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# Constitutional Law of Constitutional Amendment

Edward S. Corwin

Mary Louise Ramsey

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## THE CONSTITUTIONAL LAW OF CONSTITUTIONAL AMENDMENT\*

DURING the five year period following V-J Day, more than 150 resolutions were introduced in Congress calling for the amendment of the Federal Constitution. In 1947, an amendment limiting the tenure of the president was submitted to the states and has now been ratified by 24 of them.<sup>1</sup> A proposal for changing the method of electing the president was adopted by the Senate early in 1950,<sup>2</sup> but was defeated in the House of Representatives.<sup>3</sup> All of this agitation for a change in the fundamental law has stimulated a renewed interest in the interpretation of the amending clause itself.<sup>4</sup> Numerous disputes have arisen,

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\*This a second article dealing with the amending process under Article V of the Constitution. The previous article, *The Significance and Adoption of Article V of the Constitution* by Paul J. Scheips can be found at p. 46 in the Fall issue of this volume. [Editor's note.]

1 61 STAT. 959 (1947).

2 96 Cong. Rec. 1307 (Feb. 1, 1950).

3 *Id.*, at 10587 (July 17, 1950).

4 Article V reads: "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 Man-

many of which are still unresolved, as to the nature and scope of the amending power, the procedure by which amendments are proposed, and the entire process by which the assent of the states is given.

Prior to 1939 these questions were usually determined by the judiciary. In *Coleman v. Miller*,<sup>5</sup> decided in that year, the Supreme Court indicated that most, if not all, of such controversies will be left to Congress in the future. That decision probably will have little effect on those phases of the process which are the immediate responsibility of Congress—that is to say, the content of amendments and the procedure for proposing them—but it may enhance the importance of technical objections to methods of ratification followed in various states. Such objections will afford an opportunity to reconsider, and an excuse to kill, any change proposed by an earlier Congress.

## I.

### *Content of Amendments*

Controversy over the permissible content of amendments began in the Constitutional Convention itself. Madison's *Journal* discloses that during the debate on Article V, "Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States . . ." and moved to add a proviso "that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate." This motion was defeated but immediately thereafter the Convention adopted the second part of it.<sup>6</sup> Persistence of the fears expressed by Sherman prompted Congress, in 1861, to propose, and three

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ner 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."

<sup>5</sup> 307 U. S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

<sup>6</sup> MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES* 573 (Hunt and Scott ed. 1920).

states to ratify, an amendment barring any future changes which would "interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."<sup>7</sup>

The defeat of Sherman's motion, the adoption of an express restriction on change of representation in the Senate, and general acquiescence in the substantial curtailment of state powers effected by the Civil War amendments, would seem to have established beyond challenge that the amending clause is not to be narrowed by implied limitations.<sup>8</sup> Nevertheless, many years after the Civil War, George Tichnor Curtis found in the Ninth and Tenth Amendments a basis for the argument that the power to amend is confined to changes in the manner of executing the existing powers of the national government and does not "enable three fourths of the states to grasp new power at the expense of any unwilling state."<sup>9</sup>

With the adoption of the Eighteenth Amendment, this debate was carried into the courts. Claiming that the Amendment was void because of its substance, its opponents argued that the framers used the term "amend" in the sense attached to it by the common law; that "amendment" embraced only a correction of errors in the existing constitution, not an addition or supplement to it. They complained that the Eighteenth Amendment was "legislative" in that it laid down a rule for the conduct of in-

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<sup>7</sup> AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 196 (1897).

<sup>8</sup> In *Leser v. Garnett*, 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922), the Supreme Court refused to consider the argument that the Nineteenth Amendment was invalid because, by enlarging the electorate without the consent of the states which did not ratify it, it destroyed their autonomy as political bodies. Noting that this Amendment was similar in character and phraseology to the Fifteenth and that both had been adopted by the same procedure, it dismissed the objection with this observation: "That the 15th is valid, although rejected by six states, including Maryland, has been recognized and acted on for half a century." *Id.*, 258 U. S. at 136.

<sup>9</sup> 2 CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES 161 (Clayton ed. 1896).

dividuals without implementing legislation by Congress or the states; that it regulated vested rights, and infringed "fundamental and unamendable" principles protective of the powers of the states in the field of local government and individual rights. Whence they concluded that this Amendment was contrary to the spirit and intent and implied limitations of the amending power. The Supreme Court was not impressed by this labored reasoning. Without refuting the arguments in detail, it simply announced that the subject matter of the Eighteenth Amendment was within the power to amend reserved by Article V of the Constitution.<sup>10</sup>

Far-fetched as much of the argumentation obviously was, underlying it was a fundamental question of constitutional theory regarding the nature of the power with which Article V deals. This question may be put as follows: Is it the purpose and result of Article V to delegate a certain power of constitutional amendment to the agencies designated by it, or is it merely to provide a method for the more convenient future use of an already existing power of the people? In a sense, the direct prohibition in Article V of any amendment to deprive a state of its equal representation in the Senate contradicts both the theory that the power to amend springs from the same source as the Constitution itself, and the contention that it is subject to implied limitations. If the amending power is the same power which ordained and established the original Charter, any limitation on it must be considered as having only such force and validity as the amending power itself may at any time choose to accord it—it has the moral force of a promise given more than one hundred sixty years ago. On the other hand, the very presence of this specifically stated limitation may be taken as an indication that no other restrictions of the same nature were intended. It is not, however, incon-

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<sup>10</sup> National Prohibition Cases (*Rhode Island v. Palmer*) 253 U. S. 350, 40 S. Ct. 486, 64 L. Ed. 946 (1920).

sistent with a concept of the term "amendment" which would restrict it to a modification of the existing instrument rather than an addition to it.

