

**April 2016**

**United States Constitutional  
Amendment Process  
Legal Principles for State  
Legislators**

**Research Department**  
Minnesota House of Representatives

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The Research Department of the Minnesota House of Representatives is a nonpartisan professional office serving the entire membership of the House and its committees. The department assists all members and committees in developing, analyzing, drafting, and amending legislation.

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This publication is a general reference guide for state legislators and state legislative staff on the history and legal principles related to amending the United States Constitution.

**About This Publication.** This publication is designed for state legislators and state legislative staff as a reference guide for finding and understanding applicable law related to amending the U.S. Constitution.

This publication is part of a series of House Research Department documents exploring the role of the legislature in amending both the U.S. Constitution and Minnesota's state constitution.

The constitutional amendment series is designed as a guide for Minnesota legislators to (1) understand the powers of the legislature—and the constraints on the legislature's power—in proposing, ratifying, and submitting amendments to the people; and (2) provide a history of the Minnesota Legislature's actions related to federal and state constitutional amendments. Other publications in this series include:

- *Minnesota Constitutional Amendments: History and Legal Principles*, House Research Department, 2013
- *Legislative Approval of Proposed Constitutional Amendments (1894-2013)*, House Research Department, 2013
- *United States Constitutional Amendments: Minnesota's Legislative History*, House Research Department, 2016

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## Introduction

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The process of amending the United States Constitution—provided in Article V of the Constitution—presents a unique challenge for state legislatures as institutions, as well as for individual members of a state legislative body. This is partly due to its relatively rare implementation and also because the case law interpreting the requirements of the process has not led to a clear and concise body of law. Instead, much of the law has developed through a collection of cases arising out of particular circumstances, in particular states, at particular times across history.

**About the Case Law.** Many of the principles discussed in this publication come from rulings of the U.S. Supreme Court, but others have been generated by decisions of lower courts (including federal district and appellate courts, state supreme courts, and state courts of appeal).

While lower court decisions do not carry the same legal weight and do not have the same nationwide reach as decisions of the U.S. Supreme Court, they are included in order to capture the full breadth of legal analysis and principles that have been applied to the constitutional amendment process over time.

Several of the cases discussed are cited multiple times throughout the publication. Rather than providing full case background and analysis at each citation, the case discussion is limited to the specific points of law applicable to the topic heading under which it is cited.

## United States Constitutional Amendment Process: [Article V](#)

The process for amending the U.S. Constitution is established by Article V:

*The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.*

The U.S. Supreme Court has declared that the Article V amendment process is the only method of adding or removing language from the constitution.<sup>1</sup>

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<sup>1</sup> *Ullman v. United States*, 350 U.S. 422, 428 (1956).

**Proposal of Amendments by Congress or Convention.** The text of Article V provides two possibilities for proposing an amendment:

- (1) Congress may propose an amendment to the states, upon a two-thirds vote of both houses; or
- (2) A convention may propose an amendment to the states. A convention is called by Congress, on application of two-thirds of the states.

**Ratification of an Amendment by the States.** Once an amendment is formally proposed, ratification may occur through one of two processes, as determined by Congress:

- (1) Ratification by three-fourths of state legislatures; or
- (2) Ratification by three-fourths of states, acting by state convention.

The substance of proposed amendments is not limited, except that an amendment may not modify the balance of power among states in the Senate, without the consent of each affected state.<sup>2</sup> Article V also contains now obsolete language prohibiting certain types of amendments from being adopted prior to the year 1808.

## Summary of Procedure: Amendments Proposed by Congress

The procedure for proposing amendments, submission to the states, and final ratification follow the requirements of Article V, provisions of federal law, and the customs and practices that have developed to guide the process over time.<sup>3</sup> An amendment generally follows this path:

- (1) Proposal by Congress
- (2) Submission to States
- (3) Ratification

**Proposal by Congress.** Congress is empowered to submit a proposed amendment to the states on a two-thirds vote of both the House of Representatives and the Senate. The custom of Congress is that amendment proposals are formatted as a joint resolution.

The content of the joint resolution includes the text of the proposed amendment and the method of state ratifications (by legislatures or by state conventions). For the past century, nearly all

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<sup>2</sup> In 1922, the Supreme Court heard a challenge to the 19th Amendment (women's suffrage), based on a claim that it impermissibly violated a state's autonomy as a political body if the state failed to ratify the amendment (the petitioners were from Maryland, which had not ratified the amendment). This claim was rejected. *Leser v. Garnett*, 258 U.S. 130 (1922).

<sup>3</sup> See <https://www.archives.gov/federal-register/constitution/>, last accessed February 2, 2016.

resolutions have also included a deadline for state ratification.

**Submission to States.** Upon approval by Congress, the proposed amendment is forwarded to the National Archives and Records Administration's Office of the Federal Register (it is not presented to the president for approval). The Office of the Federal Register publishes the proposed amendment, and prepares a package of informational materials on the ratification process for delivery to each state.

The Archivist of the United States sends the proposed amendment and informational materials to each state's governor. The state's governor then submits the proposal to the state legislature for consideration.

**Ratification.** When a state has ratified an amendment, it must submit a set of paperwork back to the National Archives and Records Administration. The Office of the Federal Register verifies that the documents appear to be in proper order and acknowledges receipt. The National Archives and Records Administration also receives records of other legislative actions—such as rejection of an amendment or rescission of a ratification—but it does not make any substantive determination about the validity of these actions.

When it appears that a sufficient number of states have ratified a proposed amendment, the Archivist of the United States issues a proclamation certifying that the amendment has been ratified. The certification is published and serves as official notice of ratification.

A ratified amendment is effective as of the day a sufficient number of state ratifications are completed, not on the day the certification is proclaimed.

Further discussion of ratification procedure is provided in Parts 1 and 2.

## **Summary of Procedure: Amendments Proposed by Convention**

Apart from the requirements of Article V, there are no provisions of federal law, or established customs and practices that direct a specific procedure related to convening or administering a convention. A federal convention has not occurred since the original convention was convened to draft the constitution in 1787.

The experiences of individual states in amending their state constitutions by convention—which has occurred with some regularity over time—may be helpful in considering the issues that might arise in a federal convention, and in considering how those issues might be resolved.

Over time, state legislatures have developed customs and practices for submitting applications for a convention to Congress. Congress has never taken action in response to these applications, or in response to the customs and practices used to submit them.

Further discussion of historic practices and issues related to conventions is provided in Part 4.

