ARTICLE V: CHANGING DIMENSIONS IN CONSTITUTIONAL CHANGE

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To anyone raised under the Constitution of the United States, that document's declaration that it is "the supreme law of the land"1 may appear as a commonplace assertion. In some other nations the constitution is not viewed as law, but is seen as a primarily political document.2 In fact, some foreign constitutions are formally proclaimed to be "political constitutions."3 The writers of the American Constitution were well aware that they were engaged in fashioning an arrangement for the exercise of political functions and the peaceful adjustment of political conflict.4 And, however much validity there continues to be to de Tocqueville's famous dictum that in America every issue of policy is translated into constitutional terms and debated as a legal issue,5 it is also a historical fact that, by long-standing precedent of the Supreme Court, some issues arising under the Constitution are candidly designated "political questions,"6 while others are often avoided by the selective application of judicially developed rules of caution.7

A constitution, viewed as a political document, is a framework

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1 U.S. CONST. art. VI.
3 See. e.g., POLITICAL CONST. OF COLUMBIA, Preamble (1886). See also CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flantz eds. 1971), a comprehensive loose-leaf collection of current constitutional texts.
5 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (H. Reeve transl. 1898). Note also Corwin's observation that "[m]any other countries have . . . constitutions, but the constitutional lawyer is a unique product of our system, . . ." E. CORWIN, THE TWILIGHT OF THE SUPREME COURT xxii (1934).
for the exercise of power in the polity. Legal rules, by contrast, purport to determine the broad range of societal relationships. When a constitution is treated as just another form of law, there results an ambiguity of thought that tends to overshadow significant functional differences.

What is properly a subject for inclusion in a constitution? Even the most superficial perusal of the Index Digest of State Constitutions reveals a bewildering array of topics, from Advertising to Zoning, which one would find difficult to characterize as directly related to the exercise of governmental powers. Many of these topics have come to be included as constitutional provisions because the process of constitutional change in the respective states made it relatively easy to clothe what would otherwise be statutory matters with the aura of constitutional dignity. Some state constitutions are clearly too easy to amend; elsewhere, the process is so resistant to change that recourse has been sought in the federal courts.

How easy (or how difficult) should it be to amend a constitution? John Locke, in the fashion of his time, proclaimed that the “fundamental laws” he had drafted for the government of Carolina should “be and remain the sacred and unalterable form and rule of government... forever.” William Penn, by contrast, had observed in the preface to his Frame of Government of Pennsylvania that he did not “find a model in the world, that time, place, and some singular emergences have not necessarily altered” and then proceeded to provide a method of amendment by a qualified majority. But Penn acknowledged differences even within a frame of government. The Charter of Privileges which he approved in 1701 declares that

because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences... I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the first Article of this Charter relating to

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9 Index Digest of State Constitutions (2d ed. R. Edwards 1959).
10 Prior to 1971. California had amended its constitution 375 times; South Carolina. 398 times; Louisiana. 496 times; and Georgia. 691 times. 19 Book of the States 1972-73. at 21 (1972).
12 1 Z. Chafee, Documents on Fundamental Human Rights 146. 153 (paperback ed. 1963); Cahn, An American Contribution, in Supreme Court and Supreme Law 1. 6 (E. Cahn ed. 1954).
Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without an Alteration, inviolably for ever.\textsuperscript{14}

Liberty of conscience was to be permanently enshrined because it was essential to "the happiness of mankind." Natural law principles were widely accepted in the decades preceding the American Declaration of Independence.\textsuperscript{15} Since the principles were considered to be immutable (and "inalienable"), the written constitution which embodied them—or to the extent that it embodied them—also acquired the character of immutability.\textsuperscript{16} Thus the language of the Articles of Confederation ("and Perpetual Union") was entirely in keeping with the spirit of the times in its assumptions that nothing in the Articles would need change, and that certainly nothing should be changed except by unanimous consent of all the member states.\textsuperscript{17}

A number of the framers apparently maintained the view that there was no need to provide machinery for constitutional change. The Virginia Plan had called for the inclusion of an amendment provision in the new instrument of governance, but, when the matter came up in the Committee of the Whole, a majority voted to postpone its consideration.\textsuperscript{18} When the matter was brought up again, "several members," so James Madison recorded, "did not see the necessity of the resolution at all."\textsuperscript{19} But George Mason, supported by Edmund Randolph, reminded the delegates that they were in Philadelphia precisely because the Articles of Confederation had been found wanting and it stood to reason that the new document would also have defects. "Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular and constitutional way than to trust to chance and violence."\textsuperscript{20} The argument must have been persuasive: there were no negative votes as the proposition to provide for orderly amend-

