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STATE LEGISLATIVE RATIFICATION OF FEDERAL CONSTITUTIONAL AMENDMENTS: AN OVERVIEW

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Article V of the United States Constitution sets out the amendment procedure,[1] which consists of two stages, proposal and ratification. Each stage, in turn, offers two alternative procedures which can be interchanged to provide four means of effecting constitutional alteration. An amendment may be proposed either by a two-thirds vote of each house of Congress or by a national convention assembled upon proper application by the legislatures of two-thirds of the states; and an amendment may be ratified, as Congress decides, either by three-fourths of the state legislatures or by conventions in three-fourths of the states. To date, the legislative mode of ratification has been selected for all but one[2] of the 32 resolutions submitted to the states,[3] but despite the frequency of its use as contrasted to the convention method, very little is known about its origin and evolution. In particular, there are a number of constitutional, as well as practical questions which require definitive answers. For example, the resolution guaranteeing equal rights to women (ERA) is currently before the states where it has been approved by either 31 or 33 legislatures, depending upon whether ratification can be validly rescinded. To date, Nebraska and Tennessee have revoked their ratification and several other states are contemplating similar action.

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1. U.S. CONST. art. V.

2. Only the twenty-first amendment, which repealed prohibition, has been submitted to state ratifying conventions. This experience and the attempts to use the convention route for other amendments are examined in Martin, *Convention Ratification of Federal Constitutional Amendments*, 82 POL. SCI. Q. 61 (1967) [hereinafter cited as Martin].

3. In addition to the 26 amendments added to the Constitution, five other proposals sent before the states have failed to be ratified. These concerned: apportioning the House of Representatives (1789); compensating members of Congress (1789); permitting United States citizens to accept foreign titles of nobility (1810); recognizing slavery where it existed in the states (1861); and regulating child labor (1924). At present a sixth resolution, the Equal Rights Amendment for Women (1972), is circulating among the states.

A matter closely related to the problem of rescinding ratification is the manner in which a state legislature determines the ratification or rejection of a proposed federal constitutional amendment. This decision-making process, which logically controls, or at least influences the result, has not been explored in previous studies.[4] Therefore, this article will examine the historical and theoretical development of the legislative mode of ratification and the mechanics established by the states for processing this extraordinary business in accordance with rulings of the United States Supreme Court.

I. THE THEORY OF ARTICLE V

One of the major American contributions to the art and science of government is the concept of constitutional amendment by a formal process. It is not surprising that this country should make such an innovation inasmuch as providing the means for legitimately changing the fundamental law is implicit in the theory of a written constitution, a tenet which was first fully developed on this continent. The catalytic agent forcing this break with tradition was the idea that the will of the people is the foundation of all political power.

Long before the American Revolution, our political ancestors espoused the belief that government should be derived from the consent of the governed. Emphasizing this principle, Alexander Hamilton wrote in *The Federalist* that the "fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE . . . . [T]hat pure, original fountain of all legitimate authority."[5] In the same connection James Madison also asserted that "the express authority of the people alone could give due validity to the Constitu-

4. The leading authority on article V only discusses the process of state legislative ratification in terms of legalities and procedures. These categories concern such matters as whether the validity of legislative approval depends upon the governor's signature, whether a lieutenant governor can cast a tie-breaking vote in the state senate, and whether a state can require the holding of a referendum before the legislature acts on a proposal or delay its consideration of a submitted resolution until there has been a subsequent election of the legislature. *See* L. ORFIELD, AMENDING THE FEDERAL CONSTITUTION 61-78 (1942) [hereinafter cited as ORFIELD].

The only article analyzing the decisional process of a legislature in its constitutional amending function deals strictly with Congress. *See* Lacy & Martin, *Amending the Constitution: The Bottleneck in the Judiciary Committees*, 9 HARV. J. LEGIS. 666 (1972).

5. THE FEDERALIST No. 22, at 149 (H. Dawson ed. 1864) (A. Hamilton).

tion."[6] It was further reasoned that if the people created the Constitution, they could also revise it through procedures designed to preserve and to protect its integrity.

Extrapolating from the notion that constitutional authority rests upon the sovereignty of the people, the United States divided what had been classified as legislative action into two categories, constitution-making and ordinary lawmaking. According to a leading authority on the subject, this distinction means that:

> Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state, or deduced from long-established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the apparatus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being commands of the sovereign, having reference to the exigencies of time and place resulting from the ordinary working of the machine. Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws, are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and express . . . the expedient, or the right viewed as the expedient, under the varying circumstances of time and place.[7]

As a result of this differentiation, alterations in the fundamental law, while not always completely separate from the legislative process, require a special procedure which allows for the maximum expression of the popular will. This dual concept was a radical departure from the practice used in England where constitutional changes could be made then, as today, by Parliament, without regard for differences between constitutional and statutory actions. By classifying a constitution as a unique body of law, a special

6. *Id.* No. 42, at 306 (J. Madison).

7. J. JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS AND MODES OF PROCEEDING 83 (1873) [hereinafter cited as JAMESON].

amendatory process thus became an important requisite of the United States Constitution.

History records, however, that political theorizing was not the sole motive behind the implementation of an institutionalized amending formula. Another imposing influence was the practical realization that, as a general rule, politically organized people only resort to revolution for political change when there is no other way to accomplish it. Articulating this point at the Philadelphia Constitutional Convention of 1787, George Mason of Virginia, in urging the inclusion of an amending clause, stated:

> The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. 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.[8]

When the Convention convened, this was the prevailing attitude among a majority of the delegates who agreed on the necessity of providing for an amendment procedure. Therefore, rather than questioning the underlying premise, the discussion over article V was primarily concerned with establishing its mechanics. The result was that at a time when in the world at large "it was heresy to suggest the possibility of change in governments divinely established and ensured,"[9] the United States formulated a new theory of constitutional government.

II. The Origin of the Mode of State Legislative Ratification

The first mention of legislative participation in the changing of an organic law is found in the *Frame of Government* drawn up by William Penn and his settlers in 1682. This rudimentary amending clause stipulated:

> That no act, law, or ordinance whatsoever, shall at any time hereafter, be made or done by the Governor of this province, his heirs or assigns, or by the freemen in the provincial council, or the General Assembly, to alter, change, or diminish the form, or effect, of this

8. The Records of the Federal Convention of 1787, at 203 (M. Farrand ed. 1937).
9. C. Merriam, The Written Constitution and the Unwritten Attitude 6 (1931).

