. Id., 456, 458.

state notification. [62] The official could, of course, request the Department of Justice for a legal opinion on some issue, such as the validity of rescissions. That is the course advocated by the executive branch, naturally, but it is one a little difficult to square with the ministerial responsibility of the Archivist.[63] In any event, there would seem to be no support for a political question preclusion of judicial review under these circumstances. Whether the Archivist certifies on the mere receipt of a ratification resolution or does so only after ascertaining the resolution's validity, it would appear that it is action subject to judicial review. [64]

Congress has complete freedom of choice between the two methods of ratification recognized by Article V: by the legislatures of the States or by conventions in the States. In *United States v. Sprague*,[65] counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the States and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several States. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

Correction #14: The language of United States v Sprague, 282 U.S. 716 (1931) bears repeating: "The *United States* asserts that article 5 *is clear in statement and in meaning, contains no ambiguity and calls for no resort to rules of construction.* A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, *must call a convention to propose them.* ... The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there no room for construction and no excuse for interpolation or addition." [Emphasis added].

While the Supreme Court was addressing ratification in this lawsuit, it cannot escape notice that the Court included in its "clear statement and in meaning" example regarding Article V that "*Congress must call a convention to propose amendments on the application of the legislatures of two-thirds of the States.*" Hence, the court obviously intended to convey that the rule in the Constitution requiring Congress call a convention is plain and "calls for no resort to rules of construction [,] contains no ambiguity" [and offers] "no excuse for interpolation or addition." Otherwise, it would not have used it as an example of language requiring no rules of construction, interpolation or addition. Thus such questions as are described earlier in this article which create excuses for not calling an Article V Convention when the states have satisfied the single numeric requirement of Article V are unconstitutional as they offer an "excuse for interpolation or addition" that the plain, unambiguous language of Article V excludes.

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The term "legislatures" as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several States. It does not comprehend the popular referendum which has subsequently become a part of the legislative process in many of the States, nor may a State validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.[66] In the words of the Court: "[T]he

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

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

[64] Under the Administrative Procedure Act, doubtless, 5 U.S.C. §§701-706, though there may well be questions about one possible exception, the "committed to agency discretion" provision. Id., §701 (a)(2).

6=282 U.S. 716 (1931).

v. Smith, 253 U.S. 221, 231 (1920).

function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[67]

Correction #15: While Lesser v Garnett, 258 U.S. 130 (1922) is correctly quoted, Garnett merely quotes from Hawke v Smith, 253 U.S. 221 (1920). Hawke states, "The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the fifth article. This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, *or on the application of the Legislatures of two-thirds of the states*; ... The language of the article is plain, and admits no doubt in its interpretation. *It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.*" (Emphasis added).

The words of the court are again plain. Neither the courts nor the legislatures, state or national, have the right to alter the method of amendment which the Constitution has fixed meaning that there can be no "political question doctrine" involved where the meaning of the Constitution is plain in its intent. Even this article acknowledges while the political question doctrine may assign a particular constitutional duty to a specific branch of government, this doctrine *does not* give that branch the right to refuse to disobey, ignore or thwart that constitutional duty *unless the Constitution provides for such authority, which, in the case of Article V, it does not*. Were it so, then the court would have stated that such power must be open to interpretation and rules of construction, which it emphatically foreclosed as a constitutional option.

* * * *

Authentication and Proclamation.—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, "being certified by his proclamation, [was] conclusive upon the courts" as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about. [68] This function of the Secretary was first transferred to a functionary called the Administrator of General Services, [69] and then to the Archivist of the United States.[70] In *Dillon v. Gloss*,[71] the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth State, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the

same rule holds as to a similar proclamation by the Archivist.

Judicial Review Under Article V

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several States was conclusive upon the courts,[72] it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown into confusion by the inconclusive decision in *Coleman v. Miller.*[73] This case came up on a writ of *certiorari* to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that

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[67] Leser v. Garnett, 258 U.S. 130, 137 (1922).

[68] Act of April 20, 1818, §2, 3 Stat. 439. The language quoted in the text is from Leser v. Garnett, 258 U.S. 130, 137 (1922).

[69] 65 Stat. 710-711, §2; Reorg. Plan No. 20 of 1950, §l(c), 64 Stat. 1272.