## Ratification Data

Through 2015, all proposed amendments have been submitted to the states on the initiative of Congress; 26 of 27 ratified amendments have been ratified by the vote of state legislatures. One amendment (the 21st, repealing prohibition) was ratified by the vote of state conventions.

Table 1  
**Proposal and Ratification Data, Ratified Amendments<sup>4</sup>**

Amendment	Proposed by Congress	Method of State Ratification	Ratification by 3/4 of States
<b>1st to 10th – Bill of Rights</b>	September 25, 1789	Legislatures	December 15, 1791
<b>11th – State Sovereignty</b>	March 4, 1794	Legislatures	February 7, 1795
<b>12th – Electoral College</b>	December 9, 1803	Legislatures	June or July, 1804
<b>13th – Abolition of Slavery</b>	February 1, 1865	Legislatures	December 6, 1865
<b>14th – Due Process, Equal Protection, and Rights of Citizenship</b>	June 13, 1866	Legislatures	July 1868
<b>15th – Voting Rights based on Race</b>	February 26, 1869	Legislatures	February 1870
<b>16th – Income Tax</b>	July 12, 1909	Legislatures	February 3, 1913
<b>17th – Direct Election of Senators</b>	May 13, 1912	Legislatures	April 8, 1913
<b>18th – Prohibition</b>	December 18, 1917	Legislatures	January 16, 1919
<b>19th – Women’s Suffrage</b>	June 4, 1919	Legislatures	August 18, 1920
<b>20th – Terms of Office; Presidential Succession</b>	March 2, 1932	Legislatures	January 23, 1933
<b>21st – Repeal of Prohibition</b>	February 20, 1933	Ratifying Conventions	December 5, 1933
<b>22nd – Presidential Term Limits</b>	March 24, 1947	Legislatures	February 27, 1951
<b>23rd – District of Columbia Electoral Rights</b>	June 16, 1960	Legislatures	March 29, 1961
<b>24th – Poll Taxes Prohibited</b>	September 14, 1962	Legislatures	January 23, 1964
<b>25th – Presidential Succession</b>	July 6, 1965	Legislatures	February 10, 1967

<sup>4</sup> The data contained in this table is consistent with that reported in “Amendments to the Constitution of the United States of America,” Constitution of the United States of America: Analysis and Interpretation, United States Congress, U.S Government Printing Office (2014), available at: <https://www.congress.gov/constitution-annotated/>. Last accessed December 14, 2015.

<b>Amendment</b>	<b>Proposed by Congress</b>	<b>Method of State Ratification</b>	<b>Ratification by 3/4 of States</b>
<b>26th – Voting Rights Based on Age</b>	March 23, 1971	Legislatures	July 1, 1971
<b>27th – Congressional Salaries</b>	September 25, 1789	Legislatures	May 7, 1992

Table 2  
**Proposal and Ratification Data, Amendments Proposed but Not Ratified<sup>5</sup>**

<b>Amendment</b>	<b>Proposed by Congress</b>	<b>Method of State Ratification</b>	<b>Ratification Period</b>
<b>Congressional Apportionment</b>	September 25, 1789	Legislatures	N/A
<b>Titles of Nobility</b>	May 1, 1810	Legislatures	N/A
<b>Prohibiting Elimination of Slavery by Constitutional Amendment (“Corwin” Amendment)</b>	March 2, 1861	Legislatures	N/A
<b>Child Labor</b>	June 2, 1924	Legislatures	N/A
<b>Equal Rights Amendment</b>	March 22, 1972	Legislatures	Expired June 30, 1982
<b>District of Columbia Representation</b>	August 22, 1978	Legislatures	Expired August 22, 1985

<sup>5</sup> The data contained in this table is consistent with that reported in “Proposed Amendments Not Ratified by the States,” Constitution of the United States of America: Analysis and Interpretation, United States Congress, U.S. Government Printing Office (2014), available at: <https://www.congress.gov/constitution-annotated/>. Last accessed December 14, 2015.

# Part 1: Powers and Duties of Congress and the Federal Government

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Congress is the primary institution of the federal government with authority over the constitutional amendment process. The National Archives and Records Administration (NARA) also plays a ministerial role related to certification of amendments upon proposal and ratification.

This part is divided into the following sections:

- (1) Procedural Issues in the Federal Legislative Process
- (2) Administration of the Ratification Process

A separate discussion of the role of Congress and the Federal Government in Article V Conventions is contained in Part 3.

## Procedural Issues in the Federal Legislative Process

**Congress’s power to propose amendments includes the power to establish a deadline for ratification by the states. A deadline established by Congress is a political question and is not subject to judicial review.**

Early amendments proposed by Congress did not specify a deadline for ratification—leaving some unratified amendments still technically pending before the states today. A deadline first appeared in a proposed amendment in 1917, when Congress proposed what later became the 18th amendment (prohibition). Nearly every amendment since that time has included a deadline for ratification, either in the text of the proposed amendment itself or in the “preamble” language that appears in the congressional resolution prior to the substantive amendment text.<sup>6</sup>

*Dillon v. Gloss.* In 1921, the Supreme Court heard a challenge to the application of the 18th amendment (prohibition). An individual convicted of transporting liquor in violation of the new amendment and some related laws argued that the amendment was not properly ratified, because Congress included a seven-year ratification deadline in the proposed amendment; he claimed that inclusion of the deadline was unconstitutional.

In reviewing the history of the amendment process and the text of Article V, the Court held:

- (1) the constitution requires ratification within a reasonable time; and

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<sup>6</sup> Exceptions to the modern custom of including a ratification deadline are the 19th amendment (women’s suffrage) and the proposed child labor amendment.

(2) Congress is within its powers to set a definite deadline for ratification.<sup>7</sup>

As part of its analysis, the Court noted that both the proposal of an amendment and its ratification “are not treated as unrelated acts, but as succeeding steps in a single endeavor...” and that ratification by the states must be “sufficiently contemporaneous...to reflect the will of the people in all sections at relatively the same period...”<sup>8</sup>

***Coleman v. Miller.*** In 1939, the Supreme Court heard a challenge by several **Kansas** state legislators against their leadership officers, related to the legislature’s actions on the proposed child labor amendment. The case led to many individual legal precedents, which are discussed in applicable sections throughout this publication.