> charter, or any part, or clause thereof, without the consent of the Governor, his heirs, or assigns, and six parts of seven of the said freemen in the provincial council and General Assembly.[10]

This article not only marks the first establishment of a formal amending power in a fundamental law of government, but it also recognizes the right of the electorate to act through its chosen legislative representatives, who vote upon any proposed alteration in the constitution in an extraordinary procedure. Subsequent charters of Pennsylvania, the *Frames* of 1683 and 1696, also embodied a similar provision,[11] but none of the other colonial charters at any time provided for their alteration. In fact, the next reference to revision is found in seven of the state constitutions promulgated during the period following the Declaration of Independence, and in the Articles of Confederation, which established our first national government in 1781.

These experiences served as excellent guidelines for the later development of article V, although opinions were divided as to how constitutional changes could be made without violating the theory of popular sovereignty. For example, four of the states used the convention method, which required a special election of delegates,[12] whereas three states vested the amendatory power in their elected legislatures.[13] The basic philosophic difference between these modes concerns what degree of direct participation by voters in the process is both desirable and feasible. In the first instance delegates would theoretically stand for election on a declared position regarding some suggested alteration in a constitution, while in the latter case it was believed popularly chosen representatives could be trusted to

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10. F. THORPE, 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHAPTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3059 (1909).

11. The amending clause of 1682 was revised to read:
> That there shall be, at no time, any alteration of any of these laws, without the consent of the Governor, his heirs, or assigns, and six parts of seven of the freemen, met in provincial council and General Assembly. *Id.* at 3063.

12. These states were Georgia, GA. CONST. art. 63 (1777); Massachusetts, MASS. CONST. ch. VI, art. X (1780); New Hampshire, N.H. CONST. part III (1783); and Pennsylvania, PA. CONST. art. 47 (1776).

13. The constitutions of Delaware, Maryland, and South Carolina granted the amending power to the legislatures. DEL. CONST. art. 30 (1776); MD. CONST. art. 59 (1776); S.C. CONST. art. 44 (1778).

effect necessary amendments without violating the people's rights. This disagreement over which procedure most effectively protects the public interest has aroused debate throughout our history and has not yet been resolved.[14]

At the national level a valuable lesson was also learned since the inability of amending the Articles of Confederation was a serious problem contributing largely to their failure. An amendment first had to be proposed unanimously by the state delegations voting as states in the Confederation Congress, and then it required ratification by all state legislatures.[15] Three proposals, which by strengthening national powers would have established a more viable government, were defeated by the obstacle of state unanimity for ratification. Twice the vote of one state prevented amendment: Rhode Island rejected a provision for raising money from import duties[16] and New York vetoed a general revenue plan.[17] A third resolution relating to national control of commerce in the United States also failed ratification in several states.[18]

Considering the previously mentioned tenets of American constitutional theory, it was inevitable that an effort would be made in the Convention of 1787 to improve upon national and state experiments with amending formulas. However, the delegates expressed a sharp division as to what method should be incorporated into the new Constitution. Advocates of a strong central government favored giving Congress the exclusive power of proposing amendments. Proponents of states' rights endorsed the idea that a national convention, convened at the request of two-thirds of the state legislatures, be able to initiate constitutional amendments. The question of how to amend the Constitution was first introduced at the Convention when Edmund Randolph presented the Virginia Plan, which recom-

14. *See* text accompanying notes 21-40 *infra*. For a discussion of this disagreement on other occasions when convention ratification was advocated, see Martin, *supra* note 2.

15. ARTS. OF CONFEDERATION art. XIII.

16. This proposed amendment, which would have permitted the Confederation government to levy a five percent *ad valorem* import duty, was defeated in 1782. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 110-11 (1970).

17. This proposal, also involving the levying of an import duty, was rejected in 1783. T. NORTON, THE CONSTITUTION: ITS SOURCES AND APPLICATIONS 170 (1964).

18. This amendment was designed to end the bickering among the states by giving the Confederation government control over interstate commerce. It was rejected in 1783. *Id.*

mended an amending clause that did not require congressional participation.[19] Yet, neither this suggestion nor the ones favoring initiation of constitutional amendments by the national legislature considered the matter of ratification. This part of the amending process was evidently disregarded until discussion ensued over how the Constitution should be approved. In those debates concerning methods of ratification, there was a comparison between the merits of the convention method versus the legislative mode.

To begin with, Oliver Ellsworth of Connecticut moved for ratification by state legislatures.[20] Colonel George Mason immediately challenged this recommendation since he believed "a reference of the plan to the authority of the people [to be] one of the most important and essential of the Resolutions."[21] In his opinion the state legislatures did not have the legitimate power to perform the ratifying function because:

> They are the mere creatures of the State Constitutions, and cannot be greater than their creators. . . . Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them.[22]

Moreover, Mason believed that even if the legislatures were clothed with the authority to approve the Constitution, they were not the proper agencies to sanction the organic law of the people inasmuch as their successors would have an equal right to repudiate their decision.[23] Thus, he asserted, if the proposed national Constitution were ratified by the state legislatures, it could be assailed by the aforementioned legal arguments which could prove detrimental to its efficacy and to its esteem in the minds of the people.

Edmund Randolph next advocated state conventions as a means

19. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 121 (M. Farrand ed. 1937).
20. 2 *Id.* at 88.
21. *Id.*
22. *Id.*
23. On this point, Mason was concerned that the "National Govt. would stand in each State on the weak and tottering foundation of an Act of Assembly." This dubious status, he indicated, existed "[i]n some of the States [whose] Govts. were [not] derived from the clear & undisputed authority of the people." His own state, Virginia, was given as an example where "[s]ome of the best & wisest citizens considered the Constitution as established by an assumed authority." *Id.* at 88-89.

of reducing the influence of a few individuals who would oppose any constitutional change in the benefits they enjoyed under the existing system. He anticipated that the most likely source of opposition to a new constitution would come from "the local demagogues who will be degraded by it from the importance they now hold."[24] This group, Randolph contended, "will spare no efforts to impede that progress in the popular mind which will be necessary to the adoption of the plan. . . ."[25] Since these men controlled the state legislatures, ratifying conventions were consequently a better way to minimize the power of entrenched political interests. Furthermore, Randolph warned the convention to consider "that some of the States were averse to any change in their Constitution, and will not take the requisite steps, unless expressly called upon to refer the question to the people."[26] Therefore, submission of the Constitution to a vote of the people could also ensure action by the states.