In the First Congress, Sherman suggested that there was a difference between the authority upon which the Constitution rested and that upon which amendments would rest, the former being the "act of the people"; the latter, "the act of the State Governments."<sup>11</sup> The theory stated by the Supreme Court shortly before the Civil War in the case of *Dodge v. Woolsey*<sup>12</sup> seems to be much the same. The view set forth in Justice Wayne's opinion is that since the power to amend the Constitution is one to be exercised by agents, it must be treated as a delegated power and so a constitutionally limited power. But is this the theory of the Court today? On the strength of much that it has said in the cases arising out of the Eighteenth Amendment, the question must be answered in the negative. In *Dillon v. Gloss* we find Justice Van Devanter speaking for a unanimous Court as follows:<sup>13</sup>

Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

Nothing apparently could be plainer; the authority by which amendments to the Constitution are made is that by which the Constitution itself was ordained—it is the supreme authority of the people of the United States. To be sure, it can be exercised in accordance with the Constitu-

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<sup>11</sup> 1 ANNALS OF CONG. 708 (1789).

<sup>12</sup> 18 HOW. 331, 15 L. ED. 401 (U. S. 1856).

<sup>13</sup> 256 U. S. 368, 374, 41 S. CT. 510, 65 L. ED. 994 (1921).

tion only through certain "delegated agents"; but the essential question is what authority it is that such delegates are at any time exercising. The answer of the Court seems to be that the power thus exerted in amending the Constitution is the ultimate right of the people in the choice of their political institutions.

Nor can the people of any state, by any provision in their state constitution, disable themselves or their representatives from exercising this right. The constitution adopted by Missouri in 1875 declared that "the Legislature is not authorized to adopt, nor will the people of this State ever assent to any amendment of change of the Constitution of the United States which may in anywise impair the right of local self-government belonging to the people of this State." On the strength of this provision, the right of the Missouri Legislature to ratify the Nineteenth Amendment was assailed in *Leser v. Garnett*.<sup>14</sup> The limitation was held to be ineffective and the ratification valid, the Court saying that <sup>15</sup>

. . . the 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.

## II.

### *Submission of Amendments*

The first question to arise respecting amendments to the Constitution was as to the form they should take. On June 8, 1789, James Madison, in fulfillment of the informal understanding upon which the Constitution had been ratified in some of the states, laid before the House of Representatives certain proposals of amendment which he planned to

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<sup>14</sup> 258 U. S. 130, 42 S. Ct. 217, 66 L. Ed. 505 (1922).

<sup>15</sup> *Id.*, 258 U. S. at 137.

have inserted in the text of the Constitution at appropriate places.<sup>16</sup> When, however, the House went into Committee of the Whole on the proposed additions, Roger Sherman at once entered a protest against the idea of interweaving amendments with the original Constitution, urging that the latter sprang from a higher authority than the amending power.<sup>17</sup> He thereupon moved that the suggested amendments be proposed as supplementary to the Constitution. Other members supported the motion, one offering the singular argument that to connive in any alteration of the text of the Constitution would be a violation of the oath of members to support it;<sup>18</sup> while a third contended that if amendments were incorporated in the body of the Constitution "it will appear, unless we refer to the archives of Congress, that George Washington and the other worthy characters who composed the Convention, signed an instrument which they never had in contemplation."<sup>19</sup> Although rejected at the outset,<sup>20</sup> Sherman's proposal eventually prevailed and the precedent thus created has been followed ever since; even the Twelfth Amendment, which definitely supersedes a part of the text of Article II, appears as a supplement to the original document.

On the same occasion the suggestion was offered that before either House could properly deliberate upon specific amendments, both Houses must pass resolutions by the required two-thirds vote affirming the necessity for amendment.<sup>21</sup> No attention was paid to the suggestion, and in the *National Prohibition Cases*<sup>22</sup> the Court ruled, very sensibly, that the Houses, by proposing an amendment, indicate that they deem it necessary. From another angle,

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<sup>16</sup> 1 ANNALS OF CONG. 433-6 (1789).

<sup>17</sup> *Id.* at 707.

<sup>18</sup> *Id.* at 709.

<sup>19</sup> *Id.* at 710.

<sup>20</sup> *Id.* at 717.

<sup>21</sup> *Id.* at 430.

<sup>22</sup> 253 U. S. 350, 386, 40 S. Ct. 486, 64 L. Ed. 946 (1920).



nevertheless, the phrase has significance. It discredits entirely the argument offered in support of the Eighteenth Amendment while it was pending in Congress, that the question of the desirability of a proposed amendment was one for the state ratifying bodies rather than for the proposing body.<sup>23</sup> There is, to be sure, a certain ambiguity in the word "necessary." It may be surmised that when two-thirds of the Senate voted to submit the Seventeenth Amendment to the States, they were prompted by the belief that submission of the Amendment was unavoidable, not that the proposed change in the Constitution was desirable.

By the precedent set in 1789 and followed ever since, the requirement that "two-thirds of both Houses" vote to submit a proposed amendment applies only to the final vote of proposal in each House; all preliminary votes may be by a simple majority.<sup>24</sup> What, however, is the meaning of the word "Houses" in this context? Does it mean the total membership thereof, or simply the members present, there being a quorum of these? For all legislative purposes, it means the latter, and in 1789 it was assumed that the same word is used in the same sense in Article V.<sup>25</sup> This view was confirmed by the Supreme Court in the *National Prohibition Cases*.

An interesting question has been raised concerning the submission of the pending amendment to limit the tenure of the president. The original resolution adopted by the House of Representatives was amended by the Senate. As thus modified, the proposed amendment was approved in

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<sup>23</sup> 56 CONG. REC. 438 (1917).

<sup>24</sup> 1 ANNALS OF CONG. 717 (1789).