In the context of the right of Congress to set ratification deadlines, the *Coleman* case restated the analysis outlined in *Dillon*—proposed amendments must be ratified within a reasonable time, and Congress may specify an appropriate deadline—and took it one step further, rejecting any authority for the Court to second-guess Congress’s deadline for ratification, declaring the issue a “political question.”<sup>9</sup>

A “political question” is a specific term used to describe issues that, in the Court’s judgement, are more appropriately decided by the legislative and executive branches of government (the “political” branches) rather than by the judicial branch.<sup>10</sup>

The *Coleman* court held that a judgment about the appropriate “reasonable time” for ratification of an amendment is a political question because it relies on “an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice...” and that “[t]hey can be decided by the Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social, and economic conditions which have prevailed during the period since submission of the amendment.”<sup>11</sup>

***Idaho v. Freeman.*** The proper placement of the ratification deadline in a resolution proposing an amendment was the subject of controversy in the 1970s and early 1980s, when Congress extended the deadline for states to ratify the proposed Equal Rights Amendment by nearly three years—from March 21, 1979, to January 30, 1982. The ratification deadline in the amendment had been placed not in the proposed constitutional text, but in the resolution language introducing the proposed new text.

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<sup>7</sup> *Dillon v. Gloss*, 256 U.S. 368, 375-376 (1921); *See also United States v. Gugel*, 119 F.Supp. 897 (E.D. Ky., 1954).

<sup>8</sup> *Id.* at 374-375.

<sup>9</sup> *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

<sup>10</sup> A complete discussion of the political question doctrine is beyond the scope of this publication. For further discussion of political questions in the context of constitutional amendments, see Part 4.

<sup>11</sup> *Coleman*, 307 U.S. at 453-454.

In 1981, the extended ratification period for the proposed Equal Rights Amendment was challenged as a violation of Article V. A federal district court in **Idaho** held that the extension was improper, because it caused uncertainty as to the status of the proposed amendment and was not adopted by a two-thirds vote of Congress as required by Article V.<sup>12</sup>

The district court's ruling was put on hold after the U.S. Supreme Court agreed to hear an appeal, but the Supreme Court later ordered the case dismissed before reaching the substance of the challenge, because the extended ratification period had expired without any additional ratifications. Because there was no longer an active controversy for the court to decide, the issue was moot.<sup>13</sup>

Scholars continue to debate whether Congress's extension of the ratification period for the proposed Equal Rights Amendment was a valid exercise of its Article V powers, and the issue remains unsettled by the courts.

**27th Amendment (Congressional Salaries).** In 1992, constitutional amendment ratification deadlines again became an issue when it became apparent that the required three-fourths of states had submitted ratifications on the 27th amendment. The amendment was proposed to the states in 1789, but the final ratifications occurred more than 200 years later; the text of Congress's proposal to the states did not include a deadline for ratification.

In submitting their ratifications, several states—including **Minnesota**, in 1989—noted the *Coleman* precedent and the significant passage of time since the amendment was proposed.<sup>14</sup>

The long passage of time did not prevent the amendment from being certified as properly ratified, and Congress has not taken any action since ratification to suggest that it disagrees with the certification.

**The congressional process for submitting a proposed amendment to the states for ratification requires a two-thirds vote, in each body, of all members present and voting on the question.**

*State of Rhode Island v. Palmer* (“**National Prohibition Cases**”). In 1920, the Supreme Court addressed a series of challenges to the validity of the 18th amendment (prohibition). Several cases were consolidated and are commonly referred to as the “National Prohibition Cases.”

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<sup>12</sup> *Idaho v. Freeman*, 529 F.Supp. 1107, 1152 (D. Idaho, 1981). The district court case also addressed the powers of a state to reject an amendment or rescind a prior ratification. These issues are discussed later in this publication.

<sup>13</sup> *Idaho v. Freeman*, 459 U.S. 809 (1982).

<sup>14</sup> See [Minnesota Laws 1989, Resolution No. 6](#); See also 138 Cong. Rec. S8387 (1992) (Illinois); 138 Cong. Rec. S6837 (1992) (Colorado); 135 Cong. Rec. 5821 (1989) (Iowa).

Included among the legal challenges was a claim that the amendment was invalid because it was not properly approved by Congress. According to this theory, a two-thirds margin of members voting on the proposed amendment was insufficient; instead, it was asserted that a two-thirds vote of the entire membership of Congress was required (in essence, members abstaining or not present at the time the vote was taken would be counted as “no” votes).

The Supreme Court rejected this challenge, holding that “the two-thirds vote in each house...is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership, present and absent.”<sup>15</sup> It did not include further discussion or analysis of this point in making its decision.<sup>16</sup>

### **The act of proposing an amendment to the states is sufficient evidence of Congress’s determination that the amendment is “deemed necessary.”**

The opening phrase of Article V provides that: “[t]he Congress, whenever two-thirds of both houses *shall deem it necessary*, shall propose amendments...” (emphasis added). The Supreme Court has held that an act of Congress to “deem” an amendment “necessary” is not required.

***State of Rhode Island v. Palmer* (“National Prohibition Cases”).** In the 1920 “National Prohibition Cases,” the Court addressed a claim that the 18th amendment was invalid because there was no evidence that Congress had “deemed it necessary” to amend the Constitution.

The Supreme Court rejected this challenge, holding that the mere proposal of the amendment “sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential.”<sup>17</sup> The Court further noted that, in practice, prior amendments proposed by Congress had never contained such a declaration.<sup>18</sup>

### **The substance of a proposed amendment does not limit Congress’s discretion to determine the method of ratification by states.**

Among the key features of Congress’s Article V power is its authority to determine the method of ratification—either by a state’s legislature or by a state convention. Of all amendments proposed by Congress, only one—the 21st (repeal of prohibition)—was directed to be ratified by state convention. All others have been submitted for ratification by each state’s legislature.

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<sup>15</sup> *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920).

<sup>16</sup> The court’s opinion cites *Missouri Pacific Railway Co. v. Kansas*, 248 U.S. 276 (1919) as support for its ruling. This principle is also supported by *State of Ohio ex rel. Erkenbrecher v. Cox*, 257 F. 334 (S.D. Ohio, 1919).

<sup>17</sup> *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920).

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

***United States v. Sprague.*** In 1931, the Supreme Court heard a challenge to the validity of the 18th amendment (prohibition). The challengers asserted that the amendment’s substance required ratification by state conventions. The challengers believed that it was the intent of the Constitution’s framers to limit the authority of state legislatures to cede authority over personal liberties to the federal government; the right to enact prohibition, in their view, was reserved to the people by the 10th amendment.