Two other members also favored ratification by conventions. Hugh Williamson of North Carolina believed that "[c]onventions were to be preferred as more likely to be composed of the ablest men in the States."[27] Nathaniel Gorham of Massachusetts, on the other hand, presented a more elaborate defense, contending first that:

> In the States, many of the ablest men are excluded from the Legislatures, but may be elected into a Convention. Among these may be ranked many of the Clergy who are generally friends to good Government. Their services were found to be valuable in the formation & establishment of the Constitution of Massachts [sic].[28]

It was also emphasized that members of a specially elected convention would more honestly examine the subject than legislators who would lose some state prerogatives to the new government. Gorham was more impressed by the facility accompanying reference to special unicameral assemblies of the people, in comparison to legislative impediments such as bicameralism and the interruptions of "a variety of little business" designed by opponents to delay "if not to

24. *Id.* at 89.
25. *Id.*
26. *Id.*
27. *Id.* at 91.
28. *Id.* at 90.

frustrate altogether the national system."[29]

Despite the cogency of arguments favoring ratification by popular conventions, several delegates, chiefly those considered as friends of states' rights, defended legislative ratification of the Constitution. In doing so, Elbridge Gerry attacked the use of popular conventions for the purpose of sanctioning the proposed Constitution, because he could envision only great confusion resulting from reference to the people. Not only would the people never be able to agree on anything, but it was beyond Gerry's comprehension to suppose that the people would act any differently than their "rulers," for after all, the rulers "will either conform to, or influence the sense of the people."[30]

Another defender of ratification by state legislatures, Oliver Ellsworth, attempted to refute the argument advanced by Mason. Answering the latter's assertion that state legislatures did not have the power to ratify a national constitution, Ellsworth remonstrated that "a new sett [sic] of ideas seemed to have crept in since the Articles of Confederation were established."[31] He contended that the popular convention as an institution derived from the sovereignty of the people existed neither in theory nor in practice at the time the Articles of Confederation were formed, because the latter's powers were derived from the state legislatures, which exclusively could make alterations in the national government. Therefore, Ellsworth reminded his fellow delegates that the state legislatures were considered then as being competent to approve national articles; and he added parenthetically, "[t]heir ratification has been acquiesced in without complaint."[32]

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29. Regarding article V, the constitutional historian, Charles Warren, believed "the insertion of this alternative mode of ratification by convention had undoubtedly been due to the same liberal republican spirit which had pervaded the framing of the Constitution in other respects." Influenced by Gorham's commentary, this conclusion was based on the prevalence of voting restrictions and preclusions from officeholding in the states. These requirements applied to state legislatures, but they were not applicable in all states to special conventions which were elected to represent the sovereignty of the people. C. WARREN, THE MAKING OF THE CONSTITUTION 677 (1947).

30. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 90 (M. Farrand ed. 1937).

31. *Id.* at 91.

32. In addition, the gentleman from Connecticut believed Mason's contention that each succeeding legislature could undo the acts of their predecessors to be unfounded, and he preemptorily dismissed it in the beginning of his argument with his own contention that

Another delegate, Rufus King of Massachusetts, agreed with Ellsworth that the state legislatures had the necessary authority to ratify a national constitution; he also believed that "the acquiescence of the people of America in the Confederation" could be construed as "equivalent to a formal ratification by the people."[33] Nevertheless, he stated a preference for referring the proposed constitution "to the authority of the people expressly delegated to Conventions, as the most certain means of obviating all disputes & doubts concerning the legitimacy of the new Constitution; as well as the most likely means of drawing forth the best men in the States to decide on it."[34] To substantiate his reasoning, King used an objection made in New York against granting certain powers to the Congress under the Articles of Confederation. Some citizens of this state, he pointed out, had argued "that such powers as would operate within the State, could not be reconciled to the State Constitution; and therefore were not grantible [sic] by the Legislative authority."[35] Recognizing that there was disagreement with Ellsworth's views, King decided convention ratification could better eliminate many difficulties such as the "scruples which some members of the State Legislatures might derive from their oaths to support & maintain the existing Constitutions."[36] Hence, this argument, like Gorham's, was based on expediency, not on popular sovereignty and the theory of participation by the people in the making of constitutions.

This debate over how the new Constitution should be ratified was appropriately capped by James Madison. In his opinion the state legislatures were clearly incapable of ratifying the proposed changes inasmuch as "[t]hese changes would make essential inroads on the State Constitutions, and it would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence."[37] Madison also believed that if all state legislatures were empowered by their constitutions to pass upon alterations of the national articles there would be no problem; but since some

"[a]n act to which the States by their Legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself." *Id.*

33. *Id.* at 92.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 92-93.

state constitutions had not conferred this authority on their legislatures, he concluded it would be necessary to obtain a ratification by the people. But, according to one commentator, Madison was more concerned with consulting the people on such matters because "[h]e considered the difference between a system founded on the Legislature only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *Constitution*."[38] This postulate was the crux of Madison's discourse; characteristically, he stated it with a well-conceived defense for founding a constitution on the will of the people.