<sup>25</sup> The resolution proposing the amendments submitted to the states in 1789 was adopted in the House with "two-thirds of the members present concurring," JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1st and 2nd Congress 85, 86 (1789-93); similarly, the Senate Resolution approving (with some exceptions) the amendments proposed by the House, contains the phrase "two thirds of the Senators present concurring." JOURNAL OF THE SENATE, 1st and 2nd Congress 77 (1789-93).

the lower House by a vote of 81 to 29.<sup>26</sup> Since the membership of that House is 435, 218 members constitute a quorum. Hence it has been argued that at least 146 votes, being two-thirds of 218, were necessary for adoption of the resolution in its final form.<sup>27</sup> Support for this contention is found in the *Prohibition Cases*, where, in rejecting the argument that two-thirds of the entire membership must concur in proposing an amendment, Justice Van Devanter said: "The two-thirds vote in each House which is required in proposing an amendment is 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, present and absent."<sup>28</sup> Similar expressions are to be found in other judicial utterances and in legislative rulings, which, however, were addressed to situations where the affirmative votes equalled the required majority of a quorum.<sup>29</sup>

The final vote for submission of the amendment was sufficient under Rule XV of the House of Representatives. As interpreted by that rule, the requirement of a quorum applies only to the number of members who must be present in order for the House to have authority to transact business; it does not require that any minimum number of members vote upon a particular proposition. In 1898 a dispute arose over the vote necessary for the adoption of a resolution proposing an amendment for the popular election of Senators. Speaker Reed made the following ruling:<sup>30</sup>

The provision of the Constitution says "two-thirds of both Houses." What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that

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<sup>26</sup> 93 CONG. REC. 2392 (1947).

<sup>27</sup> N. Y. Times, April 3, 1947, p. 24, col. 6.

<sup>28</sup> 253 U. S. 350, 386, 40 S. Ct. 486, 64 L. Ed. 946 (1920).

<sup>29</sup> *Missouri P. Ry. v. Kansas*, 248 U. S. 276, 284, 39 S. Ct. 93, 63 L. Ed. 239 (1919); *United States v. Ballin*, Joseph & Co., 144 U. S. 1, 6, 12 S. Ct. 507, 36 L. Ed. 321 (1892); 8 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3503 (1936); 5 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 7028 (1907).

<sup>30</sup> 5 HINDS, *op. cit. supra* note 29, § 7027.

comes before the House. Among the business that comes before the House . . . is a proposed amendment to the Constitution; and the practice is uniform . . . that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object.

The *Congressional Record* discloses that after the vote on the motion to concur in the Senate amendments had been taken, a member made and then withdrew the point of order that a quorum was not present.<sup>31</sup> Accordingly, it is to be presumed that a quorum was present at that time.<sup>32</sup>

A further question arises whether a proposed amendment has to be laid before the president for his approval. In view of the sweeping language of Article I, Section 7, it would seem so, especially as the "Houses" therein mentioned are the same "Houses" which function under Article V. But the First Congress transmitted the proposed Bill of Rights to the states, via the president without asking or suggesting that he approve it.<sup>33</sup> Here again, what was done in 1789 has determined subsequent practice, having, indeed, been approved by the Supreme Court as early as 1798.<sup>34</sup>

An alternative method of proposing amendments is by a convention which Congress "shall" call upon the the application of the legislatures of two-thirds of the states. The first petitions for a convention were filed in 1788 and 1789 by Virginia and New York, respectively. The next occurred in 1832 and 1833 and came from Georgia and Alabama. In the sessions of Congress just prior to the Civil War petitions were received from the legislatures of six states, praying that a drafting convention be summoned. On several occasions during that era various members of Congress also offered resolutions for that purpose.<sup>35</sup> The greatest

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<sup>31</sup> 93 CONG. REC. 2392 (1947).

<sup>32</sup> 6 CANNON, *op. cit. supra* note 29, §§ 565, 565a, 624.

<sup>33</sup> 1 ANNALS OF CONG. 913-4 (1789).

<sup>34</sup> *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644 (U. S. 1798).

<sup>35</sup> AMES, *op. cit. supra* note 7, at 282, 311, 345, 356-64.

sustained effort to set in motion this machinery for proposing a change in the Constitution was made between 1895 and 1913, during which period 33 states filed applications, the great majority of which were in furtherance of an amendment providing for the popular election of Senators, others of which had an anti-polygamy amendment as their objective, and only a few of which suggested a convention of indefinite powers.<sup>36</sup> Within the past decade a number of state legislatures have formally petitioned Congress to call a convention for the purpose of proposing an amendment to limit the rate of federal income taxation.<sup>37</sup>

It appears from Madison's *Journal* that the framers intended this provision for the calling of a convention to be mandatory.<sup>38</sup> Conceding that proposition, there remains a question as to when the condition "on the application of the legislatures of two-thirds of the several states" shall be deemed to have been fulfilled. In 1929 the Legislature of Wisconsin reminded Congress that 35 states had filed applications for a constitutional convention and called upon it to "perform the mandatory duty . . . and forthwith call a convention to propose amendments to the constitution of the United States."<sup>39</sup> The 35 states listed in this memorial included every state but one which had ever petitioned Congress to call a convention for any purpose—even Virginia, Alabama and Georgia, which had filed no such applications since 1788, 1832 and 1833, respectively. This resolution was ignored, no doubt on the theory subsequently approved in *Dillon v. Gloss* that the successive steps in the process of constitutional amendment should not be widely separated in time.<sup>40</sup> To be obligatory upon Congress, the applications of the states should be reasonably contemporaneous with one another, for only then would they be per-

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<sup>36</sup> *Federal Constitutional Convention*, SEN. DOC. NO. 78, 71st Cong., 2d Sess. 2 (1930).

<sup>37</sup> 90 CONG. REC. A3969 (1944).

<sup>38</sup> MADISON, *op. cit. supra* note 6, at 574.