The Court rejected this argument. It noted the framers could have written Article V differently: “If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler that so to phrase Article V as to exclude implication or speculation...”<sup>19</sup>

The opinion also relied on past practice; in the court’s view, many of the amendments ratified by state legislatures affect rights in the same manner as prohibition—including the 13th (abolition of slavery), 14th (due process, equal protection, and rights of citizenship), and others. The Court’s unstated but clear implication was that, if the challenge to the 18th amendment succeeded, many other widely accepted amendments would be at risk of similar challenge.<sup>20</sup>

## **There is no official role for the President of the United States in the amendment process.**

Although U.S. presidents often take political positions on proposed amendments as they are being considered by Congress or the states, the text of Article V provides no official role for the president in the proposal or ratification process.

***Hollingsworth v. Virginia.*** In 1798, the Supreme Court heard a challenge to the 11th amendment (state sovereignty). After approval by Congress, the proposed amendment was sent to the states despite not having been approved by the president.

The Court held that a proposed constitutional amendment is not part of the “ordinary business of legislation” that requires presidential approval, and upheld the amendment as valid.<sup>21</sup> As part of its discussion, the Court noted the potential odd result if a presidential veto were permitted, since the threshold to override a veto and the threshold for congressional approval of a proposed amendment is the same—a two-thirds vote of both houses.<sup>22</sup>

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<sup>19</sup> *United States v. Sprague*, 282 U.S. 716, 732 (1931); see also *United States v. Panos*, 45 F.2d 888 (N.D. Ill., 1930).

<sup>20</sup> *Id.* at 734.

<sup>21</sup> *Hollingsworth v. Virginia*, 3 U.S. 378, 381

(1798) <sup>22</sup> *Id.* at 379.

**Ceremonial Presidential Signatures and Other Presidential Acts.** Despite a president’s lack of veto authority, on several occasions presidents have taken on ceremonial—and sometimes more formal—roles in the amendment submission and ratification process.

- In 1978, President **Jimmy Carter** signed Congress’s extension of the ratification period for the proposed Equal Rights Amendment, acknowledging that “the Constitution does not require that the President sign a resolution concerning an amendment to the Constitution of the United States” but that he wanted to “demonstrate...full support for the ratification of the equal rights amendment.”<sup>23</sup>
- In 1971, President **Richard Nixon** participated as a witness in the ratification certification process for the 26th amendment (voting rights based on age).<sup>24</sup>
- In 1964 and 1967, President **Lyndon Johnson** participated as a witness in the ratification certification process for the 24th amendment (poll taxes prohibited) and the 25th amendment (presidential succession).<sup>25</sup>
- In 1868, President **Andrew Johnson** issued a series of proclamations related to ratification of the 14th amendment (due process, equal protection, and rights of citizenship) by several southern states, pursuant to an act of Congress requiring him to do so as a condition of the states’ return to full statehood following the Civil War.<sup>26</sup>
- In 1865, President **Abraham Lincoln** wrote “Approved” and signed his name to the joint resolution of Congress proposing the 13th amendment (abolition of slavery).<sup>27</sup> Within a week of the president’s action, the U.S. Senate adopted a resolution affirming that a presidential signature was unnecessary to the amendment’s proposal.<sup>28</sup>
- In 1861, outgoing-President **James Buchanan** reportedly signed at least one version of Congress’s joint resolution proposing the “Corwin” amendment (prohibiting elimination of slavery by constitutional amendment).<sup>29</sup>

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<sup>23</sup> See President Carter’s Remarks on Signing H.J. Res. 638, 2 Pub. Papers 1800 (October 20, 1978).

<sup>24</sup> See <https://www.archives.gov/federal-register/constitution/>

<sup>25</sup> *Id.*

<sup>26</sup> See 15 Stat. 703 (Proc. 7 – Florida, North Carolina); 15 Stat. 704 (Proc. 8 – South Carolina); 15 Stat. 704 (Proc. 9 – Louisiana); 15 Stat. 705 (Proc. 10 – Alabama); 15 Stat. 708 (Proc. 12 – Georgia).

<sup>27</sup> See Joint Resolution Submitting 13th Amendment to the States; signed by Abraham Lincoln and Congress, February 1, 1865, at The Abraham Lincoln Papers at the Library of Congress, Series 3. General Correspondence. 1837-1897.

<sup>28</sup> *Cong. Globe*, 38th Cong., 2nd Sess. 629-31 (1865).

<sup>29</sup> Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* 2 (2004).

## **Administration of the Ratification Process**

### **The Archivist of the United States is responsible for administering the ratification process, including certifying and publishing amendments that have been ratified.**

The Archivist of the United States, in conjunction with the Director of the Federal Register, carries out various administrative duties related to submission of proposed amendments to each state and receives ratification documents from states that choose to ratify a proposed amendment. When an amendment is proposed, the archivist sends a notification to each state's governor, who then submits the proposed amendment to that state's legislature.

When the archivist has received a sufficient number of state ratifications to indicate that an amendment has been adopted, the archivist certifies the amendment and publishes its adoption in the Federal Register.<sup>30</sup>

Historically, certification of adopted amendments was a responsibility of the U.S. Secretary of State. In 1951, the job was shifted to the Administrator of General Services, and in 1984 it was delegated instead to the archivist.<sup>31</sup>

### **The role of the archivist is a purely ministerial duty.**

Courts have held that the archivist does not have authority to review claims alleging improper ratification of an amendment by a state.

*U.S. ex. rel. Widenmann v. Colby.* In 1920, a challenge to the adoption of the 18th amendment (prohibition) included claims that at least one state ratification was improperly submitted to the secretary of state, who was then responsible for administering the ratification process for the federal government.

The District of Columbia Court of Appeals held that the responsibility of the secretary of state was "purely ministerial" and did not allow for the investigation of claims of impropriety by the states. According to the court:

The secretary was not required, nor authorized, to investigate and determine whether or not the notices stated the truth. To accept them as doing so, if in due form, was his duty. As soon as he had received the notices from 36 of the states that the amendment had been adopted, he was obliged, under the statute, to put forth his proclamation. No discretion was lodged in him.<sup>32</sup>

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<sup>30</sup> See 1 U.S.C., ch. 2, § 106(b).

<sup>31</sup> For more information on the ratification and certification process, see National Archives, The Constitutional Amendment Process, <https://archives.gov/federal-register/constitution>.

<sup>32</sup> *U.S. ex. rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920).