From the standpoint of "moral obligation" Madison admitted that a league or treaty was probably as sacrosanct as a constitution, but he asserted there were two important distinctions which favored the latter from the standpoint of "political operation." These were:

> (1) A law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void.
>
> (2) The doctrine laid down by the law of Nations in the case of treaties is that a breach of any one article by any of the parties, frees the other parties from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation.[39]

In contradistinction to the legislative mode, ratification by the people in conventions could, therefore, establish the new Constitution as the supreme law of the land while ascribing the important quality of permanence to the proposed union. Concluding his address to the delegates, Madison simply noted that, if for no other reason, expediency favored the convention mode as had been explained by other delegates.[40]

Although the founding fathers selected the convention alternative for approval of the Constitution, their debate over ratifying means manifested some strong sentiments in favor of the legislative method. Therefore, when article V was being formulated, it is sur-

38. *Id.* at 93.
39. *Id.*
40. *See* text accompanying notes 21-29 *supra.*

mised, in the absence of any debates on the matter, that both convention and legislative ratification were probably included as a compromise which satisfied both sides. The only dissatisfaction expressed against the ratification section of the amending clause was by Roger Sherman of Connecticut, who attempted several times to delete any mention of how many state approvals would complete ratification.[41] He ostensibly wanted to let future Congresses decide on a quota according to the circumstances of each case, but inasmuch as he did not include a proviso to this effect in his motions there may have been an ulterior motive, since merely stating "ratification of the states" could be interpreted as requiring the consent of all states. Perhaps for this reason the Convention rejected Sherman's logic as it likewise disregarded Elbridge Gerry's complaint against ratification by conventions in three-fourths of the states.[42] Aside from these objections no one else manifested concern about the ratification formula.

When the Constitution was before the states' ratifying conventions, it was opposed principally because there was not a specified bill of rights. Article V received very little attention, despite its novelty and its involvement in the famous "gentleman's agreement" to propose, as soon as the First Congress was convened, a bill of rights to the Constitution as a condition for securing ratification. Only in Virginia was article V severely criticized, with Patrick Henry assailing the proponents' contention that "it was a plain, easy way of getting amendments." Not only did Patrick Henry believe it would prove difficult either to get two-thirds of Congress to propose amendments or to secure applications for them from two-thirds of the states; he was also convinced that ratification by three-fourths of the states would be virtually impossible, since a bare majority in the four smallest states:

> [M]ay hinder the adoption of amendments, so that we may fairly and justly conclude that one twentieth part of the American people may prevent the removal of the most grievous inconvencies [sic] and oppression, by refusing to accede to amendments. A trifling minority may reject the most salutary amendments.[43]

41. *Id.* at 629-31.

42. *Id.* at 633. *See* text accompanying note 30 *supra.*

43. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 49-50 (J. Elloitt ed. 1941).

Despite their apparent validity, these arguments carried very little weight among other delegates who were more inclined to accept the interpretations of James Madison and George Nicholas, the latter of whom especially believed the provision of alternative modes assured the success of needed constitutional alterations. Yet, Patrick Henry's analysis has particular merit for legislative ratification as illustrated by the contemporary problems associated with the approval of the Equal Rights Amendment for Women (ERA). These implications will be discussed later, but first the history of the legislative mode of ratification needs to be examined.

III. The Precedent of Legislative Ratification

Following ratification of the Constitution there was an immediate controversy in the First Congress over which ratifying means should be used for the proposed Bill of Rights. In this first instance of adding amendments to the Constitution, the decision to use the legislative mode was evidently based on a misinterpretation of article V. James Madison, the leading participant in proposing the resolutions to fulfill the "gentleman's agreement" seems to have been guided by the "connected modes concept" which inviolably coupled the modes of proposal and ratification. That is, congressional proposal required legislative ratification; conversely, convention proposal required convention ratification.[44] During this period, Madison wrote several letters in which he clearly stated his concern over choosing the most efficacious of these two methods for amending the Constitution. For example, on November 2, 1788, he wrote G. L. Turbeville that since there is agreement on the need for amendments "[t]he only question remaining is which of the two modes provided be most eligible for the discussion and adoption of them."[45]

Even though it is contrary to the stipulation of article V that Congress has the power to select the ratifying means, the idea that the mode of proposal automatically determines which alternative of ratification will be used was unquestionably accepted in at least

44. For a detailed explanation of this concept, *see* Martin, *Madison's Precedent of Legislative Ratification for Constitutional Amendments*, 109 Proc. of the Am. Philos. Soc'y 47-52 (1965).

45. 1 The Writings of James Madison 298 (G. Hunt ed. 1900-1910).

some quarters during the early years under the Constitution. The most explicit reference to the concept is found in the debates of the Eighth Congress with regard to the twelfth amendment. There, Senator Plumer of New Hampshire noted that the Constitution provided only two methods for its amendment—convention and legislative. As to the convention method, Plumer pointed out that Congress, after receiving the petitions of two-thirds of the states, must call a national convention to propose amendments, which for ratification are "not to be sent either to the State legislatures who requested the Convention, not to Congress who called it; but to a Convention chosen by the people in each State."[46] Plumer's division of the convention mode into the stages of proposal and ratification is elucidated by his additional commentary that "[t]hese State conventions will have the sole and exclusive power of approving or rejecting the amendments."[47] Moreover, it was asserted that "[t]hese two kinds of Conventions have each a check upon the other—each have particular authority delegated to them."[48] The other method was indicated to be that "if two-thirds of both houses of Congress deem it necessary to propose amendments, and three-fourths of the State Legislatures ratify them, they are valid."[49]

Senator Plumer was not alone in advocating the theory of connected modes, for Senator Tracy of Connecticut observed:

> Two-thirds of both Houses of Congress shall deem it necessary to propose amendments, and three-fourths of the State Legislatures shall ratify such amendments, before they acquire validity. I speak now sir, of the mode which has always been, and probably will be put in practice to obtain amendments. The other constitutional mode is equally guarded as to numbers. . . .[50]

Referring to the framing of the Constitution, Tracy remarked that "[i]t was well known to the Convention that amendments, if rec-

46. WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803-1807, at 46-47 (E. Brown ed. 1932). While reporting its essence, the official record of debates has an incomplete version of Plumer's speech. 15 ANNALS OF CONGRESS 153 (1803).

47. 15 ANNALS OF CONGRESS 153 (1803).

48. *Id.*

49. *Id.*

50. *Id.* at 175.

ommended or proposed by Congress, would have an imposing influence with the State Legislatures."[51] There is no evidence indicating, however, that the concept of "connected modes" existed in the Philadelphia Convention.