[70] National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. §106b.

[71] 256 U.S. 368, 376 (1921).

[72] Leser v. Garnett, 258 U.S. 130 (1922).

[73] 307 U.S. 433 (1939). Cf. Fairchild v. Hughes, 258 U.S. 126 (1922), wherein the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the States, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement with regard to the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [74] In an opinion reported as "the opinion of the Court," but in which it appears that only two Justices joined Chief Justice Hughes who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations entering into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment precedent of congressional determination "has been accepted."[75] But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly. [76] However, the unexplained decision

[74] Coleman v. Miller, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, id., 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, dicta. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in Coleman "refused to accept that position." Dyer v. Blair, 390 F. Supp. 1291, 1299-1300 (D.C.N.D.Ill. 1975) (three-judge court). See also Idaho v. Freeman, 529 F. Supp. 1107, 1125-1126 (D.C.D.Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[75] Coleman v. Miller, 307 U.S. 433, 447-456 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

[76] Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. Id., 456. Although all nine Justices joined the rest of the decision, see id., 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one Jus-

by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant' governor's vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.[77]

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratifications of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them. [78] But to what extent the political question doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive of answers.

Correction #16: This final statement of the article is no longer true. There are no longer "elusive" answers as the political question doctrine and how it encompasses the amendment process. Indeed, given that one of the two of the most recent federal lawsuits dealing with the amendatory process, Walker v United States was decided in federal district court in 2000 and the article was written in 2005, there is little excuse for a discussion of its effects not having been included in this article. The fact it was a district court ruling has no bearing whatsoever as the article refers to a moot district court ruling in its discussion of the proposed ERA amendment. Thus, it is clear this article finds that any decision by the courts, at whatever level, should be included.

If there any argument for ignoring Walker v United States because of its district court status, the same cannot be said for the second federal lawsuit, Walker v Members of Congress filed in 2004 and appealed to the Supreme Court of the United States in 2006. As the dates indicate, while a final resolution of the issues involved would have been past the date of publication, the mere existence of the lawsuit and its current appeal through the federal legal system certainly deserved note.

Both federal lawsuits, the first of their kind in United States history dealt directly, specifically and exclusively with the question of the obligation of Congress to call an Article V Convention. They addressed the fact, as has been demonstrated in earlier corrections, the states had submitted over *twenty times the number of applications required under the Constitution to compel Congress to call an Article V Convention yet Congress had never called a convention.*

Bill Walker of Washington State was the plaintiff in both lawsuits. In 2000, Mr. Walker filed an 871 page brief (http://foavc.org/file.php/1/Articles/Brief.pdf) with the district court in Seattle. Basing its conclusions on 208 Supreme Court rulings, the brief discussed all aspects of an Article V Convention The brief,

using 208 Supreme Court rulings as the basis for its conclusions, discussed all aspects of an Article V Convention including answering the various questions about an Article V Convention presented in this article. In sum, Mr. Walker's brief proved that a sufficient amount of well settled law already exists to provide the legal framework necessary for holding an Article V Convention *without fear or concern* that any of apparitions used by opponents to a convention will occur[N].

In a three-page ruling, http://foavc.org/file.php/1/Articles/Final Order Coughenor.pdf based on the self-described advisory opinion of Coleman v Miller[O] Judge John Coughenour determined a convention call was a political question for Congress to decide. In reaching this decision, Judge Coughenour established that district court judges are not bound by Supreme Court rulings. He did so by simply ignoring Supreme Court rulings that ran counter to his ruling.[P]

In 2004, Mr. Walker filed a second lawsuit, Walker v Members of Congress. In this lawsuit, Mr. Walker sued each member of Congress *individually* as well as in his official capacity. As a result, federal law required that each member of Congress request legal representation[Q] and therefore make a public decision to join *against* Mr. Walker's lawsuit. Therefore, the effect of this decision was for the member of Congress to publicly declare his or her opposition to obeying the Constitution and call an Article V Convention as required by the Constitution. All members of Congress joined against Mr. Walker.