***Leser v. Garnett.*** In 1922, the U.S. Supreme Court heard a challenge to the proper ratification of the 19th amendment (women’s suffrage) by the states of **Missouri, Tennessee, and West Virginia** on grounds similar to the claims in *Colby*. In rejecting the challenge, the Court noted that, “[t]he proclamation by the secretary of state certified that from official documents on file in the Department of State it appeared that the proposed amendment was ratified by the legislatures of 36 states...”<sup>33</sup> and that as each ratifying state “had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him...”<sup>34</sup>

***U.S. v. Sitka.*** In 1988, a challenge to the proper ratification of the 16th amendment (income tax) was filed by a taxpayer who was indicted on several counts for failure to file income tax returns. The taxpayer challenged the authority of the secretary of state to certify ratifications as an unconstitutional delegation of power from the legislative branch to the executive branch, and a violation of separation of powers principles.

The 2nd Circuit Court of Appeals rejected the challenge, holding that the authority of the secretary of state to certify ratification was “purely ministerial; it could not and did not affect the process of ratification itself, which is self-executing upon completion.”<sup>35</sup>

### **Amendments are effective upon ratification by three-fourths of states, not upon the proclamation of the archivist.**

The effective date of an amendment that has been ratified by the states is not contingent upon final certification by the archivist, or any other federal official: according to Article V, an amendment is effective and in full force as of the time it has received a sufficient number of state ratifications to be adopted.

***Dillon v. Gloss.*** In 1921, the Supreme Court heard a challenge to the effective date of the 18th amendment (prohibition): an individual was convicted of violating its provisions (and associated implementing laws), which became effective one year following ratification of the amendment. The violations occurred one day and one year after a sufficient number of states had ratified the amendment, but before the secretary of state formally proclaimed the amendment’s ratification.

The Court held that proclamation of the amendment’s adoption “is not material, for the date of its consummation, and not that on which it is proclaimed, controls.”<sup>36</sup>

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<sup>33</sup> *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

<sup>34</sup> *Id.*

<sup>35</sup> *U.S. v. Sitka*, 845 F.2d. 43, 47 (2<sup>nd</sup> Cir. 1988).

<sup>36</sup> *Dillon v. Gloss*, 256 U.S. 368, 376 (1921). In the *Widenmann* case a year earlier, the D.C. Court of Appeals reached a similar conclusion: an amendment’s “validity does not depend in any wise upon the proclamation. It is the approval of the requisite number of states, not the proclamation, that gives vitality to the amendment and makes it a part of the supreme law of the land.” 265 F. 998 at 1000 (1920).

## **Whether Congress must finally “promulgate” an amendment after ratification is unclear.**

Supreme Court case law suggests that Congress may have some role in affirming that amendments have been ratified, but what that role is, and how it operates, has not been clarified.

*Coleman v. Miller.* In 1939, the U.S. Supreme Court held that Congress—rather than the Court—has ultimate authority in determining whether a state’s amendment ratification was completed within a reasonable time and that other procedural requirements have been met.

The decision has resulted in questions about the need for Congress to act on an amendment’s ratification, or whether the Archivist of the United States can proclaim an amendment’s ratification independently. These issues were not resolved by the Court’s decision.

**27th Amendment (Congressional Salaries).** In 1992, a memorandum written to President George H. W. Bush by the Department of Justice’s Office of Legal Counsel discussed the “promulgation” requirement in detail.

In the context of the apparent ratification of the 27th amendment, the memo concluded that requiring a final act of Congress before an amendment is fully ratified was inconsistent with the text of Article V and inconsistent with the majority of past practices.<sup>37</sup> It suggested that, if an act of Congress were required to finalize a ratification, each constitutional amendment ratified since the 14th amendment would be invalid.

Despite the conclusion of the Office of Legal Counsel, the *Coleman* case does leave open reasonable questions about oversight of the ratification process—particularly in circumstances where a discretionary judgment is required. To date, these questions remain unresolved.

**14th Amendment (Due Process, Equal Protection, and Rights of Citizenship).** In 1868, Congress acted to affirm ratification of the 14th amendment. The secretary of state had already proclaimed the amendment ratified, but had also noted some controversy over the status of ratifications in **New Jersey** and **Ohio**.

The congressional resolution proclaiming the amendment ratified brought clarity to Congress’s view of New Jersey and Ohio’s attempted rescissions of their prior ratifications (Congress did not recognize the attempted rescissions), but did not bring clarity to whether such an act was necessary for the amendment to be finally ratified.

Congress’s action on the 14th amendment is a historical outlier that appears motivated, at least partly, by the political climate and national circumstances unique to the post-Civil War reconstruction era.

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<sup>37</sup> See Office of Legal Counsel, Memorandum Opinion for the Counsel to the President, from Timothy E. Flanigan, Assistant Attorney General (November 2, 1992).

## Part 2: Powers and Duties of State Legislatures and State Government

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The Article V constitutional amendment process is a unique function for state legislatures: while a legislature normally must look to its own state constitution for a source of authority to act, the authority to participate in the process of amending the U.S. Constitution is rooted directly and explicitly in its own text. And while the process of ratification or application for an Article V convention looks, in many respects, like the ordinary process of lawmaking, it is in fact an entirely separate legislative function.

This distinction results in some important—but often subtle—differences between the constitutional amendment process and the normal operations of a legislature. Acts of a legislature to ratify an amendment or apply for a convention must conform to both federal and state procedural requirements and customs.

This part is divided into the following sections:

- (1) [Source of State Legislative Authority](#)
- (2) [Procedural Issues in the State Legislative Process](#)
- (3) [Participation of Voters in the State Ratification Process](#)
- (4) [Alternatives to State Ratification: Rescission and Rejection](#)
- (5) [Ratification of Proposed Amendment by State Convention](#)

Separate discussion of the role of state legislatures and state government in Article V conventions is contained in Part 3.

### Source of State Legislative Authority

**When Congress directs state legislatures to consider ratification of a proposed amendment, a state’s representative lawmaking body is the only entity empowered to ratify the amendment on behalf of the state.**

*Hawke v. Smith.* In 1920, the U.S. Supreme Court heard a challenge to Ohio’s ratification of the 18th Amendment (prohibition). Ohio’s General Assembly had adopted a resolution ratifying the amendment in early 1919. Ohio’s state constitution, however, reserved to the people “the legislative power of the referendum on the action of the

General Assembly ratifying any proposed amendment to the Constitution of the United States.”<sup>38</sup>

The Court held that Ohio’s constitutional allowance for a referendum was inconsistent with the ratification requirements of Article V. Pointing to other provisions of the constitution where a direct vote of the people is required (such as election of members of the House of Representatives), the Court reasoned that the framers could easily have chosen to allow an alternate method for ratification by a vote of the people. Instead, ratification power is limited only to the state legislatures, or conventions of the states if Congress so directs.<sup>39</sup>

### **The power of a state legislature to ratify an amendment is not an act of ordinary state lawmaking that may be altered or restricted by the people.**

The people of a state are empowered through their state constitutions to organize and direct their state’s ordinary lawmaking functions. In some states, this includes a right for direct action through an initiative and referendum process to enact or review laws. However, the people are not empowered—except through their elected state and federal representatives—to participate directly in process of ratifying a proposed amendment.

