CHAPTER II

Judicial Review of Validity of Amendments

A. JUSTICIABILITY

To one not particularly familiar with constitutional law the notion of a court's passing on the legality of a constitutional amendment might seem strange. To him it would perhaps seem correct that the courts should unquestionably assume the validity of the Constitution and its amendments as an irreducible minimum in the decision of cases. To a Continental lawyer accustomed to a legal system in which the courts may not declare invalid even a statute, the idea of a court's determining whether a constitutional amendment is valid or not would seem astonishing. Even one familiar with American constitutional law might well have had some doubts before the litigation over the legality of the Eighteenth and Nineteenth Amendments.

Prior to the decisions in the 1920's, the only instance in which the Supreme Court of the United States had passed on the legitimacy of an amendment to the federal Constitution had arisen more than a century before in the case of Hollingsworth v. Virginia, as to the adoption of the Eleventh Amendment. In that case the attorney general of the United States, in defending the legality of the amendment, made no attempt to show that the matter was a political question, and the court did not discuss the issue. The case can therefore be cited only to the effect that the court and the parties assumed it to be a legal question. The court, moreover, passed only on the legality of the procedure of amendment, and not on the content of the amendment itself. In the later and much

1 (1798) 3 Dall. (3 U. S.) 378.
cited case of Luther v. Borden, the Supreme Court declared in dictum that "the question of validity of the adoption of an amendment was a political question. This case attracted great attention and was widely cited in the state decisions, so that many came to have the view that the question was political. Last of all, inasmuch as the courts have not assumed to pass on the constitutionality of the Constitution itself, there is some logic in arguing that, since an amendment becomes as much a part of the Constitution as any other part of it (in fact repeals any part inconsistent with it), the legality of an amendment is no more open to attack than that of the Constitution itself.

It may be laid down dogmatically that the constitutionality of the Constitution itself is a political question. In the first place it would seem a contradiction in terms to raise such a question, except in reference to the matter of its having been

8 (1849) 7 How. (48 U. S.) 1 at 39. Taney, C. J., said: "In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision." As late as 1888 it was asserted that this case "is still the law of the federal courts" in Smith v. Good, (C. C. R. I. 1888) 34 Fed. 204 at 208.

9 Luther v. Borden, (1849) 7 How. (48 U. S.) 1; Smith v. Good, (C. C. R. I. 1888) 34 F. 204; Brickhouse v. Brooks, (C. C. Va. 1908) 165 F. 534; State v. Starling, (1867) 15 Rich. L. (S. C.) 120; Koehler v. Hill, (1883) 60 Iowa 543, 14 N. W. 738, 15 N. W. 609; Miller v. Johnson, (1892) 92 Ky. 589, 18 S. W. 522, constitution held valid although the convention which had been elected to draft it made several changes in it after it had been voted on by the people of the state; Taylor v. Commonwealth, (1903) 101 Va. 829, 44 S. E. 754, constitution upheld though it had never been submitted to popular vote; Carpenter v. Cornish, (1912) 83 N. J. L. 696, 85 A. 240, affirming 83 N. J. L. 254, 83 A. 31; O'Neill, J., dissenting in Foley v. Democratic Parish Committee, (1915) 138 La. 220, 70 So. 104. See the statement in Brittle v. People, (1873) 2 Neb. 198 at 210: "When, however, a State government has been formed, and the State admitted to the Union with a given constitution, courts must recognize, and are as fully bound by, the fact as the merest citizen; and I submit, with all respect, that we can as well dispute the validity of the United States Constitution, because the convention framing it, disregarding all instructions limiting its members to making amendments to the old articles of confederation, assumed to make an entirely new frame of government, as we can inquire into any supposed irregularities or illegalities which may have entered into the construction of our own."
validly adopted according to the previously existing constitution. Where the existing constitution has come into operation through a revolution, obviously a very dangerous problem would arise if the courts should attempt to pass on the validity of the new constitution. Where the new constitution has not been the result of a revolution, a new government has not begun to function under the new constitution, the people have not acquiesced, and the old courts continue to operate, they could declare the new constitution void. Where a new government, executive and legislative, had taken their oaths under the new constitution, or even where a new government had commenced to operate under the new constitution and there was popular acquiescence, it would still perhaps be logically possible for the old courts to declare the new constitution invalid. But where the courts, as well as the other branches of the government, are operating under the new constitution, it seems inconceivable that they could pass on the validity of the instrument which is their creator. In theory, the court might decide the new constitution was invalid. But this would be tantamount to a declaration that the court itself no longer exists, since it was the creature of the constitution. The futility of the proceeding would make such a decision unlikely. As an actual fact such a court might continue to exist if the other departments of government accepted and enforced the decision, but this would seem to be a case of usurpation.

From the fact that the courts cannot declare the existing constitution invalid, it follows that they cannot so declare
any part of it (exclusive of amendments) 5 except where the parts are in conflict, in which event the courts perhaps would speak of construing or harmonizing. In fact, to declare a part void would seem even less justifiable than to nullify the whole new constitution, for in recognizing part of a new constitution it must recognize its entire validity. Since the old constitution is no longer in existence, there is no authority on which it can predicate a declaration that a part of the new constitution is invalid.

The view that the courts may not declare the existing constitution or a part of it (exclusive of amendments) invalid has particular force as to the federal Constitution. In the case of the states, many of them have adopted wholly new constitutions in pursuance, in most cases, of the mode prescribed in the previous constitution. In such cases there is doubtless justification for the courts' passing on the validity of the new constitution, though as a matter of fact such cases have been very rare. But the Constitution of the United States was not adopted according to the mode prescribed in the Articles of Confederation. In other words, our existing constitution is the product of a revolution, bloodless though it was. 6 The

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5 Carpenter v. Cornish, (1912) 83 N. J. L. 696, 85 A. 240, affg. 83 N. J. L. 254, 83 A. 31. But this view seems to have been departed from in a number of Louisiana cases arising over the 1920 state constitution. Huff v. Selber, (D. C. La. 1925) 10 F. (2d) 236; Pender v. Gray, (1921) 149 La. 184, 88 So. 786; State ex rel. Hoffman v. Judge, (1921) 149 La. 363, 89 So. 215; State v. Jones, (1922) 151 La. 714, 92 So. 310. An earlier case, State v. American Sugar Refining Co., (1915) 137 La. 507, 68 So. 742, is partially explainable on the ground that the constitution then made no provision for a convention, that the people by popular vote adopted the legislative restrictions as to subject matter imposed on the convention, and that the constitution was never ratified by popular vote. O'Neill, J., dissented on the ground that if part of the constitution could be declared invalid, the whole might be. See also, Foley v. Democratic Parish Committee, (1915) 138 La. 220, 70 So. 104.