The two Senators were not alone in espousing this conception of article V, for Representative Thatcher of Massachusetts commented:

> The Constitution has . . . made each House of Congress and the State Legislatures a check upon each other; else why are two-thirds of both Houses of Congress; and Legislatures of three-fourths of the several States required by the Constitution to concur in an amendment.[52]

Another argument over whether the resolution under consideration should read "which when ratified by three-fourths of the Legislatures of the several States" or "which when ratified by the Legislatures of three-fourths of the said States" was ended by Representative Thomas of New York, who did not believe it necessary to mention the mode of ratification in the resolution submitting an amendment.[53] In his opinion the mere fact that Congress proposed an amendment meant that it would have to be ratified by the legislatures of the states.[54]

Thereafter the record is silent on the point of "connected modes," but it is evident that this concept affected the amending process for some time, as subsequent amendments proposed by Congress called for legislative ratification, thereby establishing a precedent not broken until December 12, 1860. During this period, 783 amendments were proposed with 482 of them to be ratified by state legislatures. The remainder did not mention ratification, but there is no reason to suppose that if these resolutions had been seriously considered, the prescribed ratification would not have been by state legislatures.

IV. State Procedures for Legislative Ratification

Because only the legislative alternative was used until the twenty-

51. *Id.* at 176.
52. *Id.* at 743.
53. *Id.*
54. *Id.*

first amendment was proposed by Congress in 1933, the states had a number of opportunities to develop procedures for processing proposed federal constitutional amendments. In the absence of any specifications in article V, however, the states were not always consistent in the manner in which they considered resolutions, but gradually a relatively standard procedure evolved in the legislatures across the nation.

A. The Committee Stage

Following the Congressional example, the states have generally developed the same precedent of referring proposed amendments to committees for study before a vote is taken in each house. In 1972 a questionnaire survey[55] conducted through the Legislative Reference Service[56] or the equivalent in each state,[57] found that both houses of 46 legislatures usually refer proposed amendments to committee for consideration before any floor action is taken. In none of these states, however, is participation in the amending function controlled by statutory authority, which means that states can by-pass committee deliberation in favor of floor decision-making. This happened, for example, in the case of the twenty-fourth amendment when both chambers of the Rhode Island legislature immediately brought the resolution to the floor for approval by unanimous consent.[58]

Of the remaining four states Connecticut has a Joint Committee on Constitutional Amendments and Massachusetts has a Joint Judiciary Committee, both of which handle the preliminary discussion of federal resolutions before reporting recommendations to their respective chambers for a final vote. Only in Arizona is a proposal taken up directly on the floor without first going through the committee process, but Nebraska has traditionally followed the same

55. This approach was used because the procedures employed by the state legislatures have not been previously studied.

56. Many states provide bill-drafting assistance and other forms of legislative research through an established bureau. *See* C. ADRIAN, STATE AND LOCAL GOVERNMENTS 347 (1972).

57. In some states there is a legislative council which consists of selected legislators who study matters to be considered in the next session. It is assisted by a professional staff which also performs the functions of a legislative reference service. *Id.*

58. Reported in the questionnaire response by the Joint Committee on Legislative Affairs for Rhode Island on July 16, 1972.

practice even though consideration by the Governmental and Military Affairs Committee is permissible under its legislative rules.

While in theory the committee system guarantees a thorough investigation of alterations in the Constitution, experience with this procedure indicates that it is susceptible to manipulation by a small minority who oppose a particular change in the Constitution. This problem was discerned in the First Congress by Representative Thomas Tucker of South Carolina, who predicted that legislative ratification could be far more difficult than anyone had anticipated. Comparing the modes of ratification, Tucker perceived that as slow and uncertain as the convention method might be, ratification by state legislatures "is still worse" because "[t]he Legislatures of all the States consist of two independent, distinct bodies; the amendment must be adopted by three-fourths of such Legislatures; that is to say, they must meet the approbation of the majority of each of eighteen deliberative assemblies."[59]

The problem foreseen by Tucker soon occurred in the case of the following proposition:

> If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever from any emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them or either of them.[60]

The adoption of this amendment lacked only the vote of one state. It was rejected on March 12, 1811, by the New York Senate, thereby ending its chances in that state.[61] In South Carolina, though, it was approved by the Senate on November 28, 1811, but consideration was postponed by the lower house on December 21, 1811.[62] The resolution was reported unfavorably from committee in the next session of the legislature, and the South Carolina lower house de-

59. 1 ANNALS OF CONGRESS 716 (1789).

60. 22 ANNALS OF CONGRESS 530 (1810).

61. H. AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 329 (1897) [hereinafter cited as AMES].

62. *Id.*

cided not to consider it further on December 7, 1813.[63] In the meantime it was generally supposed in Congress, as a result of the South Carolina Senate's affirmative vote, that the amendment had been ratified by the requisite number of twelve states, and in the official edition of the Constitution of the United States, printed for the use of the Fifteenth Congress, the Title of Nobility resolution appears as the thirteenth amendment.[64] Upon being informed of this mistake, Congress corrected the error, but the general public continued to think that the amendment had been adopted. Consequently, one commentator has discovered that for over a third of a century the presumed addition was included in privately prepared editions of the Constitution and in history texts.[65]

Tucker's evaluation of the complications inherent in the gauntlet presented by legislative ratification was most recently reiterated in 1969 when the House of Representatives was debating its resolution to have the President and Vice-President elected directly by the people. Urging the use of the convention mode, Congressman Robert McClory of Illinois asserted that it promised a greater probability of success because national polls reported that 80 or 81 percent of the people supported the popular vote plan while estimates of state legislative opposition ranged somewhere between 10 to 15 states.[66] On this score it was pointed out that an amendment only has to be confirmed by 38 state ratifying conventions, whereas achieving concurrence can be much more difficult via the legislative mode because a proposal is considered by 99 decision-making bodies.[67] Anticipating that the less populous states would naturally be opposed to the amendment since the direct election plan would logically result in presidential candidates concentrating their campaigns on metropolitan areas, a few other farsighted members also believed that the convention alternative should be used, but the motion was easily defeated on the grounds that history had proven the success of the legislative method.[68] Obviously, this precedent is very strongly established in Congress.

63. *Id.*
64. *Id.* at 188.
65. *Id.* at 189.
66. For a report of this analysis, see 115 CONG. REC. 25973 (1969).
67. Nebraska has a unicameral legislature.
68. 115 CONG. REC. 25977 (1969).