\textsuperscript{14} Z. Chafee, \textit{supra} note 12, at 166.
\textsuperscript{16} Cahn, \textit{supra} note 12, at 8.
\textsuperscript{17} National Archives and Records Service, General Services Administration, \textit{The Formation of the Union} 37 (1970).
\textsuperscript{18} A. Prescott, \textit{Drafting the Federal Constitution} 685–86 (1941). This is a most convenient rearrangement by topics of Madison's notes. The most comprehensive documentation of the proceedings of the Philadelphia Convention is \textit{The Records of the Federal Convention of 1787} (rev. ed. M. Farrand 1937); Scheips, \textit{The Significance and Adoption of Article V of the Constitution}, 26 \textit{Notre Dame Lawyer} 46 (1950).
\textsuperscript{19} A. Prescott, \textit{supra} note 18, at 685.
\textsuperscript{20} \textit{Id.} at 686.
ment was approved, first in the Committee of the Whole and then by the Convention.\textsuperscript{21}

The debate that followed the report of the Committee on Detail is significant because, if one believes Madison's notes, the Convention never returned to the issue of immutability versus flexibility. The focus was entirely on the role the states should play in future changes of the Constitution. The proviso accepting equal representation in the Senate was added to quiet the fears of the small states, as was the alternative method for proposing amendments by the states through a convention.\textsuperscript{22} The late Professor Edmond Cahn speculated that

the statesmen of 1787 would be astonished to learn that at this remote date the Constitution remains in force at all. . . . Could we consult them today, I think the framers would inquire why we have not exercised the power of amendment more frequently and more extensively.\textsuperscript{23}

Indeed, one recent author has described the formal amendment process as "comatose."\textsuperscript{24} One would assume that the adjective is used in a very loose sense; the definition of "coma" is "a state of deep unconsciousness caused by disease, injury, or poison."\textsuperscript{25} While one may validly assert that article V has not been overworked, it is arguable whether this relative inaction can be attributed to factors so deleterious as to be compared to "disease, injury, or poison."

How inactive the amending process has been, can perhaps easiest be shown in tabular form.

\begin{center}
\textbf{CONSTITUTIONAL AMENDMENTS}
\textbf{BY DECADE}
\textbf{1790–Present}
\end{center}

\begin{tabular}{ll}
\textbf{Ten Year Period} & \textbf{Number of Amendments} \\
1790-1800 & 11 \\
1800-1810 & 1 \\
1810-1820 & – \\
1820-1830 & – \\
1830-1840 & – \\
1840-1850 & – \\
1850-1860 & – \\
1860-1870 & 3 \\
\end{tabular}

\textsuperscript{21} Id.\textsuperscript{22} Id. at 688–91.\textsuperscript{23} Cahn, supra note 12, at 10–11; Bates, Foreword to L. Orfield, The Amending of the Federal Constitution at vii-viii (1942).\textsuperscript{24} Dixon, Article V: The Comatose Article of our Living Constitution, 66 Mich. L. Rev. 931 (1968).\textsuperscript{25} The New Merriam-Webster Pocket Dictionary 97 (1971).
Constitutional Change

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If one accepts the propositions that the first ten amendments are really part of the initial constitution-writing effort and amendments eleven and twelve correct technical deficiencies of the original document, then this tabular presentation suggests not that the amendment process is dormant (perhaps a better word than comatose), but that it appears to have shown more life in the last twenty-five years than at any other time in the nation's history.

It must also be asked whether this numerical showing reflects qualitative significance. Have the really important changes been accomplished by the article V amendment process or have they come about by judicial review? It would be idle to argue the point: the landmark decisions of the Supreme Court have done more to adapt the nation to change than has any amendment.

Is there, then, something in the amending process that saps it of its potential vitality? Why have we not used it more extensively in the past? As a corollary, why, in recent decades, has there been so much interest in the convention method of constitutional amendment?

If one compares the amending process in the United States with provisions for constitutional change in other countries having a federal system of government, it is evident that the process in the United States is more complex and potentially more time-consuming than it is elsewhere. Indeed, ours is the only constitution to involve the legislative bodies of the states constituting the Union in this process. In some otherwise ostensibly federal

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26 Dixon, supra note 24. at 931-32.
29 McWhinney, supra note 28. at 792.
constitutions (Austria, New Zealand, the Soviet Union, West Germany), there is no provision involving the component units in the amending process.\(^{30}\)

This comparison, however, also reveals that formal arrangements that are very similar in kind may produce entirely different results. Australia and Switzerland employ amending procedures that are quite similar. The federal legislature proposes an amendment which is then submitted to popular referendum; to become a part of the constitution, the amendment must be approved by a majority of all those voting, and also by a majority of those voting in a majority of states (cantons in Switzerland).\(^{31}\) In a comparable fifty-year period (1901–51), Australian voters approved only four out of twenty-four submitted proposals, while the Swiss record was twenty-six adopted out of thirty-one submitted.\(^{32}\) Similarly, the Mexican Constitution's amending provisions are almost identical to those of the United States; yet, the political dominance of one party has produced results in Mexico that are starkly different from those in this country.\(^{33}\)

What this detour into comparative government demonstrates is that results cannot be related to form. If the formal amending process has been used relatively infrequently in the United States, the reason cannot be found in the nature of the process.