6 Jameson says that "it is clear, that the act of disregarding the provisions of the 13th of the Articles of Confederation, was done confessedly as an act of revolution, and not as an act within the legal competence of either the people or the Convention, under the Constitution then in force." JAMESON, CONSTITUTIONAL CONVENTIONS, 4th ed. (1887), § 564, p. 596. Under Article Thirteen, Congress should have proposed and the legislatures of every state should have ratified the constitution. Technically, every step was complied with except that
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Supreme Court and all the other federal courts are and always have been the creatures of the existing Constitution. Thus there has never been any court before whom its invalidity might be asserted. The federal courts have never assumed to pass on the validity of the original Constitution or any part of it, and have never admitted that it was the creature of revolution, though the commentators have frequently pointed it out.

Passing from the question of judicial cognizance of the validity of the Constitution to that of an amendment thereto, it would not be illogical to expect somewhat the same treatment of the problem. The adoption of a constitution and the adoption of an amendment certainly have many points in ratification was by three-fourths of the states (though all eventually ratified), inasmuch as the Constitutional Convention sent the Constitution to Congress, which at the advisory direction of the convention transmitted it to the state legislatures, which in turn at the recommendation of the convention passed it on to the state conventions. The framing of an entirely new constitution in violation of the directions of Congress and the designating of the ratifying bodies have been asserted to be revolutionary, but if the Constitutional Convention and the state conventions be regarded as advisory bodies the only illegal step was ratification by less than a unanimous vote. The ground of necessity pleaded by Randolph seems a rather dubious legal justification. See also, 1 Cooley, Constitutional Limitations, 8th ed. (1927) 9; 1 Burgess, Political Science and Comparative Constitutional Law (1891) 98; McCulloch v. Maryland, (1819) 4 Wheat. (17 U. S.) 316 at 403.

Professor Powell has stated: "At one time I inclined toward the view that the Constitution is still unconstitutional and that from the lawyer's standpoint we should still be operating under the Articles of Confederation which provided for a perpetual union that could not be changed without the consent of Congress and the legislatures of all the states. I have since modified that view. While the Constitution was ratified in state conventions rather than in state legislatures as the Articles of Confederation prescribed, the conventions were called by the state legislatures and so may be regarded as having lawful authority delegated by the legislatures. I now think that all irregularities were cured when North Carolina and Rhode Island finally ratified and that the Constitution then became constitutional though it had not been constitutional previously. Of course, Rhode Island's concurrence was coerced by threats of economic pressure, but she still concurred." Powell, "Changing Constitutional Phases," (1939) 19 Bost. U. L. Rev. 509 at 511-512.

7 In Smith v. Good, (C. C. R. I. 1888) 34 F. 204, it is asserted that both questions are political; while in Loring v. Young, (1921) 239 Mass. 349, 132 N. E. 65, it is stated that both are judicial, Luther v. Borden, (1849) 7 How. (48 U. S.) 1, being distinguished on the ground that in that case two rival governments were arrayed against each other in armed conflict.
common. In both there is the exercise of the highest sovereign power of the state. The adoption of an amendment is the adoption of a constitution in little. It is conceivable that over a long period of time a constitution might be so altered as to bear little resemblance to the original document. Looked at from one point of view, an amendment is of even greater import than the original provisions of the constitution since it automatically repeals all clauses inconsistent with it.\(^8\) It may even repeal a Supreme Court decision.\(^9\) Looked at from a practical standpoint, however, the chief difference is seen to be that an amendment does not produce so comprehensive and so serious an effect on the existing frame of government. The courts are left relatively free to see that the prescribed constitutional mode of alterations is complied with.

1. **Validity of Procedure of Adoption**

At the outset it should be noted that as a matter of logic a distinction might be taken between the justiciability of matters of procedure on the one hand and matters of substance on the other hand. By matters of procedure are meant questions as to whether amendments were properly proposed or properly ratified or both. Has an amendment been proposed or ratified according to the methods expressly or impliedly specified in Article Five? By matters of substance are meant, assuming that the proper procedure for amending has been followed, questions as to the content of the amendment proper. Are there limitations as to the type of subject which may be dealt with by constitutional amendment, or if not, are there

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\(^9\) The Eleventh, Fourteenth and Sixteenth Amendments operated to nullify previous decisions. Such would also be the effect of the child labor amendment. The Eleventh Amendment operated retroactively.
limitations as to how certain subjects may be treated by constitutional amendment? The Supreme Court need not treat these two problems alike, and the two types of validity will be discussed separately. The justiciability of matters of procedure of adoption will first be discussed.

If the Constitution made specific provision for the submission of the question of the validity of amendments to a designated tribunal, it might perhaps be asserted that their validity is not a question for the ordinary courts, though even in that case the exclusion of the courts has been doubted. Article Five, however, is silent, so that there is much reason to assert that the validity of amendments, like so many other controversies which may arise over the interpretation of the Constitution, is a legal question. The theory of the courts in claiming the power to adjudicate amendments is doubtless the same as that back of the power to declare laws unconstitutional. The Supreme Court may set aside any unconstitutional act of Congress or of the President, and reverse its own and the decisions of the lower courts where the interpretation was erroneous. From this it follows that where there is a failure to

10 Worman v. Hagen, (1893) 78 Md. 152, 27 A. 616. In State v. Swift, (1880) 69 Ind. 505, two judges dissenting, it appears that the court assumed the validity of a statute interpreted to allow the governor to ascertain the adoption of the amendment; in Rice v. Palmer, (1906) 78 Ark. 432, 96 S. W. 396, there is dictum that a statute could establish a special tribunal for the purpose. Jameson is of the view that Congress alone has the power to pass on amendments except in suits between individuals. JAMESON, CONSTITUTIONAL CONVENTIONS, 4th ed. (1887) 626–627.