*Hawke v. Smith.* In its *Hawke* decision, reviewing **Ohio’s** ratification of the 18th amendment (prohibition), the Supreme Court looked to the source of authority that provides the constitutional amendment proposal and ratification process. According to the Court, the U.S. Constitution is the direct source of power for state legislative participation in the ratification process. Because the people of the state have assented to the federal Constitution, they have by definition assented to the amendment process as described in Article V.

The Court distinguished the ratification process from the process of ordinary lawmaking, which is derived from the powers granted to a state legislature by the people of the state:

[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of assent of the state to a proposed amendment...

It is true that the power to legislate in the enactment of 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

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<sup>38</sup> Ohio Const. art. 2, § 1 (as amended November 5, 1918).

<sup>39</sup> *Hawke v. Smith*, 253 U.S. 221, 227 (1920). In 2015, the U.S. Supreme Court referred to this precedent favorably, distinguishing the power of a state legislature to ratify a proposed amendment with the process of lawmaking in the context of redistricting. See *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652, 2666-67 (2015).

ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.<sup>40</sup>

***Leser v. Garnett.*** In 1922, the Supreme Court heard a challenge to the procedures of **Missouri, Tennessee, and West Virginia** in ratifying the 19th amendment (women's suffrage). The challengers pointed to provisions in each state's constitution and legislative rules of procedure that allegedly restricted the power of each state's legislature to ratify the amendment.<sup>41</sup>

The *Leser* Court rejected the challenge, analyzing the issue nearly identically to the analysis of the *Hawke* Court:

[T]he function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.<sup>42</sup>

## Procedural Issues in the State Legislative Process

**State legislatures may adopt procedural rules for ratification of a proposed constitutional amendment, as long as final ratification remains a function of the legislative body.**

Courts have generally upheld state procedural requirements that provide stricter standards for ratifying a proposed amendment compared to ordinary legislation, so long as those stricter standards still conform to the Article V mandate that the ratification be an act of the legislative body.

A complete list of state constitutional provisions and legislative rules that provide unique procedural standards for ratification of a proposed constitutional amendment is included in Appendix 1. Additional customs and practices specific to Minnesota procedure are included within the text of this section.

**Litigation History on Procedural Rules.** Over time, a variety of procedures related to constitutional amendments have been ratified into state constitutions or adopted by state

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<sup>40</sup> *Id.* at 229.

<sup>41</sup> *Leser v. Garnett*, 258 U.S. 130, 136-137 (1922). Though the Supreme Court did not describe the nature of the alleged restrictions on legislative power in its decision, the Tennessee restriction was a requirement for an intervening election prior to the legislature's action on ratification. The restriction in West Virginia was a procedural rule against acting on the same matter twice (the state senate had originally acted to reject the amendment). In Missouri, it was alleged that the state constitution prohibited federal constitutional amendments that would impair the state's right of self-government. See *Leser v. Garnett*, 114 A. 840 (Ct. App. Md., 1922).

<sup>42</sup> *Id.* at 137 (citing *Hawke v. Smith* No. 1, 253 U.S. 221 (1920); *Hawke v. Smith* No. 2, 253 U.S. 231 (1920); *State of Rhode Island v. Palmer (National Prohibition Cases)*, 253 U.S. 350 (1920)).

legislatures in the form of procedural rules. Several of these procedures have been subject to legal challenge:

- **Supermajority Vote Requirements.** In 1975, a supermajority vote requirement was upheld in a federal district court ruling written by then-Judge John Paul Stevens related to **Illinois's** ratification of the proposed Equal Rights Amendment. The Illinois Constitution and the procedural rules of the Illinois Legislature require a three-fifths vote to ratify a proposed constitutional amendment.

According to the Court, "...the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine for itself."<sup>43</sup>

As of 2016, at least four states require a vote greater than a constitutional majority for ratification: **Alabama** (three-fifths of elected membership); **Colorado** (two-thirds of elected membership in House); **Illinois** (three-fifths of elected membership); and **Kansas** (two-thirds of elected membership).

- **Minnesota Practice.** The Minnesota Constitution is silent on the issue of U.S. constitutional amendment ratifications, and there are no surviving records to suggest the Minnesota Legislature has ever adopted rules establishing a supermajority vote requirement for ratification of an amendment or application for a convention.
- **Allowing Lieutenant Governor to Break a Tie.** In 1937, the **Kansas** Senate considered a resolution to ratify the proposed Child Labor Amendment, and the vote among 40 senators resulted in a tie, 20-20. Kansas's lieutenant governor, who also acted as presiding officer of the Senate, cast a tiebreaking vote in favor of ratification.

A group of Kansas legislators—including all 20 senators who had voted against ratification—filed suit challenging, among other things, the right of the lieutenant governor to cast a vote. In 1939, the U.S. Supreme Court heard the challenge, but failed to agree on whether it had authority to issue a ruling.<sup>44</sup> The practical effect of this deadlock was to uphold the lieutenant governor's right to vote.

While many states may allow this tiebreaking procedure as a matter of normal legislative practice, at least one state (North Dakota) allows the lieutenant governor to cast a tiebreaking Senate vote on constitutional amendment ratifications by explicit rule.<sup>45</sup>

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<sup>43</sup> *Dyer v. Blair*, 390 F.Supp. 1291, 1306-1307 (N.D. Ill. 1975). Judge Stevens would later be appointed associate justice of the U.S. Supreme Court.

<sup>44</sup> *Coleman v. Miller*, 307 U.S. 433, 446-47 (1939). More detailed discussion of justiciability and political questions issues is contained in Part 4.

<sup>45</sup> See Senate and House Legislative Manual 2015-2016, 64th Leg. (ND 2015), Senate Rules 323, 339.