Nevertheless, the advocates urging the adoption of the American Constitution used the availability of an amending process as an effective argument in the fight for ratification:

> [W]hat a virtue [the framers] . . . made of it! It became one of the standard arguments in the campaign for ratification, a big gun which was reserved for use after every other debating weapon had failed to repel the opposition, then wheeled systematically into place, loaded with the ammunition of ostensibly reasonableness, and discharged point-blank in the adversary's face—to his discomfort at least, often to his devastation. Does this or that provision in the draft seem unwise? Does the gentleman persist in his objection? Very well, since

\(^{30}\) W. Livingston, supra note 28, at 301. In the Federal Republic of Germany, however, the upper house (Bundesrat) consists of officials of the Länder (state) governments, so that state views are reflected in that portion of the federal legislative machinery.

\(^{31}\) Australia Const. ch. 8, § 128 (1901); Switzerland Const. arts. 118–23 (1874, amended 1891).

\(^{32}\) W. Livingston, supra note 28, at 118, 185–87. The figures for Switzerland do not include proposals submitted by popular initiative. There were thirty-six such proposals, of which six were adopted. In addition, seven propositions advanced as counter-proposals to initiative proposals received the requisite number of votes. Altogether, therefore, the Swiss Constitution was amended thirty-nine times in fifty years—or, roughly ten times as often as the Australian Constitution.

\(^{33}\) W. Livingston, supra note 28, at 303. See also R. Scott, Mexican Government in Transition ch. 3 (1959).
the times do not admit of delay, let us proceed to ratify in haste, then we can go about amending at leisure.\footnote{Cahn, supra note 12, at 11.}

And amend they did—no less than a dozen times in the first fifteen years. Alexander Hamilton\footnote{THE FEDERALIST NO. 85, at 607 (H. Dawson ed. 1863).} and his allies appeared to be sound prognosticators. Then, for sixty-two years, nothing.

Was there no change for sixty-two years? Obviously, anyone familiar with the history of the Constitution knows the answer. It is embodied in \textit{McCulloch v. Maryland},\footnote{17 U.S. (4 Wheat.) 316 (1819) (prohibiting the states from taxing the Bank of the United States).} \textit{Trcuiesi of Dartmouth College v. Woodward,}\footnote{17 U.S. (4 Wheat.) 518 (1819) (barring the states from impairing contractual obligations by amending legislatively granted corporate charters).} \textit{Cohens v. Virginia,}\footnote{19 U.S. (6 Wheat.) 264 (1821) (sustaining the Court's appellate jurisdiction to review state criminal proceedings).} \textit{Gibbons v. Ogden,}\footnote{22 U.S. (9 Wheat.) 1 (1824) (upholding the plenary power of the federal government to regulate interstate commerce).} \footnote{5 U.S. (1 Cranch) 137 (1803).} to name but a few, none thinkable without \textit{Marbury v. Madison.}\footnote{Id. at 176 (emphasis added).}

There is a brief passage in \textit{Marbury v. Madison} that deserves to be brought into this discussion. Here are Chief Justice Marshall's words:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; \textit{nor can it, nor ought it to be} frequently repeated.\footnote{"The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants. It is it's [sic] natural manure." Letter from Thomas Jefferson to W.S. Smith, November 13, 1787, in 4 THE WRITINGS OF THOMAS JEFFERSON 465, 467 (P. Ford ed. 1894).}

Certainly, the great Chief Justice did not accept Thomas Jefferson's oft-quoted proposition that every generation needed to establish its own claim to the fruits of liberty.\footnote{E.g., A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 407 (4th ed. 1970).} Marshall's language clearly implies that there should be a renewal of the constituent act—just not too frequently. But, if one accepts Marshall's dictum, how often would be too frequently?

There are numerous scholars who believe that the Civil War wrought a transformation of American political life of major significance, in that, for all practical purposes, it converted a confederacy into a true union.\footnote{Id. at 176 (emphasis added).} Under this view, the Civil War...
amendments to the Constitution were the formal manifestation of this change. Thus, to borrow Marshall's phrase, the second "great exertion" came roughly seventy years after the first one.

Another seventy years later, the nation again faced the question of whether the Constitution was adequate to the needs of the day. The crisis involved the Court's failure to sustain measures designed to allow government regulation of private economic relationships. A first attempt to change the Constitution by the process of formal amendment failed to produce timely results. The constitutional crisis of 1937 did not produce the violence of the crisis of 1861, but one may well say that, constitutionally, it was a "great exertion" indeed. The resolution, however, came by judicial fiat rather than constitutional amendment.