11 McConaughy v. Secretary of State, (1909) 106 Minn. 392, 119 N. W. 408. But this seems improper since the courts, as well as the other departments of government, are bound by the Constitution.

12 In practice, Congress has several times in effect decided on the meaning of Article Five. In resolutions it has asserted that the approval of an amendment by the President is unnecessary (see infra, chap. III, note 30), that two-thirds of a quorum of each house of Congress is the majority required for proposing amendments [SENATE JOURNAL, 1st Cong., 1st sess. (Sept. 9, 1789), p. 77], that the Fourteenth Amendment was ratified [(1868) 15 Stat. L. 708–711], and that states may not withdraw their ratifications [(1868) 15 Stat. L. 706, 708].
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comply with the regular mode of amendment prescribed in Article Five, the courts may regard the procedure as null and void.

_Hollingsworth v. Virginia_,¹³ as mentioned above, seems to have been the first case, either national or state, in which the validity of an amendment was passed on. But, as there stated, no attempt was made to show that the issue was a political one; the question, moreover, was simply one as to the procedure in adopting the amendment; and the court upheld the validity of the amendment. In 1836 a state case¹⁴ on the subject maintained the right of the courts to inquire into the validity of amendments. But the opinion of the court was brief, and like the prior federal case upheld the validity of the amendment. In 1849 the federal Supreme Court asserted in dictum that the question was political.¹⁵ Until the recent cases on the Eighteenth¹⁶ and Nineteenth¹⁷ Amendments, this was the only pronouncement of the court on the subject, so that if there had been no intervening circumstances the court might have adhered to its view in that case. However, in the meantime there had been constantly increasing litigation in the state courts over the validity of amendments. In 1854 the Alabama court in _Collier v. Frierson_¹⁸ asserted that it was a justiciable question and held an amendment invalid. The case is notable for the fact that it is the first and only case before 1880 holding an amendment unconstitutional. In 1856 the Mississippi Supreme Court held the question a judicial one.¹⁹ In 1864, however,

¹³ (1798) 3 Dall. (3 U. S.) 378. See note 1, supra.
¹⁴ State v. McBride, (1836) 4 Mo. 303.
¹⁸ (1854) 24 Ala. 100.
¹⁹ Green v. Weller, (1856) 32 Miss. 650.
the Maryland court took the view that it was a political question.20 In 1876 the Minnesota court regarded it as judicial.21

Up to 1880 only about seven cases had arisen in which the validity of an amendment was attacked in the courts. Up to 1890 about twenty such cases had arisen. But since that date a large number of cases have been decided. The state decisions have been virtually unanimous to the effect that the question is judicial, and the state courts now exercise supervision over every step of the amending process.22 Luther v. Borden23 was discussed by many of the courts, and the limited holding of that case was precisely defined.

What then should be the position of the courts as to amendment of the federal Constitution? That the question has been an open one even up to recent times is indicated by the cases which have arisen. In the first case which arose, Hollingsworth v. Virginia,24 the Supreme Court in 1798 passed on the procedure of amendment with respect to a proposal by Congress and held that the President need not concur in the proposal of an amendment. But no one raised the point that

20 Miles v. Bradford, (1864) 22 Md. 170. The same view has since been taken in State v. Swift, (1880) 69 Ind. 505, power of political department inferred from a statute; Beck, J., dissenting in Koehler v. Hill, (1883) 60 Iowa 543 at 568, 14 N. W. 738, 15 N. W. 609; Van Syckel, J., dissenting in Bott v. Board of Registry, (1897) 61 N. J. L. 160, 38 A. 848; McCulloch, J., dissenting in Rice v. Palmer, (1906) 78 Ark. 432, 96 S. W. 396, pointing out that if the question is judicial the validity of an amendment is never definitely settled.

21 Dayton v. St. Paul, (1876) 22 Minn. 400.

22 (1939) 53 HARV. L. REV. 134; (1940) 24 MINN. L. REV. 393 at 402.

23 (1849) 7 How. (48 U. S.) 1. In that case two rival governments were in armed conflict; the validity of a constitution, not an amendment, was in issue, and the opinion was therefore dictum; federal jurisdiction was involved as to the validity of a state constitution, and not of a federal amendment; the constitution of Rhode Island provided no mode of amendment. There are dicta in a few cases that when the amendment relates to the existence, power or functions of the courts, the question is political. Koehler v. Hill, (1883) 60 Iowa 543, 14 N. W. 738, 15 N. W. 609; State ex rel. McClurg v. Powell, (1900) 77 Miss. 543, 27 So. 927.

24 (1798) 3 Dall. (3 U. S.) 378.
the issue was a political one; and it should be noted that the court upheld the amendment involved. The opinion was a brief one of only five lines. In 1849 the Supreme Court in a dictum in the famous case of *Luther v. Borden* stated that the question was a political one. In *White v. Hart* the Supreme Court in dictum intimated that the validity of the Civil War Amendments was a political question. In *Dodge v. Woolsey* Mr. Justice Campbell in a dissenting opinion referred with approval to the doctrine of political questions as laid down in *Luther v. Borden*. In *Smith v. Good* a federal circuit judge, in passing on a controversy involving the validity of an amendment to a *state* constitution, held the controversy to be a political one and stated that the case of *Luther v. Borden* was still controlling in the federal courts, and that it had been followed in *White v. Hart*. Thus the cases arising in the nineteenth century seem to have regarded the question as a political one.

It was in the first one-third of the twentieth century that support for the view that the issue should be regarded as a judicial one received its greatest impetus, though some of the cases involved substance rather than procedure. In 1905 a lower federal court held that the validity of an amendment to a *state* constitution was a judicial question. In 1910 a lower federal court passed on the validity of the Fifteenth Amendment, seeming to have assumed that the validity of the substance of an amendment involved a judicial question. This latter case was offset by a lower federal court decision as to the validity of the Eighteenth Amendment that only the...