- **Minnesota Practice.** In Minnesota, the Senate President is elected from among the Senate membership; the lieutenant governor is not an officer of either legislative body and does not have a role in voting or any other aspects of legislative procedure.
- **Requiring an Intervening Election between an Amendment Proposal by Congress and Ratification by the State Legislature.** The state constitutions of **Illinois, Florida, and Tennessee** all contain provisions that prohibit consideration of a proposed amendment until an election of the legislature has occurred following the proposal.

Courts have noted Article V's delegation of power, and the practical impact of the intervening election requirement, in overturning these provisions: "[w]e do not believe that delegated federal power may be inhibited by a state constitutional provision which, in practical effect, determines whether votes of legislators opposing an amendment shall be given greater, lesser, or the same weight as the votes of legislators who favor the proposal."<sup>46</sup>

- **Minnesota Practice.** There are no surviving records to suggest that an intervening election requirement has ever been proposed or enacted in Minnesota.

### **State legislatures have varying rules related to the style of legislative document used to ratify a proposed amendment.**

Procedural rules in at least 11 state legislatures require ratification of proposed amendments by joint resolution, and at least require ratification by concurrent resolution. It is likely that many other states use one of these forms as a matter of custom and practice. There does not appear to be any case law or past practice of Congress to suggest that any particular form of resolution is preferable to another.

In some states, the style of resolution used to ratify a proposed amendment may impact the vote threshold required for adoption.

A list of legislative rules that explicitly require a certain resolution style is included in Appendix 1.

**Minnesota Practice.** In Minnesota, amendment ratifications and applications for Article V conventions were customarily styled as joint resolutions through much of the 19th and early 20th centuries. Ratifications of the 13th and 14th amendments—the first two amendments ratified by Minnesota after statehood—were styled as concurrent resolutions.

Beginning with ratification of the 23rd amendment (District of Columbia Electoral Rights) in 1961, Minnesota's ratifications and applications for Article V conventions have been styled more simply as: "a resolution."

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<sup>46</sup> *Dyer v. Blair*, 390 F.Supp. 1291, 1308 (N.D. Ill. 1975) (overturning Illinois' provision); *see also Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972) (overturning Tennessee's provision); *Trombetta v. State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973) (overturning Florida's provision).

## **Gubernatorial approval of constitutional amendment ratifications is likely not required by Article V.**

Though never litigated directly, ratification of proposed constitutional amendments have been treated as acts that are not subject to a governor's approval or veto authority. This does not prevent a state from presenting a ratification to the governor according to its own customs and practices.

*Hollingsworth v. Virginia.* In 1798, the Supreme Court held that the president's veto authority does not extend to Congress's proposal of an amendment to the states for ratification, noting that the text of Article V refers specifically to the power of Congress to propose amendments.<sup>47</sup> Since Article V similarly refers specifically to the power of state legislatures (or state conventions) to ratify an amendment, the *Hollingsworth* precedent could support the argument that a state's governor has no role in the ratification process.

*Dillon v. Gloss.* In 1921, the Supreme Court heard an appeal of an individual's conviction for violating the 18th amendment (prohibition) and related laws.

The acts that resulted in the conviction occurred January 17, 1920. The terms of the 18th amendment provided an effective date of one year after final ratification. In deciding the day on which the amendment had been finally ratified, the court took "judicial notice" of the final acts of the state legislature in determining each state's ratification date. The court did not appear to consider any subsequent actions by a state's governor following ratification by its legislature.<sup>48</sup>

**Historic Practices of Federal Government.** The historic practice of Congress and federal officials in certifying amendment ratifications suggests that presentment is not required.

The official record of the Constitution and its amendments published at the direction of Congress relies on the last action of a state's legislature to determine the date of that state's ratification, without regard to whether the governor took action to approve the amendment.<sup>49</sup>

In 1911, the Office of Solicitor in the U.S. Department of State prepared a memorandum on the necessity of a governor's approval, in the context of the state of **Washington's** apparent ratification of the 16th amendment (income tax). **Washington's** ratification had been submitted to the U.S. Secretary of State as required, but the ratification did not include the approval of the governor, which appeared to be in violation of Washington's state constitution.

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<sup>47</sup> *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

<sup>48</sup> *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

<sup>49</sup> See Amendments to the Constitution of the United States of America, Constitution of the United States of America: Analysis and Interpretation, United States Congress, U.S. Government Printing Office (2014), available at: <https://www.congress.gov/constitution-annotated/>. Last accessed December 14, 2015.

The solicitor’s memo includes a thorough review of gubernatorial approval practices across many states for earlier constitutional amendments and appears to conclude—based on those past practices and a consideration of state constitutional law—that the governor’s signature of approval on Washington’s amendment ratification was not required.<sup>50</sup>

Similarly, in 1913, the Office of the Solicitor reviewed an attempt by **Arkansas’s** governor to veto that state’s ratification of the 16th amendment. The solicitor advised the U.S. Secretary of State that the governor’s attempted veto was of no legal effect and that the state of Arkansas should be included among the list of states ratifying the 16th amendment.<sup>51</sup> In proclaiming the amendment ratified, the secretary of state acted consistently with this advice.

**Minnesota Practice.** Despite the lack of a requirement under Article V, Minnesota resolutions ratifying constitutional amendments have customarily been presented to the governor.

There are no surviving legislative records to suggest that Minnesota’s practice of presentment has ever interfered with the ability of the legislature to certify an amendment ratification as required by the U.S. Constitution and federal law.

In 1999, the Joint Rules of the Minnesota House and Senate were amended to exempt joint resolutions ratifying a proposed amendment, or applying for a convention, from the presentment process—instead requiring the Revisor of Statutes to deposit the resolution directly with the Secretary of State.<sup>52</sup> To date, the legislature has not acted to ratify an amendment or apply for a convention in the period since this rule was adopted.

Despite the joint rule, a joint resolution that contains an amendment ratification or application for a convention and that also contains another act of the legislature where presentment to the governor is required, will be presented for signature as required by the Minnesota Constitution.<sup>53</sup>

### **Typographical and other technical errors in processing a resolution do not invalidate ratification.**

With some apparent regularity, state resolutions to ratify proposed amendments have contained technical, grammatical, and other typographical errors. These errors have led to legal challenges.

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<sup>50</sup> Memorandum from P.D.R., Office of the Solicitor, U.S. Department of State, to the U.S. Department of State “Memorandum on the necessity for the governor’s approval of an amendment to the federal constitution approved by the legislature of the state.” (April 20, 1911).

<sup>51</sup> Letter from P.D.R., Office of the Solicitor, U.S. Department of State, to the U.S. Secretary of State (February 20, 1913).