But suppose the "switch in time" had not occurred? One cannot speculate on either the time required or the bloodshed engendered, but it stands to reason that the changes now reposing in the pages of 301 U.S. (and later volumes) would have come about constitutionally. Amendments twenty-two to twenty-six might have dealt with social security, labor relations, minimum wages, and agricultural adjustment.

Thus, in 1937, the Court saved the nation from the full force of a "great exertion" of constitutional reform. But the incremental nature of judicial review rarely has the impact, symbolic or otherwise, of an actual constitutional enactment. In addition, in the decades since the turn of the century, the almost unqualified veneration of the Constitution that was so characteristic of the late nineteenth century had given way to an increasing realization of the role of judicial temperament, initiative and judgment.

Typical of this shift was the change in the personal perspective of Charles Evans Hughes.

Charles Evans Hughes, who in earlier years had been made to writhe by misuse of his statement torn out of context that

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45 The Child Labor Amendment had been proposed by Congress in 1924 (43 Stat. 670), but failed to receive the necessary number of ratifications. See also Coleman v. Miller, 307 U.S. 433 (1939).  
47 E. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 64-79, 95-115 (1941).  
48 "The phrase is Joseph Alsop's. J. ALSOP & T. CATLEDGE, supra note 46, at 135.  
49 "The divine right of kings never ran a more prosperous course than did [the] unquestioned prerogative of the Constitution to receive universal homage." W. WILSON, CONGRESSIONAL GOVERNMENT 4 (1885).  
50 E. ROSTOW, THE SOVEREIGN PREROGATIVE 23-44 (1962); W. RUMBLE, AMERICAN LEGAL REALISM 214 passim (1968); Miller, Some Pervasive Myths about the United States Supreme Court, 10 ST. LOUIS U.L.J.153 (1965).
"the Constitution is what the judges say it is," was more careful in his phrasing in a book published in 1928, but he did say there that since the Supreme Court's appellate power was determined by Congress, a body representing the people, it was the will of the people that sustained and made effective the extraordinary power of the Court. He seemed to be saying, indeed, that although Congress and the people were governed by decisions of the Court in matters of constitutional interpretation, the will of the people in the long run determined what the Court said about the content of the Constitution. The spread of such sentiments and the promotion of more realistic understanding of the Constitution and of the Court which defined its meaning may have incidentally jeopardized the hitherto prevailing reverence for the Constitution and for the Court as its interpreter.51

The nineteenth century witnessed limited use of the formal constitutional amendment process because (1) the Constitution was held in high reverence, and (2) much of what needed changing was accomplished by Court interpretation. On the other hand, the twentieth century sees increased recourse to the formal amending procedure because (1) realist perspectives have stripped the Constitution of its aura of superiority, and (2) Court interpretations either have failed to meet societal needs (as in the thirties), or have served to create new or to aggravate existing social tensions.

Moving Congress to the point where two-thirds of the members of each of the two houses52 will agree to propose an amendment is, however, a task of no mean dimensions. The alternative article V amendment process, getting thirty-four state legislatures to agree to petition Congress to call a constitutional convention, might appear to involve even greater difficulties, but experience suggests otherwise. State legislatures rather notoriously spend little time on amendments which they are called upon to ratify,53 and studies of interest group activities indicate that resistance to pressure and influence is considerably less pronounced at the state level than it is at the national level.54 The convention process of article V thus loomed increasingly attractive.

52 This does not mean that two-thirds of the total membership must vote approval. The amendments of 1789 were submitted by two-thirds of the members present. The Supreme Court specifically sustained this practice in The National Prohibition Cases, 253 U.S. 350, 386 (1920). See L. Orfield, supra note 23, at 49-50; Corwin & Ramsey, The Constitutional Law of Constitutional Amendment, 26 Notre Dame Lawyer 185, 190-91 (1951).
53 See D. Morgan, Congress and the Constitution 243-45 (1966) for two illustrations.
The language of article V leaves a number of questions unanswered. A literal interpretation would lead to the conclusion that whenever the number of applications received from the states equaled two-thirds of the number of states then in the Union, the condition of article V has been met and a convention should be called. Conceivably, this situation may have occurred at some time in the nineteenth century; a reliable count of state resolutions requesting a convention is not available. The first concerted effort to produce constitutional change through the article V convention-amendment process occurred between 1901 and 1909, when twenty-six states asked for an amendment to bring about the popular election of United States Senators. Simultaneously, momentum gained for an amendment to make polygamy a federal offense. Between 1906 and 1911, twelve states petitioned Congress to call a convention to consider the proposed anti-polygamy amendment. Eight of these states had also joined in the campaign for the popular election of Senators. Since, at the time, the critical number of states needed was thirty-one, the unduplicated number of petitioning states was short by one, and the question of sufficiency, despite disparity of subject, did not arise.