In 2006, Walker v Members of Congress was appealed to the Supreme Court of the United States. Mr. Walker, as appellant, was required to state the facts and law of the issue before the Court in his writ of certiorari. (http://foavc.org/file.php/1/Articles/Writ of Certorari, Walker v Members of Congress.pdf) Mr. Walker stated as a matter of fact and law that an Article V Convention call was based on a simple numeric count of applying state legislatures. He stated as a matter of fact and law that there were no other terms, conditions or caveats for the call such as same amendment subject, contemporaneous, or any other excuse Congress might attempt to employ in order to not call an Article V Convention once the states had applied in proper number for such a call. He stated as a matter of fact and law that Congress had no discretion whatsoever regarding issuing a convention call and such a convention call was "peremptory" on the part of Congress.

Mr. Walker also stated as a matter of fact and law that by refusing to call a convention and by joining against his lawsuit, the members of Congress were in violation federal oath of office laws including associated federal criminal law.[R] Mr. Walker stated as a matter of fact and law that by refusing to obey the Constitution and call an Article V Convention members of Congress had engaged in "overthrowing our constitutional form of government". He stated as a matter of fact and law that Congress, by ignoring "Article V so as to gain exclusive control of that process" is an "alteration of the form of government of the United States by unconstitutional means."

Under Rule 15.2 of Supreme Court rules, the United States was required to respond and state whether or not Mr.

Walker had misstated any fact or law.[S] Acting in his official capacity as solicitor general and as attorney of record for all the members of Congress, Solicitor General Paul D. Clement waived response to Mr. Walker's statements of fact and law. http://foavc.org/file.php/1/Articles/Waiver_of_Response_By_Government.pdf Therefore, under Rule 15.2 Mr. Clement, in his official capacity was asserting he "perceived" no "misstatement of fact or law" in Mr. Walker's writ of certiorari. On October 30, 2006, the Supreme Court of the United States denied certiorari indicating it had no issue with any fact or law raised by Mr. Walker in his certiorari.

Summation.

There is no question the states have submitted a sufficient number of applications for an Article V Convention to compel Congress to call an Article V Convention. There is no question Congress, in violation of federal criminal law, as admitted by Congress' own attorney of record in public court, has refused to obey the law of the Constitution and call an Article V Convention.

Because of this clearly unconstitutional decision, several questions are now lurk about Congress' decision to disobey the Constitution and refuse to call an Article V Convention. Can Congress veto any part of the Constitution at its political will? Does the Constitution still have validity or has it become an entire dead letter, as it no longer is obeyed by the government? If members of Congress can commit criminal actions with apparent impunity, what other criminal acts may they commit?

There is one more point. As Coleman made it clear any judicial ruling on Article V is an advisory opinion,[T] which possesses no legal weight whatsoever, then it follows the rulings in the Walker lawsuits, as they deal with Article V, must also be advisory and therefore carry no legal weight. Thus, the original intent of the Founders, that a convention call is peremptory upon Congress remains intact and with full legal effect as the Coleman decision, being an advisory decision, had no legal effect on this peremptory requirement of the Constitution. Coleman did not discuss an Article V Convention and no other court ruling except Walker has ever attempted to extend the Coleman doctrine of exclusive control of the entire amendatory process by Congress to include the Article V Convention. However, as criminal violation of oath of office by members of Congress has nothing to do with the amendatory process, it follows the admission in open public court by the attorney of record for the government that Congress has violated federal criminal law must carry full legal weight as Coleman did not address this issue at all.

All the questions raised in this article along with those raised by our corrections concerning Article V now boil down to a single question: which is more dangerous, a theoretical "runaway" convention which has never occurred in the entire history of well

vention which has never occurred in the entire history of well over a 1000 conventions, or a runaway Congress able to veto the Constitution at will, which as a result of the Walker decisions, is no longer theoretical, but demonstrable, fact.