<sup>39</sup> 71 CONG. REC. 3369 (1929).

<sup>40</sup> 256 U. S. 368, 374, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

suasive of a real consensus of opinion throughout the nation for holding a convention, and by the same token, they ought also to be expressive of similar views respecting the nature of the amendments to be sought.

Although no convention has ever been held, the provision has not been entirely ineffective. The petitions just mentioned, asking for a convention to propose an amendment for the popular election of Senators, undoubtedly were instrumental in bringing about the submission by Congress itself of the Seventeenth Amendment, a reform which the Senate had long resisted.

But is it essential that two-thirds of the state legislatures, or any number thereof, should make application to Congress for a convention in order to enable Congress to call one; why may not Congress summon a convention on its own initiative? No such call has ever been made, but if we assume that the machinery which is prescribed by Article V for amending the Constitution is a particular organization of the inherent power of the people of the United States to determine their political institutions, then it would seem that Congress's obligation to call a convention upon the application of the legislatures of two-thirds of the States was not thought to exhaust its power in this respect, but was intended merely to specify a contingency in which it would be under the moral necessity of exercising it. If, however, the powers of Congress under Article V represent something less than this plenary power of the people, then its obligation to call a convention in the contingency of a demand upon it to do so by the legislatures of two-thirds of the States may very well comprise its full power in the premises.

However, an amendment is proposed, Congress must decide whether it shall be ratified by state legislatures or by conventions in the states. In *United States v. Sprague* <sup>41</sup> it

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<sup>41</sup> 282 U. S. 716, 51 S. Ct. 220, 75 L. Ed. 640 (1931).

was argued that by the Tenth Amendment "the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the federal government in that behalf. . . . the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment;"<sup>42</sup> that the Eighteenth Amendment was of the latter character; and hence, having been ratified only by the state legislatures, was invalid. The district court, ignoring this argument, substituted one of its own which led to the same practical result. Judge Clark was willing to concede that Congress originally had possessed the right to choose between the two types of referendum, but concluded that the subsequent progress of political science had established the constitutional convention as the appropriate instrumentality for effecting constitutional changes of major importance.<sup>43</sup> The Supreme Court rejected both arguments. It found the language of Article V to be too entirely free from ambiguity to admit of reading into it the teachings of political science or other outside considerations. Furthermore, it pointed out, Congress had never resorted to conventions up to that time, notwithstanding the fact that the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth Amendments "touch rights of the citizens" at vital points.<sup>44</sup>

What did the framers have in mind when they referred to conventions in the states? No doubt much the same type of bodies as those to which they themselves referred the original Constitution, namely, bodies which would be created *ad hoc* for the sole purpose of passing upon certain amendments referred to them, and which, once they had done so, would be *functus officio*. How, then, are such bodies to be summoned into existence? The conventions which ratified the original Constitution assembled upon the

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<sup>42</sup> *Id.*, 282 U. S. at 733.

<sup>43</sup> 44 F. (2d) 967, 981 (D. N. J. 1930).

<sup>44</sup> 282 U. S. 716, 734, 51 S. Ct. 220, 75 L. Ed. 640 (1931).

"recommendation" of the several state legislatures. But the whole process by which the Constitution was established was so exceptional that it contributes little to the solution of the present problem. The power seems clearly to belong to Congress in its legislative capacity, as auxiliary to the power delegated to it by Article V in the submission of amendments. Serious practical difficulties would, of course, be encountered if Congress decided to proceed without the co-operation of state legislatures. In addition to determining the make-up of the convention and who might vote for delegates thereto, the federal lawmakers would have to set up the machinery for conducting the election and provide funds both for the election and for the functioning of the conventions.

When the Twenty-first Amendment was under consideration, A. Mitchell Palmer, who had been Attorney General during Wilson's administration, brought forward a plan designed to by-pass the state legislatures.<sup>45</sup> It would have authorized the governor of each state to call an election for delegates to a convention. The election was to be state-wide for a panel of delegates representing each side of the question and was to be held in accordance with the election laws of such state. The voters were to be electors qualified under the respective state laws. The expenses of the election were to be met by a national appropriation. In the end Congress decided to leave the matter to the state legislatures, and the expediency of this course was vindicated by the fact that ratification was consummated in less than a year. Only five states failed to take steps for the holding of a convention. Forty-three enacted the necessary enabling legislation. In North Carolina the electorate voted against holding a convention after the legislature had made provision for calling one.<sup>46</sup>

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<sup>45</sup> 76 CONG. REC. 130 (1932).

<sup>46</sup> Myers, *The Process of Constitutional Amendment*, SEN. DOC. NO. 314, 76th Cong., 3d. Sess. 23 n. 62 (1940). In three States the scheduled conven-

Having submitted an amendment to the states, may Congress thereafter withdraw it? Some commentators have expressed the opinion that this cannot be done.<sup>47</sup> However, much that Chief Justice Hughes said in *Coleman v. Miller* concerning the factors which would have to be considered in determining what was a reasonable time for ratification could also be urged in support of an affirmative answer to this question. He wrote: <sup>48</sup>

When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. . . . [These questions] can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social and economic conditions which have prevailed during the period since the submission of the amendment.

If, as the concurring Justices argued in this case, all questions concerning the submission of amendments are for Congress alone to decide, the right of formal withdrawal is of little moment; the lawmakers almost certainly could find some pretext to inter an amendment believed to be no longer desirable.

### III.

#### *Ratification of Amendments*

After an amendment which is within the power reserved by Article V has been lawfully proposed, further questions

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tions did not assemble because ratification was completed before the date appointed for their meeting. *Ibid.* For a valuable article on the whole story see Brown, *The Ratification of the Twenty-First Amendment*, 29 AM. POL. SCI. REV. 1005 (1935).