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25 (1849) 7 How. (48 U. S.) 1. The facts are given in note 23, supra.
26 (1871) 13 Wall. (80 U. S.) 646.
27 (1885) 18 How. (59 U. S.) 331 at 373. This case did not involve the validity of an amendment.
28 (C. C. R. I. 1888) 34 F. 204.
political department can declare an amendment void for violating alleged limitations as to substance.\(^{81}\) Thus up to 1920 there were no decisions by the Supreme Court itself squarely passing on the justiciability of amendments. In fact, between 1798 and 1920 the validity of no federal amendment was passed upon by the Supreme Court. In 1920 in *Hawke v. Smith\(^{32}\)* the Supreme Court passed on a question of ratification by the state legislatures and concluded that the states could not restrict the ratifying power by providing for a binding popular referendum. The decision, it is to be noted, is aimed at the acts of the states and not those of Congress. The court did, however, construe the meaning of the phrase “legislatures” in the federal Constitution rather than the phrase as it appeared in the resolution of Congress proposing the amendment.

In the same year came the *National Prohibition Cases;\(^{33}\)* in which the Supreme Court upheld the validity of the Eighteenth Amendment against arguments of unconstitutional content and improper procedure of adoption. The solicitor general argued that both of these questions were political. The procedural question involved the meaning of “two-thirds of both Houses” in the proposal of an amendment by Congress.\(^{34}\) The Supreme Court failed to develop any doctrine as to just what questions it was deciding, or of its own power. Hence the decision is somewhat dubious as a precedent. In *Dillon v. Gloss;\(^{35}\)* decided a year later, the court seemed more clearly to review the extent of the powers of Congress under Article Five with respect to fixing the time limit for ratification, but the court was not very explicit as to its own powers. In 1922, in *Leser v. Garnett;\(^{36}\)* the court again seems

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\(^{82}\) (1920) 253 U. S. 221, 40 S. Ct. 495.
\(^{83}\) (1920) 253 U. S. 350, 40 S. Ct. 486, 588.
\(^{34}\) See infra, chap. III, at note 28.
\(^{35}\) (1921) 256 U. S. 368, 41 S. Ct. 510.
\(^{36}\) (1922) 258 U. S. 130, 42 S. Ct. 217.
inferentially to have given comfort to the doctrine of political question. After arguing only by analogy to the Fifteenth Amendment, the court declared that the subject of the Nineteenth Amendment was within the amending power. But as to the argument that two of the states had not ratified properly, the court gave the broad answer that "official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts." Thus in effect the court treated the state acts and the acts of the secretary of state as involving the doctrine of political question.

In 1931 after almost a decade the court in United States v. Sprague did not try to distinguish the question before it from that in Leser v. Garnett. The court ruled that Congress could select the method of ratification, whether by state legislatures or by state conventions. The language of the court is such as to induce the belief that the court regarded the amending process as generally justiciable.

There was an interval of eight years without any decisions on the amending clause. Then came the decisions in 1939 involving the ratification of the child labor amendment. The court laid down a doctrine that some steps in the amending process involved political questions. It should be carefully noted that it did not hold all questions concerning the amending process to be political. The effect of the previous rejection by a state of an amendment was held to involve a political

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87 Ibid., 258 U. S. at 137. Rottschaefer, Constitutional Law (1939) 399, states: "It should be noted that the conclusive effect of the official notice to, and the certification thereof by, the Secretary is based on certain assumptions. How far a court would reach its own independent conclusion on the matters thus assumed cannot be definitely stated." See also Quarles, "Amendments to the Federal Constitution," (1940) 26 A. B. A. J. 617 at 618. Mr. Quarles, however, states that the proposal of an amendment is a political question.


question. The interval of time in which the states might ratify
an amendment was also held to involve a political question. 40
Thus it is only as to these two questions that the court defin­
itely decides that no justiciable question is involved. The
court came to no conclusion as to the justiciability of the ques­
tion whether a lieutenant governor of a state was such a part
of the legislature that he could cast a deciding vote when
the state senate was evenly divided. The court gave as its rea­
son that the court was equally divided, although nine judges
heard the case. 41 The Kansas Supreme Court had apparently
regarded all three of the above issues as justiciable, 42 and the
Kentucky Court of Appeals had inferentially regarded the
first two as justiciable. 43 The majority opinion thus seems to
leave untouched the apparent doctrine of the earlier cases
that certain procedural questions were justiciable.

The difficulties in deciding how long the states should have
to ratify, particularly where there has been a considerable
period of no action at all followed by widespread action,
doubtless justified the court in treating the question of time
as a political one. A proper review of whether Kansas had
ratified the child labor amendment would entail "an
appraisal of a great variety of relevant conditions, political,
social and economic, which can hardly be said to be within
the appropriate range of evidence receivable in a court of
justice." 44 It should be noted, however, that just such an

40 Two of the justices, McReynolds and Butler, seemed to dissent on the issue
of lapse of time. Presumably they concurred in the view that the effect of prior
rejection by a state was a political question. See note, (1939) 48 YALE L. J. 1455 at 1457.
41 It is therefore suggested in (1939) 48 YALE L. J. 1455 that the court
"sawed a justice in half." But McReynolds, J., was absent at the last conference
of the court held on June 3. (1939) 28 GEO. L. J. 199 at 200, note 7.
42 Coleman v. Miller, (1937) 146 Kan. 390, 71 P. (2d) 518; see opinion
appraisal has been made in the multitudinous cases involving due process. On the other hand, the difficulties as to the effect of rejection were not so great, although admittedly the theorists were badly divided. The court might well have held, as the solicitor general argued, that states could constitutionally reverse their former acts of rejection or ratification until such time as three-fourths of them had ratified. Perhaps, however, that question was deemed too closely linked with the time allowable for ratification. The court indicated two reasons for regarding the question of the effect of a prior rejection as involving a political question: (1) historical precedent in the efforts made by New Jersey and Ohio to withdraw their ratifications of the Fourteenth Amendment, Congress in effect declaring their withdrawals abortive; and (2) the absence of any basis in either Constitution or statute for judicial interference. But neither reason is strongly convincing. With respect to the first, it seems an unusual approach for the body recognized as having the power to review acts of Congress to adopt and rely on an act of Congress as precedent, particularly since the act of Congress was passed in a period of unrest and since the court had had no opportunity to pass on its validity. With respect to the second reason, it should be observed that there were no stronger constitutional or statutory bases for the decisions rendered in previous cases arising concerning the amending process.