Almost as soon as the eighteenth amendment had become a part of the Constitution, agitation began at the state level to seek its repeal by the convention method. Wayne B. Wheeler, the General Counsel of the Anti-Saloon League of America, argued that Congress had rejected the "mandatory" construction of article V, a construction which maintained that once two-thirds of the states had asked for a convention, the role of Congress in calling the convention was purely ministerial. Wheeler took the position that there had been a sufficient number of state petitions during a period in which no less than seven Congresses had been sitting. Congress had been given seven opportunities to act and

55 Article V of the Constitution reads in part:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress...

U.S. Const. art V.

56 L. Orfield, supra note 23, at 42. Senator Ervin counted 304 applications between the years 1789 and 1971, but conceded that an accurate count was not possible. 117 Cong. Rec. 36754 (1971).


58 Wheeler, supra note 57, at 787-88.

59 Id. at 782. 788-89.
had failed to do so. The conclusion Wheeler drew from this congressional inaction was that there was no way to activate the convention method without Congress wanting to do so.\textsuperscript{60}

The theory that congressional calling of a convention was a ministerial function appeared to be supported by the weight of authority at the time. W.W. Willoughby's magisterial treatise noted that "the act thus required of Congress . . . is stated in imperative form by the Constitution."\textsuperscript{61} A later writer asserts unequivocally that "all writers on the subject are in agreement on the point that, when a sufficient demand is made, it is mandatory upon Congress to call a convention."\textsuperscript{62}

Wheeler, in his concern for the preservation of the eighteenth amendment, was primarily interested in demonstrating why, in spite of the imperative language of the Constitution, Congress should not act. Frank Packard, a strong partisan of the proposed constitutional limitation of the income tax rate, was concerned with how Congress could be made to act. Noting that state courts had issued writs of mandamus against legislative bodies\textsuperscript{63} and that the Supreme Court had mandamused the legislature of West Virginia,\textsuperscript{64} Packard concluded that mandamus would be available to compel Congress to call a convention. Somewhat naively, he added that

\begin{quote}
[w]hether the writ would be obeyed, or whether the claim might be advanced that one department of the federal government is powerless to assert its authority over another and co-ordinate branch of the same government, are questions which could not be answered at this time and \textit{may, for that matter, never arise.}\textsuperscript{65}
\end{quote}

In view of the fact that \textit{Coleman v. Miller}\textsuperscript{66} had been decided thirteen years earlier, Packard's position is difficult to justify. In \textit{Coleman}, four justices had urged that the amending process

\textsuperscript{60} Id. at 790, 802.

\textsuperscript{61} I W. WILLOUGHBY, \textit{THE CONSTITUTIONAL LAW OF THE UNITED STATES} 597 (1929). Willoughby cited Justice Story's opinion in \textit{Martin v. Hunter's Lessee}, 14 U.S. (1 Wheat.) 304, 328--33 (1816), as authority for the proposition that when the word "shall" is used in the Constitution, a mandatory duty is imposed. Curiously enough, Willoughby ignored \textit{Kentucky v. Dennison}, 65 U.S. (24 How.) 66 (1861), which held that "it shall be the duty" was not a mandate or imperative, but only imposed a moral obligation.


\textsuperscript{63} Id. at 135, citing \textit{State v. Town Council}, 18 R.I. 258, 27 A. 599 (1893).


\textsuperscript{65} Packard, \textit{supra} note 62, at 137 (emphasis added). In the same vein is Dirksen, \textit{The Supreme Court and the People}, 66 MICH. L. REV. 837, 871 (1968).

\textsuperscript{66} 307 U.S. 433 (1939).
should not be "subject to judicial guidance, control or interference at any point." Three other members of the Court (including Chief Justice Hughes) agreed that the key issue of "the efficacy of ratification by state legislatures, in the light of previous rejection or attempted withdrawal" should be treated as a "political question," but they were not prepared to negate all judicial competence to review the amending process. By shying away from the all-inclusive position taken by the concurring justices, Justices Hughes, Stone, and Reed avoided the necessity of overturning the precedent of Dillon v. Gloss, in which the Court had entertained—and affirmatively answered—the question of Congress' authority to set a seven-year limit on the time allowed to states to ratify a proposed amendment.

Lester Orfield summarized the state of the law after Coleman:

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.

Coleman v. Miller was decided thirty-four years ago. There has been no decision of the Supreme Court interpreting article V in the years since, although five amendments have been added to the Constitution (and a sixth one has been proposed by Congress and is currently awaiting ratification by the requisite number of states). The uncertainties bequeathed by Coleman are still with us.

Indeed, given the lapse of time, it could be argued that Coleman itself is of doubtful value as a precedent. Of the justices who participated in Coleman, only one—Justice Douglas—is still on the Court. Justice Douglas was one of the four justices who would have favored a complete "hands-off" position, contending that all questions arising from the amending process belonged in the category of "political questions."