<sup>47</sup> CONG. GLOBE, 41st Cong., 2d Sess. 1477, 1479 (1870) (argument of Roscoe Conkling); JAMESON, CONSTITUTIONAL CONVENTIONS § 585 (4th ed. 1887).

<sup>48</sup> 307 U. S. 433, 453, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).



arise concerning the action of the states in giving or withholding their assent to it. These problems fall into two categories—those relating to the right of the state legislature to act upon the proposition at the time it undertakes to do so, and those dealing with the procedure whereby it shall express its will.

### *When May a State Act?*

The debate as to when a state is at liberty to ratify or reject a proposed amendment has been directed to three subsidiary inquiries: How long after its submission does an amendment remain open for ratification? When is action by a state legislature foreclosed by its own prior acceptance or rejection of the proposal? May postponement of consideration be required by a state constitution or statute?

Four amendments submitted prior to the Civil War—two of the twelve proposed in 1789, one proposed in 1810 and one in 1861—have never been ratified. The same is true of the Child Labor Amendment proposed in 1924. Are these amendments still to be regarded as pending? As a matter of fact, the Ohio Legislature adopted a resolution in 1873 purporting to ratify one of the 1789 proposals.<sup>49</sup> Perhaps it was with this circumstance in mind that Congress added a third “section” to the Eighteenth Amendment which provided that ratification must take place in seven years. This was an obviously futile proceeding. As part of an unratified amendment, the provision was inoperative, and if ratification had taken place after the prescribed date it would still have been inoperative unless the ratification was valid in spite of it! In *Dillon v. Gloss* the Supreme Court properly treated the so-called “section” as a part, not of the amendment itself, but of the resolution of proposal, and sustained it on the ground that it gave effect to the implications of Article V that ratification

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<sup>49</sup> *Dillon v. Gloss*, 256 U. S. 368, 372, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

"must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period. . . ." <sup>50</sup>

In this same case Justice Van Devanter intimated that the four proposals which antedate 1900 were no longer open to ratification.<sup>51</sup> But when asked to hold that the Child Labor Amendment could not be ratified thirteen years after its submission, the Court refused to decide the issue, saying that this was a political question which should be left for the determination of Congress in the event three-fourths of the states ever gave their assent to the proposal.<sup>52</sup>

Does a state legislature exhaust its power to act on an amendment by the adoption of a resolution accepting or rejecting it? In *Coleman v. Miller*, Chief Justice Hughes reviewed the events leading up to the proclamation that the Fourteenth Amendment had been ratified and concluded that "the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification."<sup>53</sup> This proposition rests upon a concurrent resolution adopted by Congress in 1868, declaring the Fourteenth Amendment operative as a part of the Constitution. That resolution included in the list of states which had ratified the Amendment the names of three—Louisiana, North Carolina and South Carolina—which first rejected and later ratified the proposal, and of

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<sup>50</sup> *Id.*, 256 U. S. at 375. In 1930 Fiorella La Guardia, then a member of the House of Representatives, made an ingenious argument that the effect of Section three was to limit the duration of the Eighteenth Amendment to a period of seven years after ratification unless it was reratified by three-fourths of the states within that period. His reasoning was that the section could not have applied to the original ratification because it was not then a part of the Constitution; therefore it must be interpreted to operate prospectively after the original ratification of the amendment made it a part of the Constitution. 72 CONG. REC. 1898 (1930).

<sup>51</sup> 256 U. S. 368, 375, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

<sup>52</sup> *Coleman v. Miller*, 307 U. S. 433, 454, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

<sup>53</sup> *Id.*, 307 U. S. at 449.

two—New Jersey and Ohio—which had attempted to withdraw their earlier ratifications.<sup>54</sup>

Upon closer examination this legislative precedent is found to be less conclusive than the opinion of the Chief Justice indicated. There was another, quite distinct, issue involved in the dispute as to whether the Fourteenth Amendment had been duly ratified; namely, whether the seceding states should be counted in ascertaining the number of states necessary for ratification. On January 11, 1868, before any state had attempted to change its mind, either by ratifying after rejection, or by retracting its previous consent, Senator Sumner of Massachusetts introduced a joint resolution which recited that twenty-two states had ratified the Fourteenth Amendment and declared that it was to all intents and purposes a part of the Constitution.<sup>55</sup> A similar resolution was offered in the House of Representatives by Representative Bingham on January 13th.<sup>56</sup> Two days later, the Ohio Legislature voted to revoke its assent which previously had been certified to the Secretary of State. On January 31st, Sumner expressed the opinion that the attempted withdrawal of Ohio's ratification was ineffective. After stating that the "assent of the State once given is final," he went on to say that the action of Ohio was a nullity because the Amendment was already a part of the Constitution. He declared:<sup>57</sup>

This amendment was originally proposed by a vote of two thirds of Congress, composed of the representatives of the loyal States. It has now been ratified by the Legislatures of three fourths of the loyal States, being the same States which originally proposed it, through their representatives in Congress. The States that are competent to propose a constitutional amendment are competent to adopt it. Both things have been done. The required majority in Congress have proposed it; the required majority of States have

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<sup>54</sup> 15 STAT. 709 (1868).

<sup>55</sup> CONG. GLOBE, 40th Cong., 2d Sess. 453 (1868).

<sup>56</sup> *Id.* at 475.

<sup>57</sup> *Id.* at 877.

adopted it. Therefore I say this resolution of the Legislature of Ohio is *brutum fulmen*—impotent as words without force.

In a brief exchange with Sumner, Reverdy Johnson of Maryland voiced the tentative impression that assent could be withdrawn at any time before ratification was complete. Said he: <sup>58</sup>

. . . supposing the amendment not to have been adopted . . . my impression is that they can withdraw; . . . I look upon what the States do preliminary to a decision of a majority which, when made, makes the amendment proposed a part of the Constitution as a mere promise or undertaking that each will assent when the others are ready to assent, but that the day after the assent is given, or at any period subsequent to the giving of the assent, if the State assenting thinks that it has made a mistake, and that the Constitution should not be amended in the way proposed, it may withdraw its assent.