Making the effect of a prior rejection a political question results in greater uncertainty as to the status of an amendment. On the general problem of justiciability it should be remembered also that the state courts have frequently and by the great weight of authority held that they may pass

45 Moore and Adelson, "The Supreme Court: 1938 Term, II," (1940) 26 Va. L. Rev. 697 at 709; (1939) 39 Col. L. Rev. 1232 at 1235-1236; (1940) 24 Minn. L. Rev. 393 at 404.
46 (1868) 15 Stat. L. 708.
47 (1940) 24 Minn. L. Rev. 393 at 399-400.
upon the validity of the procedure of amending the state constitutions, even though there be no express basis therefor. From the point of view of orderly amending procedure it is doubtful that the doctrine of political question should be extended to other procedural steps. If orderly procedure is essential in the enactment of ordinary statutes, should it not be even more so as to the adoption of important and permanent constitutional amendments? Such orderly procedure might call for compliance with certain fundamental prerequisites without emphasizing small details.

In *Coleman v. Miller*, 49 four of the members of the Supreme Court felt that a far more sweeping doctrine of political questions should be laid down. Mr. Justice Black in an opinion concurred in by Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Douglas, thought that Congress possesses “exclusive power over the amending process,” that neither “state nor federal courts can review that power,” and that “whether submission, intervening procedure or Congressional determination of ratification conforms to the commands of the Constitution, calls for decisions by a ‘political department’ of questions of a type which this Court has frequently designated ‘political.’” 49 No question can get into the courts. “The process itself 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.” 50 In the companion case of *Chandler v. Wise*, 51 Mr. Justice Black and Mr. Justice Douglas state that “we do

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49 Ibid., 307 U. S. at 459, 457.
50 Ibid., 307 U. S. at 459.
51 (1939) 307 U. S. 474 at 478, 59 S. Ct. 992. For a criticism of this view, see Quarles, “Amendments to the Federal Constitution,” (1940) 26 A. B. A. J. 617. It is pointed out that the Constitution does not expressly or impliedly except the amending process from the judicial power of the federal courts, whereas it inferentially does except the processes of impeachment, election of Congressmen, expulsion of Congressmen, and suits against the United States by citizens of another state.
not believe that state or federal courts have any jurisdiction to interfere with the amending process."

The view that the amending process involves essentially political issues has been urged by a number of writers. Albert E. Pillsbury, former Attorney General of Massachusetts, argued in 1909 that the scope of the amending power is a political question. Wayne B. Wheeler argued in 1920 that the validity of the Eighteenth Amendment was a political question. Professor Oliver P. Field in 1924 pointed out that courts had developed the doctrine of political questions where there was a "lack of legal principles for the courts to apply in their consideration of cases involving certain types of subject matter." Melville Fuller Weston set forth a doctrine of political questions in 1925 particularly with respect to the adoption and amendment of constitutions. Walter F. Dodd in 1931 was one of the most recent writers on the subject.

2. Validity of Substance

It has just been seen that even under the most recent decisions some questions of procedure in amendment are justici-
able. But there may be difficulties other than procedural ones. Will the courts inquire into the substance of an amendment, or is that a political question? Most of the cases have involved the question of the validity of procedure. It was not until 1920 that the Supreme Court passed on the substance of an amendment. The court ruled, in the *National Prohibition Cases*,\(^{57}\) that there were no defects of substance in the Eighteenth Amendment. The following year the Nineteenth Amendment was attacked as improper in substance and the court expressly discussed the question of substance,\(^{58}\) whereas no reasoning was set out in the *National Prohibition Cases*. Back in 1915 when the content of the Fifteenth Amendment was attacked, the court completely ignored that argument in its decision.\(^{59}\) In 1931 the Supreme Court inferentially refused to allow an attack on the substance of an amendment when it held that all amendments were subject to ratification by state legislatures if Congress so chose.\(^{60}\) In the light of the recent decisions on the child labor amendment, it may be that the court now regards the substance of an amendment as presenting a political question. That would from a practical point of view be a defensible position since no limitations on substance have yet been found, and it is unlikely that any will ever be found.\(^{61}\)

Relatively few attacks have been made on the substance of amendments in the state courts. Apparently the first case in which this question was directly raised was that of *Livermore v. Waite*\(^{62}\) by the California court in 1894. That court

\(^{57}\) *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486.


\(^{61}\) See infra, chap. IV.

\(^{62}\) (1894) 102 Cal. 113, 36 P. 424. The court suggests that the power of the legislature to propose amendments is much less than that of a convention, and that a convention is subject only to the Constitution of the United States. The distinction appears unsound, however, as a convention is merely a legal agent of the state for the purpose of amendment, just as the legislature is. The court also contends that an amendment which if adopted would be in-
held that an amendment was void in substance because certain of its provisions were to become operative at the will of certain officials mentioned in it, although it was regularly voted on by the people. Neither the federal nor the state constitution imposed such a restriction and it seems that it was one discovered by the California courts. Two years later the Missouri court took the opposite view in a case involving similar facts. Where the constitution is silent as to the scope of an amendment, the view of the state courts appears to be that the courts may not pass on the character of the amendment. Where the state constitution contains limitations on the scope of amendments, logically the courts should have power to determine whether the content is proper. Limitations on the scope of amendments should be found within the amending clause, and the other articles of the constitution should not be viewed as limitations. Thus the bill of rights and the amending clause are themselves subject to alteration unless expressly forbidden to be altered. Most state constitutions contain no such limitations, however, and the problem therefore seldom operative, or contingent on the acts of a group of individuals, is invalid. But if the people have imposed no such limitations, there would seem to be no good reason why such an amendment may not be proposed.