Another intricacy of legislative ratification, that of committee resistance, is illustrated by the experience of the ERA. During the three years it has been before the states, this resolution has encountered stiff opposition in several legislative committees, and final approval probably depends upon clearing this obstacle. For example, in Virginia the ERA has been "pigeonholed" for two consecutive years (1973-74) by the House of Delegates' Privileges and Election Committee.[68.1] Supporters of the amendment contend that there have been enough votes on the floor for ratification, but their efforts to discharge the amendment from the committee have failed. This controversy has even involved the Virginia Attorney General, whose office prepared a memorandum used by the committee in making its decision not to report the proposal. According to this opinion, ratification might mean the end of separate rest rooms for men and women, both sexes drafted into the military services and girls in the cadet corps at the Virginia Military Institute.

The Virginia episode demonstrates how a minority of legislators can preclude an entire state legislature from acting on a matter of national responsibility. In this instance, the votes of only 12 of the 20 committee members were needed to prevent further consideration. Since 46 of the states usually begin the process of deliberation at the committee level, there is actually a total of 184 bodies in these states participating in the decision-making permitted by article V of the Constitution. Adding to this number the joint committee procedures of Connecticut and Massachusetts and the floor action policy of Arizona and Nebraska, the final total of decisional units concerned with ratification is 193, a much greater figure than the enumerations of Representatives Tucker[69] and McClory.[70] Herein lies a previously undiscussed aspect of the legislative mode which, on one hand, has the advantage of checking ill-conceived constitutional changes by providing a great deal of discussion on any proposal, but on the other hand, has the disadvantage of minority obstruction to an alteration widely desired by the American public.

B. Constitutional Lobbying

The diffusion of amendment decision-making in many state legis-

68.1. During the 1975 session of the General Assembly the Senate Privileges and Election Committee initially reported the bill out to the Senate floor. The entire Senate voted, by a small margin, to recommit the bill to the Committee, which, by a vote of 8 to 7, decided not to report the ERA back to the Senate floor.

69. *See* text accompanying note 59 *supra*.

70. *See* text accompanying note 67 *supra*.

latures furnishes ample opportunity for the application of external organizational pressure either to pass or to reject a proposed amendment. Although this phenomenon of American politics has affected the amending process throughout this century, it has received very little publicity. One of the first accounts explaining how a legislature may be influenced in the ratifying process was published in 1970 on the fiftieth anniversary of the nineteenth amendment's adoption, when a national magazine featured the recollections of Harry T. Burn, who cast the tie-breaking vote for ratification in the Tennessee House of Representatives on August 18, 1920.[71] Tennessee was the last chance for ratification before state legislative sessions would be held again two years later. Therefore, its legislature was called into special session, at which time a bitter struggle began between the suffragettes and their opposition, with the legislators being subjected to all of the tactics used by lobbyists.

A more recent study has disclosed how the powerful national lobby, Common Cause, campaigned successfully for the ratification of the twenty-sixth amendment, which lowered the voting age to eighteen years.[72] This organization researched each state where the resolution was expected to face stiff opposition for the purpose of mapping a strategy to achieve ratification. Pressure was brought to bear on legislatures through mailings from the general public, advertising on the news media, personal persuasion and so forth. The efficacy of these efforts was evidenced by the fastest time for ratification on record and by the subsequent use of the same techniques by both sides in the current controversy over ratifying the ERA.

The advent of constitutional lobbying in the state legislative ratifying process has led to some efforts to control it. Anticipating the possibility of state legislatures being pressured by organized groups into accepting unpopular amendments, Ohio amended its constitution in 1918 to require a referendum following its legislature's decision to ratify or to reject a federal constitutional change. After the Ohio legislature approved the Prohibition Resolution, a state citizen petitioned for an injunction to prevent the holding of a referendum

71. Cahn, *The Man Whose Vote Gave Women the Vote*, 34 LOOK, Aug. 25, 1970, at 60.

72. A. Yowell, Ratification of the Twenty-Sixth Amendment, (1970) (unpublished M.A. thesis, Virginia Polytechnic Institute and State University).

by claiming that such action was an unconstitutional use of state funds. When the Supreme Court reviewed the claim in *Hawke v. Smith*,[73] it ruled, first, that under the Constitution, Congress has the plenary power to select the mode of ratification to be used by the states.[74] Second, the Court emphasized that "ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word."[75] Instead, it was pointed out that ratification "is but the expression of the assent of the State to a proposed amendment."[76] The Court found the basis for separating the functions of state legislatures in the following interpretation:

> It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.[77]

It was further believed that the prevalence of this view in the Philadelphia Convention of 1787, coupled with the desire to avoid conflicting action in the states, explains why Congress was wisely given exclusive control over selecting the means of ratification.[78]

Several years after striking the requirement of a referendum, the Supreme Court, in *Leser v. Garnett*,[79] ruled against the stipulation contained in several state constitutions which required that following the submission of an amendment to the states, the regularly scheduled legislative election must be held before the legislature could take any action on it. In this way the voters would have an opportunity to express their opinion about a proposal for which there was public concern. Reiterating the essence of its decision in *Hawke v. Smith*, the Court again precluded any state-prescribed

73. 253 U.S. 221 (1920).
74. *Id.* at 227.
75. *Id.* at 229.
76. *Id.*
77. *Id.* at 230.
78. Despite the finality of the ruling in *Hawke v. Smith*, it was repeated recently with regard to a similar provision in the Florida Constitution. *See* Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973).
79. 258 U.S. 130 (1922).

alterations to article V's ratifying modes.[80] Thus, the only alternative available to the state legislatures for sampling public opinion on a proposed federal constitutional amendment is a public hearing conducted during the committee stage of the ratifying process. At present only Connecticut requires the holding of a public hearing, but Nebraska explicitly has this prerogative if it chooses to refer a resolution to committee. While they do not so specify in their rules and regulations, other states at times use the device of a public hearing, which is obviously constitutionally permissible inasmuch as it is a long-standing practice of legislatures to conduct their business in this manner. It is clear from Supreme Court rulings, however, that any other reform designed to secure more public participation in the legislative method of ratification will have to be initiated by a constitutional amendment.