In Baker v. Carr, Justice Brennan, writing for a six-member majority of the Court, quoted Coleman's language that

[I]n determining whether a question falls within [the political question] category, the appropriateness under our system of

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67 Id. at 459 (concurring opinion).
68 Id. at 450.
69 256 U.S. 368 (1921).
70 369 U.S. 186 (1962).
71 L. ORFIELD, supra note 23, at 36 (emphasis added).
72 Chandler v. Wise, 307 U.S. 474 (1939), while appearing in the reports after Coleman v. Miller, was decided on the same day.
government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.\textsuperscript{73}

In the subsequent discussion of representative cases, Justice Brennan carefully described the Coleman holding in the limited terminology of Chief Justice Hughes.\textsuperscript{74} Justice Douglas' concurring opinion explicitly avoided the discussion of the doctrine of political questions.\textsuperscript{75} while Justice Frankfurter, in dissent, quoted the last part of the same sentence by Hughes that Brennan had used.\textsuperscript{76}

Chester Antieau, in his treatise on constitutional law, asserts that "whether amendments to the Federal Constitution have been properly ratified is a political question."\textsuperscript{77} In light of the carefully limited description of the Coleman holding in the Baker opinion, it would appear that Orfield\textsuperscript{78} was more accurate in stressing the remaining areas of uncertainty.

Past decisions, to be sure, have answered a number of questions relating to the amending process.\textsuperscript{79} The Court has ruled that the content of an amendment to the Constitution cannot be challenged and that an explicit finding of necessity is not required.\textsuperscript{80} Early in the nation's history presidential approval of a proposal adopted by Congress was held not required by the language of article V.\textsuperscript{81} In Dillon v. Gloss,\textsuperscript{82} the Court suggested that proposals, which had been pending so long as to be out-of-date, might have lost their force and held that, by reasonable extension, Congress could provide for a time limit for ratification.

The Court has further held that Congress has complete freedom of choice between the two modes of ratification provided by article V;\textsuperscript{83} that if Congress elects ratification by legislatures, the states may not substitute a popular referendum or make legislative ratification subject to voter approval by referendum;\textsuperscript{84} and that an amendment becomes an operative part of the Constitution on the

\begin{footnotes}
\item[73] Id. at 210.
\item[74] Id. at 214.
\item[75] Id. at 242-43 (Douglas, J., concurring).
\item[76] Id. at 283 (Frankfurter, J., dissenting).
\item[77] 2 C. ANTEIAU, MODERN CONSTITUTIONAL LAW 672 (1969), citing Coleman v. Miller.
\item[78] See note 68 and accompanying text supra.
\item[79] L. ORFIELD supra note 23, at 8-126. See also Corwin & Ramsey, supra note 52.
\item[80] National Prohibition Cases. 253 U.S. 350 (1920).
\item[81] Hollingsworth v. Virginia. 3 U.S. (3 Dall.) 378 (1798).
\item[82] 256 U.S. 368 (1921). All amendments proposed since that time have carried a seven-year time limitation within which ratification must occur.
\item[84] Leser v. Garnett. 258 U.S. 130 (1922); Hawke v. Smith. 253 U.S. 221 (1920).
\end{footnotes}
day on which a sufficient number of states have in fact ratified it, rather than on the date of the proclamation of ratification by the Secretary of State. 85

But a number of questions remain unanswered. Without pretending to be exhaustive, these questions may be listed as follows:

1. May Congress on its own initiative call a convention to amend or revise the Constitution?
2. If a convention is called, whether in response to state petitions or not, is Congress at liberty to determine its composition and procedures?
3. If a convention is called, may Congress limit it to a specific proposal or topic?
4. If Congress has transmitted a proposed amendment to the states and the ratification process has not been completed, may Congress withdraw the proposal?
5. If a state has acted to ratify a proposed amendment, may it recall that action in favor of rejection?
6. If a state acts on ratification, must its action be in accord with its own legislative procedures or may Congress prescribe procedures for this purpose? 86

The call for "a new Constitution" is heard with some regularity, usually from academic quarters. 87 These proposals rarely have aroused much response. Yet the time may come when political forces consider the time ripe for such a move. A restrictive interpretation of article V might suggest that Congress must await receipt of petitions from thirty-four states before it can call a convention. The better view seems to be that of Corwin and Ramsey:

[If we assume that the machinery which is prescribed in 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' 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