Edward v. Lesueur, (1896) 132 Mo. 410, 33 S. W. 1130. But in State ex rel. Halliburton v. Roach, (1910) 230 Mo. 408, 130 S. W. 689, an amendment was held void as being legislative in character, and also because it was operative for only ten years; but in dictum the court said that a proposed prohibition amendment would be valid, since prohibition was subject to permanent as well as temporary regulation. This decision was probably a political one. Professor Rottschaefer says its position is indefensible. ROTTSCHEFER, CONSTITUTIONAL LAW (1939) 398.


The Alabama constitution, article 18, § 284, forbids the change of representation in the legislature on any other than a population basis.
arises, as the doctrine of implied limits on the nature of amendments has not been adopted by the state courts.

The Constitution of the United States contains one express restriction on the nature of amendments. No state may be deprived of its equal suffrage in the Senate without its consent. Prior to 1808 no amendment could be made abolishing the slave trade, or imposing a direct tax without apportionment. Since that date, unless the courts adopt the view that there are implied limitations, the only criterion of character an amendment has had to meet is that it must not violate the equal suffrage clause. The absence of any limitations as to form or substance is shown in the cases of the Eleventh and the Eighteenth Amendments. The Eleventh Amendment operated retroactively. The Eighteenth Amendment by its own provision was not to go into effect until a year after its ratification, and was to be inoperative unless ratified within seven years after its submission by Congress to the states. Though, as has been seen, the Eighteenth and Nineteenth Amendments were attacked as void in substance, the contentions were rejected. Since no implied limitations as to scope are likely to be laid down and since the only limitation on content is the equal suffrage clause and that is really a limitation on the method of ratification rather than on the substance of amendments, there would seem to be no great dangers arising out of the view that a political question is here involved. Arguably, however, the Supreme Court cases on substance might be interpreted as meaning simply that there are no limitations on the substance of amendments. On that view it would not be necessary to assert that conformance to limitations is a political question.


The question of justiciability has now been treated both as to the validity of the procedure of adoption and the validity of substance. It would seem of value to summarize the state of the law after the 1939 decisions. First, as to procedure it may be said that certain phases of procedure are political and certain are justiciable questions. The effect of a state's previous rejection of an amendment upon its later approval involves a political question.\(^68\) The time interval after submission of an amendment in which states may ratify also involves a political question. On the other hand, neither expressly nor impliedly overruled\(^69\) are earlier holdings that the following involve justiciable questions: (1) the meaning of "two-thirds of both Houses" in the proposal of an amendment by Congress; (2) whether Congress has the power of selecting ratification by legislatures rather than by conventions; (3) the necessity of the President's approval of the proposal of an amendment; and (4) the meaning of "legislatures" ratifying federal amendments with respect to compulsory popular referenda. Undecided is the question whether a lieutenant governor of a state is such a part of the legislature that he may cast a deciding vote when the state senate is evenly divided. Second, as to the justiciability of the substance of an amendment, possibly though not probably unaffected are decisions as to the Eighteenth and Nineteenth Amendments holding inferentially that the problem is justiciable.

With respect to the proper procedure required as a result of the doctrine of political question, it would seem the following is called for: a proper party plaintiff must first prosecute a suit to determine whether the matter involved is justi-

\(^{68}\) Probably there would be the same result as to the effect of a prior ratification. (1939) 13 So. Cal. L. Rev. 122 at 124.

\(^{69}\) Moore and Adelson, "The Supreme Court: 1938 Term, II," (1940) 26 Va. L. Rev. 697 at 707-709. The majority of the court carefully distinguished Dillon v. Gloss, (1921) 256 U. S. 368, 41 S. Ct. 510; four justices wished to overrule it. See also (1940) 24 Minn. L. Rev. 393 at 399.
ciable, and if it is not justiciable he must appeal to Congress. If the question is found to be a political one, there would seem to be no very effective or regular methods of enforcing the procedure Article Five seems to demand. Thus political prestige rather than legal right may become the more dominant influence.

The doctrine of political question raises a number of questions, the answers to which cannot easily be predicted. Where a political question is found to be involved as to a certain procedural step in a given case, what are the powers of the Secretary of State of the United States? May he promulgate the adoption of the amendment only under the formal express permission conferred by Congress, or may he do so unless Congress forbids promulgation? Is a two-thirds vote of Congress necessary to allow or to prevent promulgation of the amendment? May Congress decide the political question before three-fourths of the states have ratified? If it does, may it later, but before three-fourths have ratified, change its position? May Congress decide, with respect to a particular amendment, that a state once having rejected may later ratify, and then decide differently with respect to a different amendment?

B. PROCEDURAL QUESTIONS

It has been seen that at least some questions of the legality of the procedure of adoption of an amendment to the federal Constitution are justiciable. If the court had held that all questions concerning the amending process are political, obviously no one could raise the question of validity in the courts. But since the court regards some questions as justiciable, the problem immediately arises as to how the validity of an amendment may be attacked.

70 (1940) 24 MINN. L. REV. 393 at 406.
1. Proper Forum

It would seem feasible to raise the question of the validity of ratification by a particular state in the courts of that state as well as in the federal courts. One case reached the United States Supreme Court by writ of error to the Supreme Court of the state of Ohio to review a decree of the latter court. Another case reached the Supreme Court by writ of error to the Court of Appeals of Maryland to review a judgment of the latter court. In each of these cases state courts passed on the validity of amendments to the federal Constitution. In each of them the proceeding was by a citizen and voter, or citizens and voters, of a state against its public officers. No question as to the jurisdiction of the state courts or as to the availability of the relief prayed, if a case were made out for the granting of such relief, was raised.