C. Voting

Since article V is silent on the matter, the states have set their own policies concerning what percentage of the membership in each legislative chamber is necessary to approve a proposed resolution. In the past some of the states have required a majority of two-thirds to correspond with the congressional quota.[81] However, the recent survey of state procedures[82] reports that today only the Washington legislature and the Kansas lower house use the two-thirds rule. This means, of course, that from a numerical standpoint it is not as difficult to ratify an amendment before a state legislature as it is to propose it in Congress, a fact which may explain why only five rather obscure resolutions have failed of ratification.[83]

In the absence of a constitutional statement on the subject, the Supreme Court has ruled in *Coleman v. Miller*, that whereas questions involving ratification voting procedures and quotas are political in nature, they must be answered by the elected legislature, not the judiciary.[84] Thus, the upper house of a state legislature was allowed to decide whether a lieutenant governor who presided over

80. *Id.* at 137.
81. *See* AMES, *supra* note 61, at 297.
82. *Supra* note 55.
83. *Supra* note 3.
84. Coleman v. Miller, 307 U.S. 433 (1939).

that chamber could cast the tie-breaking vote on the Child Labor Amendment.[85] A similar controversy has recently developed over the ratification of the ERA. During the summer of 1974, a majority of the Illinois Senate approved the ERA, but the president of that body ruled that a two-thirds vote was needed.[86] Supporters of the proposed amendment are planning an appeal to a three-judge federal court[87] but, following the *Coleman* decision, it seems unlikely that the special court will answer such a question.

D. Reporting Procedure

Once a state legislature has voted on a proposed amendment, the decision is communicated to the governor who merely transmits the result to the Administrator of General Services Administration who keeps the official record of ratifications and rejections. A governor does not have the power either to sign or to veto the legislature's decision.[88] Likewise, the General Services Administrator only reports the count of states which have completed their actions. He does not have the authority to rule on the validity of ratifications or rejections or, in the instance of recent events, rescissions. The answers to these questions must be found in Congress.

V. RESCISSION OF RATIFICATION

As previously noted, Nebraska and Tennessee have rescinded their ratifications of the ERA, and several other states have contemplated the same course of action.[89] If enough of the remaining states ratify the proposed amendment, the matter will become moot, but there will remain the issue of whether a state can constitutionally reconsider its decision. In *Coleman v. Miller*, the Supreme Court held that a state can later ratify an amendment after it has been previously rejected by the legislature,[90] but for an answer to the question of rescission it is necessary to look elsewhere.

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85. *Id.* at 438.

86. Washington Post, July 14, 1974, at A2, col. 1.

87. *Id.*

88. According to an early case, neither the President nor a state governor can constitutionally participate in the amending process because it is a constituent function to be performed by the elected representatives of the people in either the convention or legislature. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

89. 32 CONG. Q. 175 (1974).

90. Coleman v. Miller, 307 U.S. 433 (1939).

A. *The History of Rescission*

The first occurrence of a state withdrawing its approval involved the fourteenth amendment. New Jersey and Ohio rescinded their ratifications before three-fourths of the states had given their consent, and both states justified their actions on the grounds that since the amendment had not been incorporated into the Constitution, a state still had the prerogative of reconsidering its decision.[91] Congress, disagreeing with this contention, ordered that the New Jersey and Ohio ratifications be counted as official and irrevocable.[92] Before any appeal could be taken to court, enough states accepted the amendment to end all opportunity for litigation. Later, Oregon withdrew its consent to the fifteenth amendment[93] while Tennessee reached a similar decision on the nineteenth amendment,[94] but in both cases the action was meaningless as the amendments had already been adopted by three-fourths of the other states when the rescissions were made.

In recent years the states have competed for the honor of being the 38th state to ratify an amendment, and this development has led to a humorous incident concerning article V. In the case of the twenty-fifth amendment North Dakota, on February 10, 1967, ratified the proposal,[95] only to discover that it was the 37th and not the 38th state to do so. Immediately North Dakota withdrew its consent to await another state's ratification, but in the meantime Minnesota, thinking it would be the 38th, approved the amendment,[96] as did Nevada within a short time.[97] North Dakota's rescission was evidently accepted because Minnesota and Nevada were declared respectively to be the 37th and 38th states to ratify the twenty-fifth

91. This episode is reviewed in AMES, *supra* note 61, at 299.

92. The only reason given by Congress for its decision was that since article V mentions only ratification and does not refer to rejection, the New Jersey and Ohio resolutions were irregular and therefore invalid. 15 Stat. 708 (1868).

93. Oregon withdrew its ratification on October 15, 1868, whereas the fourteenth amendment was officially proclaimed ratified on July 28, 1868. *Id.*

94. C. TANSILL, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES: 1889-1926, S. Doc. No. 93, 69th Cong., 1st Sess. 281 (1926).

95. Reported in the questionnaire response of the North Dakota Legislative Council. *See* note 55 *supra*.

96. This ratification is recorded for February 10, 1967. S. REP. No. 91-1367, 91st Cong., 2d Sess. 2 (1970).

97. *Id.*

amendment.[98] Obviously, this event does not constitute a solid precedent for judging later cases.[99] However, the reaction of Congress to the New Jersey and Ohio rescissions must be considered as a valid precedent.[100] In addition, there is a solid theoretical justification for denying a state the right to withdraw its ratification.

B. The Theory of Nonrescission

It has been noted earlier in this article that the separation of fundamental law from ordinary statutory law was essential in developing the concept of constitutional amendment.[101] Accordingly, a special procedure is required to make a change in the Constitution because it is the statement of fundamental law. The distinction between fundamental and ordinary law was incorporated in article V by demanding a vote of two-thirds of the members of both houses of Congress for the proposal of amendments to the Constitution, a greater majority than is demanded for the passage of ordinary legislation.[102] In a like manner the greater majorities required for the calling of a national convention to propose amendments and for the ratification of resolutions by the states are based on the theory that issues concerning fundamental law are of a higher order than matters involving ordinary law. This difference was emphasized by the Supreme Court in *Hawke v. Smith*, when it delineated the lawmaking function of a state legislature from its capacity to ratify

98. *Id.*

99. According to the official report of ratification for the twenty-fifth amendment, the National Archives did not receive any information from North Dakota. If its rescission was received, certainly no decision was made on its validity. A probable explanation for what happened is that both of North Dakota's actions were disregarded since the requisite number of ratifications also occurred on the same day, thereby mooting the issue. At any rate, there is no evidence of a decision which establishes a solid precedent. *Id.*

100. In his analysis Orfield does not believe that this is a strong 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." ORFIELD, *supra* note 4, at 20. In *Coleman v. Miller*, however, the Supreme Court confirmed the congressional precedent by stating that:

> Thus the political departments of the Government dealt with the effect both of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification. . . . This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted. 307 U.S. 433, 449-50 (1939).