86 This list draws on Corwin & Ramsey, supra note 52. and Gilliam, Constitutional Conventions: Precedents, Problems, and Proposals, 16 St. Louis U. L.J. 46 (1971).
87 E.g., BALDWIN, REFRAMING THE CONSTITUTION (1972); W. ELLIOTT, THE NEED FOR CONSTITUTIONAL REFORM (1935); W. MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA (1921); R. TUGWELL, A MODEL FOR A NEW CONSTITUTION FOR A UNITED REPUBLIC OF AMERICA (1970).
intended merely to specify a contingency in which it would be under the moral necessity of exercising it. 88

If a convention embodies "the inherent power of the people of the United States," may its powers be restricted? John Jameson, whose treatise long served as the principal authority on constitutional conventions, maintained that a convention could be restricted to a limited mandate. 89 Dodd and Hoar, writing two generations later, took the view that a convention was bound by the existing constitution but could not be limited by the legislature. 90 The case against limitation was perhaps most clearly stated by Gooch:

[N]o legal limitation can exist upon the legally defined method of amending a constitution. The proposition is well recognized by serious students of jurisprudence. Denial of the proposition involves a contradiction in terms. In civilized states that are subject to law, the highest law is the constitution. Legal power to amend the constitution is the highest form of authority to make law. For any legal limitation on this power to exist, the limitation would have to be contained in and defined by a higher form of law. But since the Constitution is the highest form of law, this is an impossibility. 91

Conceptually, this position would seem unassailable. In practice, however, the weight of decisions has been the other way. 92 The decisions are, however, those of state courts dealing with state conventions in the light of state constitutions. The works of Jameson, Dodd, and Hoar likewise all deal with conventions at the state level. It is at least arguable that, because of the federal aspects involved, a national convention differs sufficiently from state conventions that state decisions need not necessarily control. Therefore, generalizations based on state decisions are not necessarily applicable.

Senator Sam Ervin, who is the author of legislation intended to implement the convention method, 93 has stated that the argument

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88 Corwin & Ramsey, supra note 52, at 196.
90 W. Dodd, The Revision and Amendment of State Constitutions 73. 77–80 (1910); R. Hoar, Constitutional Conventions 91 (1917).
92 See e.g., Staples v. Gilmer, 183 Va. 338. 32 S.E.2d 129 (1944); Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907).
93 S. 215. 92d Cong., 1st Sess. (1971); S. 623. 91st Cong., 1st Sess. (1969); S. 2307. 90th Cong., 1st Sess. (1967). These bills, virtually identical in content, would provide procedures for calling a constitutional convention under article V. Sections two through
against a limited convention "can be wrenched from Article V—but only through a mechanical and literal reading of the words of the Article, totally removed from the context of their promulgation and history." The Senator's reading of the historical record persuaded him that the framers "did not appear to anticipate the need for a general revision of the Constitution" and that they expected a "specific amendment or amendments rather than general revision."

It is possible to quarrel with this reading of the record. Far more compelling is the practical argument advanced by the Senator:

If the subject matter of amendments were to be left entirely to the convention, it would be hard to expect the states to call a convention in the absence of a general discontent with the existing constitutional system.

Paul Kauper made the same point with perhaps even greater poignancy:

[T]he usefulness of the alternative amendment procedure as a means of dealing with a specific grievance on the part of the states will be defeated if the states are told that it can be invoked only at the price of subjecting the nation to all the problems, expense, and risks involved in having a wide open constitutional convention.

Thus the limiting language of the Ervin bill, while it is not compelled by legal logic, is clearly more in keeping with practical considerations and political feasibility.

The Ervin bill supplies an equally realistic solution to the question of whether a state may recall its ratifying action:

SEC. 13 (a) Any State may rescind its ratification of a proposed amendment by the same processes by which it

five define procedures to be used by the states in making application to Congress for the calling of a constitutional convention. Sections six through ten establish procedures for congressional calling of a convention and regulate the convention's organization and conduct. Section eleven provides that congressional approval of any amendment agreed upon by the convention must occur within ninety days; sections twelve and thirteen deal with the ratification process.

95 Id. at 882.
96 Id. at 883.
97 Kauper, supra note 27, at 912.
98 The bill originally introduced by Senator Ervin read:

No convention called under this Act may propose any amendment or amendments of a general nature different from that stated in the concurrent resolution calling the conventions.

S. 2307, 90th Cong., 1st Sess. § 10(b) (1967). See also Ervin, supra note 94, at 900.
ratified the proposed amendment, except that no State may rescind when there are existing valid ratifications of such amendment by three-fourths of the States.

(b) Any State may ratify a proposed amendment even though it previously may have rejected the same proposal.\(^9\)

Section 13(b) confirms prior practice and the specific ruling in *Coleman v. Miller*.\(^{100}\) Section 13(a), on the other hand, breaks new ground but addresses itself to a problem which, subsequent to the drafting and introduction of the Ervin bill, appeared as a concrete issue.\(^101\) Again it would appear that the solution is founded less in consideration of the legal constraints than in the perspective of the practicalities of the political process.