2. Time of Attack

It will be conceded that the validity of an amendment, if justiciable at all, can be attacked after its promulgation and when it is sought to be put into effect. But must the plaintiff wait until then to bring suit or may he sue before ratification? In an early case a federal trial court refused to permit attack on the validity of an amendment prior to adoption. However, the state courts have permitted attacks on an amendment proposed by Congress even though it has not as yet been ratified by three-fourths of the states. This practice was impliedly approved by the Supreme Court when it refused jurisdiction upon other grounds of an appeal from an

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71 Hawke v. Smith, (1920) 253 U. S. 221, 40 S. Ct. 495.
74 Wise v. Chandler, (1937) 270 Ky. 1, 108 S. W. (2d) 1024; Coleman v. Miller, (1937) 146 Kan. 390, 71 P. (2d) 518. In Hawke v. Smith, (1920) 253 U. S. 231, 40 S. Ct. 495, the Supreme Court reviewed an Ohio case where the validity of the Nineteenth Amendment was attacked prior to adoption.
attack in a state court on the Child Labor Amendment after only twenty-eight states had ratified. Arguably an employer of child labor might have a sufficient special interest to attack the child labor amendment, and yet not be able to show that the injury is clear and immediate. In the first place, thirty-six states might never ratify. In the second place, the child labor amendment does not abolish child labor, but merely authorizes Congress to do so. Moreover, technically an injunction as to certifying by one state would be useless, since it is the action of three-fourths of the states and not the certifying notice that marks the adoption of an amendment.

Another theory which may bar relief is that of the doctrine of separation of powers. That doctrine prevents interference with legislative processes. For instance, no injunction lies against an administrative official who is submitting to the electorate a proposed amendment to a state constitution.

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\(^{76}\) (1937) 37 Col. L. Rev. 1201; No irreparable injury was found in State of Ohio ex rel. Erchenbrecher v. Cox, (D. C. Ohio, 1919) 257 F. 334.


Arguably the same theory should apply where the federal secretary of state is the defendant. Hence to attack the validity of an amendment it is thought necessary to await its apparent ratification. The difficulty of the plaintiff if he does so wait is that he will run into the objection that the courts will not go behind the secretary of state's promulgation of ratification. It has been argued that the validity of ratification of an amendment as distinct from the substance of an amendment may not be attacked after the secretary of state's proclamation of its adoption. It has also been stated that an irregularity of Congress in proposing an amendment cannot be attacked prior to adoption, as for instance by an action to enjoin the governor of a state from submitting an amendment to the legislature, but only after its promulgation and when it is sought to put it into effect. That seems sound policy as preventing too free attack on amendments, and as giving proper weight to the fact that it was Congress that was acting.

With respect to the remedy of injunction, it should be noted that it might be sought at any of a number of stages: (1) against the submission of an amendment to the state by the Secretary of State of the United States; (2) against submission by the governor to the legislature or state convention; (3) against legislative officers certifying action by the legislature; (4) against certification of ratification by the governor; (5) and against certification by the Secretary of State of the United States. No case has arisen as to submission by the United States Secretary of State to the state. It is true that after Congress has proposed an amendment, the secretary of state sends a copy thereof to each governor, and the gov-

80 Nor would mandamus lie against the secretary of state to compel announcement of the rejection of an amendment, since the statute under which he acts imposes no such duty on him, (1818) 3 Stat. L. 439; (1934) 5 U. S. C. § 160.
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error in turn transmits it to the legislature. But the Constitution is silent as to these two steps, which are based simply on statute. It would therefore seem that they might be omitted as unnecessary. Since the two steps are not legally significant, injunction would be refused as futile. With respect to submission by the governor to the legislature, it has been held in a lower federal case that no injunction lies to attack an irregularity of Congress in proposing. With respect to legislative officers certifying action by the legislature, the Supreme Court of Kansas refused relief by way of mandamus. The Kentucky state court allowed injunction and a declaratory judgment with respect to certification by the governor to the Secretary of State of the United States. With respect to injunction against certification by the secretary of state, no injunction should lie, and it has been refused, since the Constitution calls for no act by the secretary of state, the final act being the approval by three-fourths of the states.

In favor of permitting attack before adoption by three-fourths of the states is the view that procedural difficulties in framing constitutional questions should be minimized in the interests of efficiency and certainty. To refuse relief seems technical. To grant it makes for speed. The opposing argument is that constitutional decisions should be few in

85 Wise v. Chandler, (1937) 270 Ky. 1, 108 S. W. (2d) 1024. Since the governor had already mailed the certificate of ratification to the secretary of state (subsequent to the filing of the bill for injunction and issuance of the restraining order, but prior to the service thereof), it is hard to see how either an injunction or a declaratory judgment would accomplish anything. (1937) 37 Col. L. Rev. 1201. It was argued in the case that since, under the doctrine of Leser v. Garnett, (1922) 258 U. S. 130, 42 S. Ct. 217, the validity of inoperative ratifications might not be assailed after promulgation by the federal secretary of state, the proper time to attack was at the time the governor was about to send in notice of ratification.
number, postponed as long as possible, and rendered only if necessary.\textsuperscript{88}

3. \textit{Proper Party Plaintiff}

The right of a party to raise the issue of validity of an amendment should be determined by the same theories that are applied to other constitutional issues. In a case arising in the federal courts it was held that the general right of a citizen to have the federal government administered according to law, and to prevent waste of public moneys was not a basis for a suit to decide whether a federal amendment about to be adopted was valid.\textsuperscript{89} But a private individual whose interests of person or property have been injured, or are threatened with injury, by the enforcement of legislation the validity of which depends upon the validity of a constitutional amendment, should have the right to raise the issue in a proceeding to which he is a party.

Members of the Kansas legislature assailed the validity of the ratification of the child labor amendment by an original proceeding in mandamus in the Kansas Supreme Court to enjoin further proceedings, and to compel the secretary of state of Kansas to erase the indorsement that the resolution had passed the senate and to indorse on the resolution a statement that it did not pass. Petitioners also sought to restrain the officers of the legislature from signing the resolution, and the secretary of state from authenticating and delivering it.