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tice did not participate in deciding the issue of the lieutenant governor's participation; apparently, Justice McReynolds was the absent Member. Note, 28 Geo. L. J. 199, 200 n. 7 (19). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

[77] The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 886-901 (1980), and his student note, Comment, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 La. L. Rev. 896 (1977). Two perspicacious scholars of the Constitution have come to opposite conclusions on the issue. *Compare* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 414-416 (1983) (there is judicial review), *with* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 435-436 (1983). Much of the scholarly argument, up to that time, is collected in the ERA-time-extension hearings. *Supra*, n. 40. The only recent judicial precedents directly on point found justiciability on at least some questions. Dyer v. Blair, 390 F. Supp. 1291 (D.C.N.D.Ill., 1975) (three-judge court); Idaho v. Freeman, 529 F. Supp. 1107 (D.C.D.Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[78] In Baker v. Carr, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker, supra*, 217, identified as elements of political questions, e.g., "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." Later formulations have adhered to this way of expressing the matter. Powell v. McCormack, 395 U.S. 486 (1969); O'Brien v. Brown, 409 U.S. 1 (1972); Gilligan v. Morgan, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may say, what it did, particularly in *Powell* but also in *Baker*, largely drains the political question doctrine of its force. See Uhler v. AFL-CIO, 468 U.S. 1310 (1984) (Justice Rehnquist on Circuit) (doubting *Coleman*'s vitality in amendment context). But see Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon *Coleman* to find an issue of treaty termination nonjusticiable). *Compare* id., 1001 (Justice Powell concurring) (viewing *Coleman* as limited to its context).

Endnotes

[A] See Rutledge's version of proposal, "An alteration may be effected in the articles of union, on the application of two-thirds of the state legislatures by a convn." Hamlin, p16.

[B] "Article XIX of the draft provided the following, 'On the application of the Legislatures of two thirds of the States in the Union, for *an amendment* of this Constitution, the Legislatures of the United States shall call a Convention *for that purpose*."' [emphasis in original] Hamlin, p.17.

[C] Hamlin, p.17.

[D] See generally Hamlin, pp. 18-19.

[E] See Hamlin, p.21.

[F] "Article 5th. By this Article Congress only have the Power of proposing Amendments at any future time to this Constitution, & shou'd it prove ever so oppressive, the whole people of America can't make, or even propose Alterations to it; a Doctrine utterly subsersive of the fundamental Principles of the Rights & Liberties of the people[.]" See Hamlin, p. 22.

[G] "Col: Mason thought the plan of amending the Constitution exceptionable & dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case." Hamlin, p.22.

[H] Hamlin, p.22.

[I] Hamlin, p.23.

[J] Hamlin, pp. 33,34.

[K] Hamlin, p. 34.

[L] Hamilton's use of the word "peremptory" in Federalist 85 is unique in the Federalist papers. It is the only example where a *legal term* was used to describe a part of the Constitution meaning the Founders understood and intended the clause in precise, legal terms. Therefore the word peremptory meant the same then as it does now: "Imperative; final; decisive; absolute; conclusive, positive; *not admitting of question, delay, reconsideration or of any alternative*. Self-determined; arbitrary; no requiring any cause to be shown." Black's Law Dictionary (Emphasis added).

[M] "The United States asserts that article 5 *is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction.* [emphasis added] A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses; or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. ... The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."

[N] Since 1776, nearly 1000 conventions have been held throughout the world. Nearly three-quarters of these conventions have been held in the United States and there is no record of *any of the fears* such as a runaway convention ever occurring. Further, none of the questions raised in this article have ever been known to have been such an obstacle as to prevent or otherwise thwart any of these conventions in the exercise of their operation or function. See http://www.article-5.org/file.php/1/Articles/StateConstitutionalConventions.pdf .

[O] "Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court... . Neither State nor Federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress *in the nature of an advisory opinion, given wholly without constitutional authority*." Coleman v Miller, 307 U.S. 433 (1939) (Emphasis added).

[P] See http://foavc.org/file.php/1/Articles/New Powers Granted Congress.htm ; see also http://foavc.org/file.php/1/Articles/The Missing Supreme Court Rulings.htm .

[Q] There are several federal laws requiring members of Congress must request representation from the Department of Justice before the government can represent them, e.g., 2 U.S.C. 118. http://foavc.org/file.php/1/Articles/2 U.S.C. 118.htm

[R] 5 U.S.C. 331, 5 U.S.C. 3333, 5 U.S.C. 7311 (1) and 18 U.S.C. 1918 (a criminal statute).

[S] "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Rule 15.2 Rules of Supreme Court of the United States.

[T] Advisory opinion. Such may be rendered by a court at the request of the government or an interested party indicating how the court would rule on a matter should adversary litigation develop. *An advisory opinion is thus an interpretation of the law without binding effect*." Black's Law Dictionary. (Emphasis added).