If the action of a state legislature on a proposed amendment to the Constitution of the United States were viewed as an ordinary legislative act, rescission of the amendment would be permissible, essentially as if it were the repeal of a statute. But the established view is that ratification is not a legislative function. When Congress proposes an amendment, its power to do so derives from article V; and when a state legislature acts on the proposal, it does so by virtue of, and in accordance with, article V.\(^102\) The legislature acts in a constituent capacity, not a legislative one. It could be asserted that constitution-making, as distinguished from law-making, is an event of unique impression and that the states are called upon to engage in this function but once for each proposal. The logic of this reasoning would, of course, require rejection of the present rule that ratification following rejection is a valid exercise of the state’s role under article V.

Even without considering the practical aspects, this “one-chance-only” approach stands on weak foundations. Conceptually, one could argue that a constituent act is an exertion of the will of the people *at one time*. However, article V precludes this by dividing the constituent act into two phases, one of which (the proposal) has to precede the other (the ratification).\(^103\) Once this separation is made, and given further the lack of coincidence in time of state legislative sessions, it seems difficult to maintain that the second phase of the constituent act cannot take place at

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\(^9\) *S. 215, 92d Cong., 1st Sess. § 13 (1971). See also Ervin, supra note 94, at 902.\(^{100}\)

\(^{100}\) 307 U.S. at 433. See note 66 and accompanying text supra.

\(^{101}\) In the spring of 1973, resolutions were introduced in the legislatures of several states seeking rescission of a previous ratification action of the Equal Rights Amendment. Nebraska’s legislature acted to rescind. *N.Y. Times*. Mar. 16, 1973. § 1. at 1 col. 4; *N.Y. Times*. Mar. 17, 1973. § 1. at 13 col. 3.


\(^{103}\) See note 55 supra.
any time within the period allowed by Congress. Within that period, can the constituent will be required (or expected) to remain constant? The answer would seem to be that, if the constituent will is sovereign, one can hardly forbid it to change.

Permeating the Ervin bill is the assumption, derived from the concurring opinion in *Coleman*, that the amending process is political and properly the exclusive province of Congress. Earlier it was suggested that *Coleman v. Miller* might not be as strong a precedent today as it seemed even two decades ago.\textsuperscript{104} The Ervin bill would make this question entirely academic, for it proposes to withdraw the amending process from judicial review altogether.\textsuperscript{105} As Paul Kauper observed,

whether Congress can insulate the questions as thoroughly from judicial review as is proposed in the Ervin bill is not clear, although as a practical matter it may be supposed that the courts will accord Congress a wise discretion both in interpreting the article V language and in administering the legislation designed to implement it.\textsuperscript{106}

Since these words were written, the personnel of the Supreme Court has undergone major change, with the newer members displaying a marked tendency to defer to Congress.\textsuperscript{107} The Ervin bill's foreclosure of judicial review probably runs less risk of judicial nullification today than it did five years ago.

Meanwhile, activity on the amendment front continues unabated. Applications for a convention to amend the Constitution appear to have become the preferred mode of response by those who dislike a given ruling by the Court.\textsuperscript{108} It must be expected that, sooner or later, there will be a congruence of applications compelling a congressional call for a convention. Hopefully, the Ervin bill (or an equivalent) will have prepared for the event.

Once a convention has taken place and the feasibility of this process has been demonstrated, it can be anticipated that the device will be employed with increasing frequency. *Formal* amendment will then assume new importance in the constitutional scheme and in the political life of the nation. Presumably, a

\textsuperscript{104} See note 71 and accompanying text supra.
\textsuperscript{105} S. 2307, 90th Cong., 1st Sess. \$§ 3(b), 5(c), 10(b), 15(c) (1967).
\textsuperscript{106} Kauper, *supra* note 27, at 908.
\textsuperscript{107} Kauper, *A Look at the Burger Court and a Look Back at the Warren Court*, 17 Law Quadrangle Notes (Univ. of Mich.) 6, 11 passim (1973).
\textsuperscript{108} In response to *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973), twelve State legislatures petitioned Congress, within five months of the decisions, for a convention to amend the Constitution by providing a definition of "person" to include a fetus at any state of development after the moment of conception. *Population Crisis*, July–Aug., 1973, at 1.
Concomitant consequence would be a decline in the importance of *informal* amendment—and hence in the role of the Supreme Court.

Whether this is or is not desirable is an issue of great dimensions. Involved are such basic propositions as the ability of democratic government to be responsive to the public's needs and wants, and the perennial question of the balance among the three branches of a government based on a separation of powers. These are issues that are quite clearly political to the highest degree. Thus the essence of the American constitutional scheme is, as in other nations, revealed as preeminently political. The change foreseen by the concurring justices in *Coleman*¹⁰⁹ may in fact be imminent and appropriate.

¹⁰⁹ See note 67 and accompanying text supra.