\textsuperscript{89} Fairchild v. Hughes, (1922) 258 U. S. 126, 42 S. Ct. 274. This case did not decide that such a party could not attack in the state courts. See also, notes (1937) 37 \textit{Col. L. Rev.} 1201; (1937) 24 \textit{Va. L. Rev.} 194; comments, (1937) 47 \textit{Yale L. J.} 148; (1939) 48 \textit{Yale L. J.} 1455; and article by Moore and Adelson, “The Supreme Court: 1938 Term, II,” (1940) 26 \textit{Va. L. Rev.} 697 at 706.
to the governor. The Kansas Supreme Court denied a writ of mandamus but stated that the right of the plaintiffs to sue was itself clear. The United States Supreme Court granted certiorari and though it upheld the action of the legislature it agreed, four judges dissenting, that the parties had a right to sue. This holding is probably consistent with earlier cases. The holding is also in accord with the theory of most state courts recognizing any citizen's interest. The Wyoming court has held that a taxpayer might sue to enjoin an election as to repeal of the Eighteenth Amendment, although the injunction was refused in the particular case since the election was legal. In Iowa a recent statute authorized injunctions against the submission of amendments to state constitutions. Any taxpayer might sue. The governor and secretary of state could be enjoined from submitting the amendment. Thus Iowa is the first state to allow the judicial determination of the validity of a constitutional amendment before its adoption.

In Kentucky, where a suit was brought by individual citizens and members of the legislature to enjoin certification of ratification to the secretary of state by state officials, no ques-

90 Coleman v. Miller, (1937) 146 Kan. 390, 71 P. (2d) 518. Petitioners were 21 members of the Kansas senate, 20 of whom voted against the resolution, and 3 members of the house.


95 Comment, (1932) 17 Iowa L. Rev. 250.
tion of the plaintiff's capacity to sue was raised, for the defendant had failed to file a special demurrer. When the Kentucky case came to the United States Supreme Court, the Solicitor General of the United States, in his brief for the United States as amicus curiae, conceded that the case was properly before the court. He pointed out that the petitioners (defendants in the state court) were public officers performing federal functions and were seeking to sustain the validity of the act of ratification. Hence decisions holding that public officers may not invoke the jurisdiction of the court in their official capacity to challenge the constitutionality of state acts were not in point. The case, moreover, was not academic. To prevent official notice of the action of the state from reaching the Secretary of State of the United States interfered with the amending process. Official notice from the state is conclusive on the federal secretary of state as to the procedural validity of the ratification, and the proclamation by the federal secretary of state is conclusive on the courts in that regard. Moreover, the orderly receipt of official notice aids in avoiding confusion and uncertainty.

The solicitor general was more dubious in the Kansas case, since the petitioners (plaintiffs in the state court) were public officers attacking the validity of the claimed ratification. But he went on to point out that at least two of the petitioners were members of the state legislature when the amendment was previously rejected and had voted for rejection. Hence their suit might be regarded as an effort on their part to pro-

96 Wise v. Chandler, (1937) 270 Ky. 1, 108 S. W. (2d) 1024. The Kansas and Kentucky cases seem to be the first cases involving attacks on federal amendments by legislators. (1939) 28 Geo. L. J. 199 at 201. Possibly in reality legislators were given a standing to sue because they take part in the amending process. Or possibly jurisdiction was taken to make possible a decision on the merits.

97 But he admitted that if the case had been first brought in a federal court it would properly have been dismissed on the ground that the complainants had no sufficient legal interest. Brief, p. 34.
tect and vindicate their votes as against what was asserted to be a spuriously countervailing act.

The Supreme Court, in ruling on the Kentucky case, concluded that it was without jurisdiction on certiorari to review the action of the Kentucky court directing the clerk of the court to give official notice to the secretary of state of rejection of the child labor amendment, since after the governor forwarded the certificate of ratification there no longer existed a controversy. The case had become moot. That is to say, while the petitioners might be proper parties, there must still be a controversy. The writ of certiorari was therefore dismissed. The court thought that the state court had jurisdiction up to the time of forwarding the certification of ratification. After such forwarding "there was no longer a controversy susceptible of judicial determination." Justices Black and Douglas concurred on the ground that neither the state nor federal courts "have any jurisdiction to interfere with the amending process." Justices McReynolds and Butler thought that the Kentucky judgment should be affirmed.

The Supreme Court, in ruling on the Kansas case, concluded that the members of the Kansas Senate who voted against ratification of the child labor amendment, and who claimed that their votes were sufficient to prevent ratification, had such an interest in mandamus proceedings begun by them and other legislatures questioning the validity of the legislative action as to give the United States Supreme Court jurisdiction to review on certiorari the adverse decision of the Kansas Supreme Court even though they would not have had standing to sue initially in the federal courts. The Kansas

100 Ibid., 307 U. S. at 478.
court had likewise treated the legislator's interest as sufficient to justify it in entertaining and deciding federal questions raised. The decision of the Kansas court was affirmed. Four of the judges thought that the petitioners had no standing to sue; that there was no controversy before the court. These four judges, in an opinion by Mr. Justice Frankfurter, thought it immaterial that such petitioners were given standing to sue in the Kansas Supreme Court. Such petitioners had no more standing than other citizens of Kansas or even of other parts of the United States. Every United States citizen was equally interested in whether or not the child labor amendment was still alive. Clearly such petitioners would have no standing to sue in a federal court. The federal courts are not bound by state court rulings as to the petitioners' standing. Petitioners' rights of voting in the Kansas legislature were merely political rights undeserving of protection. Justice Butler, in a dissenting opinion concurred in by Justice McReynolds, did not deny that the petitioners could sue.

The present chapter indicates the difficulties encountered in attacking the validity of an amendment to the federal Constitution. If the Supreme Court is not ready to apply the doctrine of political questions to all phases of the amending process, as four members of the court wish, it will apply it to some phases of the amending process and what such phases are remains largely uncertain. Even if the court finds a justiciable question presented, the court may find that the case was brought in the wrong court, or that it was brought at too early a stage in the amending process, or that it was not brought by a proper party plaintiff, or that there was no controversy.

102 A more logical line of reasoning would seem to be as follows: a majority of the court hold that the effect of a prior rejection and the time interval for ratification are not justiciable questions. Such a holding means that they are not justiciable in either state or federal courts. Mr. Justice Black's opinion brings this out clearly. Moreover, since the issues are "exclusively federal questions and not state questions," as pointed out by the Chief Justice, Coleman v. Miller, 307 U. S. 433 at 438, 59 S. Ct. 972, the holding as to justiciability binds the state courts. See comment, (1939) 48 YALE L. J. 1455 at 1456, note 4.