In the Senate, the Ohio resolutions were referred to the Committee on the Judiciary, which also had Sumner's original motion under consideration.<sup>59</sup> No further action was taken by that House until July 9th, when it called upon the Secretary of State for a list of the states which had ratified the amendment.<sup>60</sup> By that time the New Jersey Legislature also had voted to revoke its ratification and six additional states, including Louisiana, North Carolina and South Carolina, had ratified. On July 18th, Sherman introduced a new resolution declaring the amendment effective; this also was referred to the Committee on the Judiciary,<sup>61</sup> which was discharged from consideration thereof on July 20th.<sup>62</sup> The following day, after being changed to a concurrent resolution, it was approved in the Senate without debate and without a record vote. It was rushed to the House of Representatives which promptly concurred, also without de-

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<sup>58</sup> *Id.* at 878.

<sup>59</sup> *Id.* at 453, 878.

<sup>60</sup> *Id.* at 3857.

<sup>61</sup> *Id.* at 4197.

<sup>62</sup> *Id.* at 4230.

bate, but by a yea-and-nay vote.<sup>63</sup> In this resolution, the 29 states named as having given their assent, including the five which had changed their minds, were referred to as "being three fourths *and more* of the several States of the Union."<sup>64</sup>

Inasmuch as Congress did not take this action until additional ratifications had been certified, it is plausible to infer that a majority did not support the view of Sumner and Bingham that the Amendment had become effective before the further ratifications or attempted withdrawals were made. The resolution adopted was not, however, inconsistent with their thesis. It also can be supported by Johnson's tentative opinion that a state's assent could be revoked at any time before ratification was complete. In the absence of committee reports or recorded debate, it is impossible to find in this legislative history an endorsement of either of the two theories advanced for declaring the amendment adopted.

In any event, the inclusion in this list of Louisiana, North Carolina and South Carolina is not decisive as to the effect of a rejection by a legislature which is admittedly competent to act on a constitutional amendment. At the time they expressed their dissent, these states were treated by Congress as being still in a state of rebellion; they were required to adopt new constitutions and to ratify the pending amendment before they could obtain readmission to the Union.<sup>65</sup>

That the resolution declaring the adoption of the Fourteenth Amendment was not regarded as a determination of the effect either of rejection or withdrawal was demonstrated by events attending the adoption of the Fifteenth Amendment. Again, Ohio reversed itself, this time by ap-

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<sup>63</sup> *Id.* at 4296.

<sup>64</sup> *Id.* at 4266. Emphasis supplied.

<sup>65</sup> 15 STAT. 2 (1867); 15 STAT. 73 (1868).

proving the Amendment after first voting against it,<sup>66</sup> while New York repudiated its earlier assent.<sup>67</sup> In discussing these developments on the floor of the Senate, Roscoe Conkling of New York took the position that a ratification was irrevocable but that a rejection had no legal effect whatsoever.<sup>68</sup> Davis of Kentucky argued that a vote by a state legislature either to reject or to ratify was final and conclusive.<sup>69</sup> Significantly, neither mentioned the adoption of the Fourteenth Amendment or the resolution of Congress declaring it to be in effect.

Not until two additional states had ratified, thus making it unimportant whether New York and Ohio were counted, did the Secretary of State proclaim the adoption of the amendment. His proclamation listed these two states among those which had ratified, but it also recited without comment that the New York Legislature had passed resolutions "claiming to withdraw" its ratification. Ohio's previous rejection was not mentioned.<sup>70</sup> Prior to the issuance of this proclamation, a resolution similar to that adopted with reference to the Fourteenth Amendment had been introduced in the Senate to confirm the Fifteenth, but it never came to a vote.<sup>71</sup> Without qualification, it named New York and Ohio as having ratified the latter Amendment.

The persistence of sharp disagreement as to the correct interpretation of Article V is reflected in the unsuccessful effort made at this time to pass a bill declaring that any attempted revocation of a State's consent to an amendment

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<sup>66</sup> CONG. GLOBE, 41st Cong., 2d Sess. 110 (1869); *Id.* at 918 (1870).

<sup>67</sup> CONG. GLOBE, 41st Cong., 2d Sess. 377 (1870).

<sup>68</sup> *Id.* at 1477.

<sup>69</sup> *Id.* at 1479. Both Conkling and Davis argued from the premise that ratification by a state legislature had the same effect as would ratification by a convention in case that method were chosen by Congress. Both assumed that ratification by a convention would be final. Davis made the further assumption that rejection by a convention would exhaust the power of a state to act on an amendment. Conkling did not meet this issue squarely.

<sup>70</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2290 (1870).

<sup>71</sup> *Id.* at 1444, 2738, 3142.

should be treated as null and void. The House approved such a measure,<sup>72</sup> which, however, died on the Senate Calendar after being reported adversely by the Judiciary Committee.<sup>73</sup> Earlier in the session the upper House had voted to postpone indefinitely a joint resolution of similar tenor.<sup>74</sup>

Looking to the merits of the issue, there appears to be nothing in the language or policy of Article V to preclude ratification at any time, irrespective of prior disapproval. The Constitution speaks only of ratification by the states; there is no reason why an unfavorable vote by one legislature should bar contrary action by its successors. The teaching of *Dillon v. Gloss* that ratification should "reflect the will of the people in all sections at relatively the same period . . ." lends support to the view that later retraction should also be taken into account. Likewise, if change of public sentiment is relevant, the formal action of a state withdrawing its prior consent is pertinent. What weight should be given this relevant fact would, however, be for Congress to determine.