101. *See* text accompanying notes 5-7 *supra*.

102. The Constitution provides that a majority of each house "shall constitute a Quorum to do Business." U.S. CONST. art. I, § 5.

proposed constitutional amendments.[103] In approving an alteration to the Constitution a state legislature acts on behalf of the sovereign people who, in theory, have the sole power to make and change the fundamental law of a nation.[104]

While there was disagreement in the Philadelphia Convention over which mode was most appropriate for ratifying the Constitution,[105] there was no objection[106] to including the legislative method alongside the convention method as an equally valid alternative.[107] Under the legislative method, two-thirds of both houses of Congress can propose amendments and three-fourths of the state legislatures can ratify the amendments. Therefore, when a state legislature acts upon a proposed federal constitutional amendment, it does so in the special capacity of the peoples' representative in a process which was created by the founding fathers to make the Constitution an enduring, viable body of fundamental law.[108]

With regard to the ratification of an amendment, the theory separating fundamental and ordinary law holds that once a state has agreed to an amendment the decision cannot later be rescinded, but conversely, a state can later accept an alteration it has previously

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103. *See* text accompanying notes 75-78 *supra*.

104. On this point the Maine Supreme Court has ruled that:

> [T]he state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law making body, but is acting in behalf of and as representatives of the people as a ratifying body under the power expressly conferred upon it by Article V. The people through their [national] Constitution might have clothed the [state] Senate alone, or the [state] House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. *In re* Opinion of the Justices, 118 Me. 544, 546-47, 107 A. 673, 674 (1919).

105. There was no discussion of the modes, as the question over which was the most theoretically correct method for promulgating a new constitution had evidently been resolved in favor of the Convention, while for proposing and ratifying amendments to a constitution either the convention or the legislative mode was considered satisfactory. *See* text accompanying notes 20-40 *supra*.

106. The vote of the states on article V was nine to one. The New Hampshire delegation was divided, and New York did not vote. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 631 (M. Farrand ed. 1923).

107. The theory that both the convention and legislative method are equally representative of the people in amending state constitutions has always prevailed among the states, all of which today authorize the use of either mode. BOOK OF THE STATES 4 (1974).

108. *See* notes 103 and 104 *supra*.

rejected.[109] This concept was first invoked in 1865 when the Kentucky legislature rejected the thirteenth amendment. When the resolution of rejection was submitted to the Governor, he returned it to the legislature with the following message:

> When ratified by the legislatures of the several States, the question will be finally withdrawn, and not before. Until ratified, it will remain an open question for the ratification of the legislatures of the several States. When ratified by the legislature of a State, it will be final as to such State; and, when ratified by the legislatures of three fourths of the several States, will be final as to all. Nothing but ratification forecloses the right of action. When ratified, all power is expended. Until ratified, the right to ratify remains.[110]

The rationale supporting this concept is provided by the doctrine of political or social compact.[111] Although this idea is a hypothesis for explaining the origin of a constitution, it also serves the purpose of establishing a basis in fundamental law for relationships between individuals, between citizens and their governments and between the components of a federal system such as the United States. Since the Constitution was ratified by the authority of the states, it is considered in theory to be a compact among equal states. According

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109. In *Coleman v. Miller* the Supreme Court deferred to the judgment of the political branches of the government in accepting this thesis. It was thus noted that:

> The argument in support of that view is that Article V says nothing of rejection but speaks only of ratification and provides that a proposed amendment shall be valid as part of the Constitution when ratified by three fourths of the States; that the power to ratify is thus conferred upon the State by the Constitution and as a ratifying power, persists despite a previous rejection. 307 U.S. 433, 447 (1939).

110. Message of Governor Bramlette of March 1, 1865, to the Kentucky Legislature. Cited in JAMESON, *supra* note 7, at 520. According to Jameson, this interpretation of article V has a great deal of historical legitimacy. In his opinion the evidence indicates that:

> It could hardly have been unintentional, that the contingency of a rejection of the proposed amendment by one or more States was left unprovided for; and it would seem a stretch of power to interpolate into that article a provision, that if rejected by one legislature or by three fourths of even all of the legislatures, such action should be taken to be definitive. On the contrary, it is reasonable to suppose the convention intended to give to dissenting legislatures an opportunity to recede from an application of their negative which circumstances might show to be hasty and disastrous. *Id.* at 520-21.

111. This doctrine means that a government is based on the consent of the governed, who have agreed through the promulgation of a contract to accept certain duties and responsibilities in return for the government's guarantee of individual rights. JAMESON, *supra* note 7, at 68.

to this concept, a state can later accept an alteration it has previously rejected because a rejection has not changed the governmental system or the conditions under which it functions. On the other hand, it is not possible for a state to later reject an alteration it has accepted without affecting those states which have agreed to make the proposed change. Once a state has agreed to a change in the fundamental law it can reverse its decision only by securing the consent of the requisite number of states in the amending process, in the same manner that prohibition was repealed by the twenty-first amendment. Article V, then, provides the mechanism for preserving the sanctity of agreements in fundamental law, and a state cannot legitimately revoke its ratification of an amendment to the fundamental law anymore than it can abrogate its consent to the formation of the American Union in the original ratifying conventions.[112]

VI. Conclusion

After analyzing all of the evidence, it is apparent that the mode of state legislative ratification involves more than the mere approval of a proposed federal constitutional amendment. It is a forum for constitutional discussion, an arena for competing political forces and conflicting ideologies and a fortress for defending the constitutional system. In short it is a distinctive process within the total amending process. Over the years the legislative mode has served the nation well, and as more is learned about the intricacies of its operations, some reforms will probably be made to improve its effectiveness.

112. The tenet that a state cannot revoke its consent to the formation of the American union was expressed in the Philadelphia Convention. *See* note 32 *supra*. The Supreme Court endorsed this thesis in Texas v. White, 74 U.S. (7 Wall.) 700 (1869).

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