A long-mooted question concerning the right of a state to require that action on a proposed amendment be delayed until a new legislature has been elected was answered in *Leser v. Garnett*.<sup>75</sup> The fact that the Constitution of Tennessee required such postponement was cited in support of the argument that the purported ratification of the Nineteenth Amendment by the Legislature of that State was a nullity. Instead, the Supreme Court held that this consti-

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<sup>72</sup> *Id.* at 5356.

<sup>73</sup> CONG. GLOBE, 41st Cong., 3d Sess. 1381 (1871).

<sup>74</sup> CONG. GLOBE, 41st Cong., 2d Sess. 28 (1869); *Id.* at 3971 (1870).

<sup>75</sup> 258 U. S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505 (1922). Massachusetts passed a law in 1920 which declared it "to be the policy of the commonwealth that the general court, when called upon to act upon a proposed amendment to the federal constitution, should defer action until the opinion of the voters of the commonwealth has been taken . . ." It provided further that if an amendment is not ratified by the session of the general court to which it is first submitted, it shall be submitted to the people at the following state election. MASS. ANN. LAWS c. 53, § 18 (1946).

tutional provision was of no effect, since the power to act on a proposed amendment to the Federal Constitution is derived from the latter document.

### *Procedure for Ratification*

When a constitutional amendment is before a state for consideration, who constitutes the "legislature" by which its will is to be expressed, and what rules govern the proceedings? It was decided in *Hawke v. Smith*<sup>76</sup> that the term "legislatures" as used in Article V still means, as it did in 1789, "the representative bod[ies] which . . . [make] the laws of the people."<sup>77</sup> It therefore does not include the electorate in states where the popular referendum has become a part of the legislative process, and approval by the people on a referendum vote cannot be made a condition of ratification. Similarly, it has been established by practice, with the implied approval of the Supreme Court, that legislative resolutions ratifying proposed amendments to the Federal Constitution are not subject to gubernatorial veto. In *Leser v. Garnett*, it appeared that the Governor of Tennessee had not certified the ratification of the Nineteenth Amendment to the Secretary of State. The Supreme Court held, nevertheless, that the Amendment had been validly ratified, saying "As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him. . . ."<sup>78</sup>

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<sup>76</sup> 253 U. S. 221, 40 S. Ct. 495, 64 L. Ed. 871 (1920).

<sup>77</sup> *Id.*, 253 U. S. at 227.

<sup>78</sup> 258 U. S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505 (1922). The effect of a gubernatorial veto was called into question in connection with the adoption of the Twelfth Amendment. The Governor of New Hampshire vetoed the resolution of that State's Legislature to ratify the proposal. If effective, ratification by New Hampshire would have brought the total of consenting states to the necessary three-fourths. The amendment was not proclaimed, however, until another state had ratified, and the proclamation did not include New Hampshire as one of the ratifying states. Myers, *op. cit. supra* note 46, at 34.



The Constitution is silent concerning the procedures to be followed by state legislatures in acting on proposed constitutional amendments, and Congress has never undertaken to supply the omission. In 1869, to be sure, joint resolutions for this purpose were presented in both Houses of Congress but did not pass in either.<sup>79</sup> The resolution introduced into the House of Representatives would have required each branch of a state legislature to proceed to a consideration of a pending amendment on the sixth day of any regular or special session, and to continue to meet until final action was taken on the amendment. A proposed change was to be deemed ratified if it received the vote of a majority of the members elected to each house. Whether such a measure is within the power of Congress incident to the submission of amendments is doubtful.

A still unsettled question which has arisen from time to time is whether provisions of state constitutions defining a quorum, prescribing the majority necessary for the enactment of legislation, or regulating the conduct of legislative business are applicable to ratification of amendments to the Federal Constitution. In 1871, the Indiana Senate voted to rescind that State's "pretended ratification" of the Fifteenth Amendment, on the ground, among others, that this action had been taken by less than a quorum of each house of the state legislature as defined by the state constitution.<sup>80</sup> More recently, the purported ratification of the Child Labor Amendment by at least two states was clouded by uncertainty as to the effect of state constitutional provisions governing the passage of a local law. The Governor of Illinois certified to the Secretary of State that this Amendment had been ratified by the Illinois Legislature, although the resolution to that effect had been

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<sup>79</sup> CONG. GLOBE, 41st Cong., 1st Sess. 75, 102, 334 (1869). The House resolution bore a strong resemblance to the act passed in 1866 (14 STAT. 243) requiring state legislatures to meet at an appointed day and to proceed as therein directed to elect a United States Senator.

<sup>80</sup> CONG. GLOBE, 41st Cong., 3d Sess. 1250 (1871).

adopted in the Senate by less than a majority of all members elected thereto, as required for the enactment of legislation.<sup>81</sup> On the other hand, the ratification of this proposal by Kansas was valid only if the provision of the state constitution authorizing the Lieutenant Governor to cast a deciding vote applied to the ratification of an amendment.<sup>82</sup>

Since proposed amendments are submitted to the state legislatures and not to the people it would seem, on principle, that restrictions imposed by the people, in the state constitution, on the adoption of legislation, should not be binding with respect to the performance of this federal function if the legislature chooses to adopt other rules. But in the absence of special rules sanctioning a different procedure, by what authority can it be said that proceedings which do not conform to the requirements for ordinary legislation constitute the action of the state legislature within the sense of Article V?

As long as the Supreme Court adhered to the position taken in *Leser v. Garnett* that official notice to the Secretary of State that a State had ratified an amendment "was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts,"<sup>83</sup> questions as to the regularity of state action were of little more than academic interest. But in *Coleman v. Miller* and *Chandler v. Wise*<sup>84</sup> the Court, in effect, closed the door to judicial determination of these issues. In the former it held that the legal consequences of a previous rejection of an amendment by a state legislature, and of the lapse of time since the submission of the proposal, were political questions which should be resolved by Congress rather than by the courts. Being equally divided on the point, it did not decide

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<sup>81</sup> JOURNAL OF THE ILLINOIS STATE SENATE, 58th General Assembly 1751 (1933).

<sup>82</sup> *Coleman v. Miller*, 307 U. S. 433, 446, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

<sup>83</sup> *Leser v. Garnett*, 258 U. S. 130, 137, 42 S. Ct. 217, 66 L. Ed. 505 (1922).

<sup>84</sup> 307 U. S. 474, 59 S. Ct. 992, 83 L. Ed. 1407 (1939).

whether the right of a Lieutenant Governor to cast a deciding vote was a justiciable issue. Although this case left open the possibility that some questions might still be found to be justiciable at some stage, the opinion in *Chandler v. Wise* indicates that even those questions might cease to be cognizable by a court before it had an opportunity to pass upon them. There citizens and taxpayers sued to restrain the Governor of Kentucky from certifying an allegedly void resolution of the state legislature purporting to ratify the Child Labor Amendment. Before being served with summons in this suit, the Governor forwarded a certified copy of the resolution to the Secretary of State by mail. The Supreme Court dismissed a writ of certiorari on the ground that while the state court had jurisdiction *in limine*, after the Governor had transmitted the notice of ratification "there was no longer a controversy susceptible of judicial determination."<sup>85</sup>

In a concurring opinion in the *Coleman* case, four Justices expressed the view that the process of amendment "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point."<sup>86</sup> Even without this invitation, the uncertainty as to what, if any, questions the courts would entertain in the future would constitute a strong inducement to Congress to occupy the whole field. And once it has done so, it is extremely improbable that the Supreme Court would undertake to eject it.

Nor is it likely that Congress would exhibit the same reluctance to examine the regularity of state action as has the Court. Moreover, there appears to be no reason why all decisions concerning the ratification of an amendment could not be taken by a simple majority vote. Since such votes would, on the surface at least, relate merely to ques-

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<sup>85</sup> *Id.*, 307 U. S. at 478.

<sup>86</sup> *Coleman v. Miller*, 307 U. S. 433, 459, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

tions of fact and of law raised by objections to the validity of purported ratification, rather than to the wisdom of the amendment, it would be straining a point to say that they were governed by the phrase "whenever two thirds of both houses shall deem necessary." No other provision of the Constitution would require more than a simple majority in this situation. The only legislative precedent is the resolution adopted in 1868 declaring the Fourteenth Amendment to be a part of the Constitution. In the House of Representatives, 127 members voted in the affirmative, 33 in the negative, with 55 not voting.<sup>87</sup> The yeas and nays were not taken in the Senate. The *Congressional Globe* simply recites: "The resolution was adopted."<sup>88</sup>

#### IV.

##### *Conclusion*

No amendment to the Constitution has been adopted since *Coleman v. Miller* was decided. Any estimate of its practical results lies, therefore, entirely in the realm of speculation. Where an amendment is sharply controversial, there is a strong possibility that the issue will be fought out all over again in the Halls of Congress after three-fourths of the states have given their assent. To this extent the process of changing the Constitution may become still more difficult than it has been in the past. In view of the decision in *Dillon v. Gloss* that an amendment takes effect on the date of the final ratification required for its adoption, rather than on the date when it is proclaimed,<sup>89</sup> there is a further possibility of a period of serious confusion and uncertainty while the validity of ratification is being determined.

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<sup>87</sup> CONG. GLOBE, 40th Cong., 2d Sess. 4296 (1868).

<sup>88</sup> *Id.* at 4266.

<sup>89</sup> 256 U. S. 368, 376, 41 S. Ct. 510, 65 L. Ed. 994 (1921).

To leave the way open for Congress to bury a proposed amendment even after three-fourths of the states have approved it seems to be consonant with the purpose of the framers to permit changes in the fundamental law only when there is a strong preponderance of contemporaneous opinion in favor of it. If a majority of both Houses of Congress felt compelled for any reason to declare that a proposed amendment had not been duly ratified, that action would raise grave doubts as to whether the amendment had the requisite support in public opinion at that time. But if the lawmakers are to exercise this function some way must be found to minimize the confusion until the issue is decided. The ruling that an amendment becomes effective the moment the thirty-sixth state ratifies it should be repudiated. And provision should be made for determining when Congress has said its final word on the subject. Although it has been suggested that in proclaiming an amendment, the Secretary of State speaks with the authority of Congress, no one can say whether such a proclamation would preclude subsequent inquiry into the validity of ratification, or if not, whether there is any time limit on the power of Congress to reopen the matter. In 1930, eleven years after the Eighteenth Amendment was ratified, Representative La Guardia of New York offered a joint resolution to declare that amendment inoperative on the ground that ratification of the original resolution was ineffective to make the amendment a permanent part of the Constitution.<sup>90</sup> But as this resolution was never acted upon the question remains unanswered.

One method of handling the problem might be for Congress to repeal the present statute authorizing the Secretary of State to proclaim the adoption of an amendment immediately upon receipt of official notice of the requisite

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<sup>90</sup> 72 CONG. REC. 1761 (1930). This resolution was referred to the Committee on the Judiciary and was never reported. For a statement of the author's reasoning, see note 50 *supra*.

ratifications. Instead, he might be directed to transmit such evidence to Congress when three-fourths of the states have purported to ratify. To avoid a stalemate, it might be desirable to provide that unless Congress directs otherwise with a designated period, the Secretary should issue, at the end of such period, a proclamation, which should be deemed conclusive, declaring that the amendment had been adopted. In any event, having been given virtually complete responsibility in the premises, it is up to Congress to provide some procedure for a prompt and definitive decision as to the validity of the ratification of any amendments it proposes.

*Edward S. Corwin*

*Mary Louise Ramsey*