<sup>52</sup> For the current version of this rule, see 88th Legislature, Temporary Joint Rules of the Senate and House of Representatives, 2.07 (2013).

<sup>53</sup> These types of resolutions are not a customary part of Minnesota’s legislative process, but have been introduced and heard in committee. For an example of a proposed resolution that contains both an application for a convention and other items, see S.F. 17, 88th Leg. (Minn. 2013) requesting that Congress propose a constitutional amendment related to the rights of artificial entities to engage in political speech or, in the alternative, applying for a convention for that purpose.

The challenges have not succeeded.

**16th Amendment (Income Tax).** The 16th amendment has been subject to several legal challenges, based on claims that the ratifying resolutions of many state legislatures contained “typographical and punctuation errors.” According to one court’s description, these errors are alleged to be:

...errors of diction, capitalization, punctuation, and spelling. The text Congress transmitted to the states was: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” Many of the instruments neglected to capitalize “States,” and some capitalized other words instead. The instrument from Illinois had “remuneration” in place of “enumeration”; the instrument from Missouri substituted “levy” for “lay”; the instrument from Washington had “income” not “incomes”; others made similar blunders.<sup>54</sup>

In each of the cases, the challengers have asserted that these errors invalidate the state’s ratification. Courts have consistently rejected these claims:

- ***United States v. Wojtas***. In 1985, a district court in **Illinois** rejected the challenge, holding that review of state ratifications are a nonjusticiable political question.<sup>55</sup>
- ***Sisk v. Commissioner of Internal Revenue***. In 1986, the 6th Circuit Court of Appeals held that the apparent errors did not go to the meaning of the amendment and that “inasmuch as the state legislatures are empowered by the constitution only to ratify or reject and not to amend a proposed amendment, it must be presumed, in the absence of any indication to the contrary, that they intended to ratify it.”<sup>56</sup> The court further found no evidence of fraud in the secretary of state’s certification that the amendment had been ratified.
- ***United States v. Thomas***. In 1986, the 7th Circuit Court of Appeals held that review of state ratifications was not proper since the secretary of state had already declared the amendment ratified. In discussing the way these errors were handled, the court noted that states had produced more substantial errors when ratifying earlier amendments, but those errors did not prevent the proposed amendments from being ratified.<sup>57</sup>
- **Memorandum of Solicitor, Department of State**. In 1913, the Office of the Solicitor, in the U.S. Department of State, issued a memorandum that contains a comprehensive review of the many typographical, grammatical, and procedural errors included in state

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<sup>54</sup> *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986).

<sup>55</sup> *United States v. Wojtas*, 611 F.Supp. 118 (N.D. Ill. 1985).

<sup>56</sup> *Sisk v. Commissioner of Internal Revenue*, 791 F.2d 58, 61 (6th Cir. 1986).

<sup>57</sup> *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986).

ratification documents that had been submitted on the 16th amendment and other amendments proposed up until that time.<sup>58</sup>

The types of errors reviewed by the solicitor's memo include:

- Many typographical errors made by state legislatures in printing their resolutions ratifying several proposed amendments. According to the memo, only four state ratifications (out of a total 37 ratifications that had been submitted at the time of the memo) accurately and precisely quoted the 16th amendment's text as proposed by Congress. Many ratifications of earlier amendments also contained errors.
- The **Kentucky** Legislature's quick action to ratify the 16th amendment before the proper paperwork had even been submitted to the legislature by the governor.<sup>59</sup>
- **Minnesota's** failure to submit a copy of its resolution ratifying the 16th amendment to the U.S. Secretary of State. Minnesota instead submitted a notice of ratification in the form of a letter, written by the governor's secretary, indicating that the ratification had occurred.
- The **Arkansas** governor's attempted veto of his state legislature's ratification of the 16th amendment.

It does not appear that any of the issues raised in the memo prevented a state's ratification from being included in the secretary of state's proclamation that the applicable amendment had been ratified.

## **Participation of Voters in the State Ratification Process**

Several courts have held that the voters have no direct role in ratification of a proposed amendment; a final determination on ratification is a function of the state legislature and may not be delegated to the voters. However, the right of states to conduct "advisory" referendums has been upheld.

### **Article V does not permit submission of a proposed amendment to the voters in a binding referendum.**

Courts have rejected nearly all attempts to submit a state legislature's ratification of a proposed amendment to the voters. These attempts were particularly common in response to the proposed

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<sup>58</sup> Office of the Solicitor, United States Department of State, "Ratification of the 16th Amendment to the Constitution of the United States," Memorandum (February 15, 1913).

<sup>59</sup> In addition to the 1913 memo, Kentucky's actions were also considered at length in a separate memo of the solicitor. *See* Memorandum from P.D.R., Office of the Solicitor, U.S. Department of State, to the U.S. Department of State, "Kentucky's ratification of the sixteenth amendment to the federal constitution. Power of a state to withdraw the ratification already given to a constitutional amendment" (March 21, 1912).

18th amendment (prohibition).

### **Prohibition and Women's Suffrage Amendments**

- ***Hawke v. Smith***. In 1918, the voters of **Ohio** adopted a state constitutional amendment reserving the right of the people to approve, by referendum, any action of the Ohio General Assembly ratifying a proposed amendment to the U.S. Constitution.<sup>60</sup>

The following year, Ohio's General Assembly acted to ratify the proposed 18th amendment (prohibition). As directed by the General Assembly's resolution, the governor forwarded the resolution to the U.S. Secretary of State. However, a referendum on November 4, 1919, resulted in Ohio voters rejecting ratification of the amendment.

The U.S. Supreme Court held that the referendum violated Article V. In the Court's view, the power of ratification by state legislatures is derived directly from Article V and is not an ordinary act of legislation over which a state's people have authority to require a referendum.<sup>61</sup>

- **State Supreme Courts**. The U.S. Supreme Court's *Hawke* decision overturned a prior decision of the Ohio Supreme Court holding that the referendum on the proposed 18th amendment was valid.<sup>62</sup> In a separate proceeding, but on the same grounds, the U.S. Supreme Court also overturned a similar ruling of the Ohio Supreme Court on a referendum for the proposed 19th amendment (women's suffrage).<sup>63</sup>

Around the same time as the *Hawke* decisions, state supreme courts in **California, Michigan, Oklahoma, Missouri, and Maine** all rejected attempts to submit state legislative ratifications of the proposed amendment to the voters based on an analysis of the requirements of Article V.<sup>64</sup>

State supreme courts in **Arkansas, Oregon, and Colorado** similarly rejected efforts to submit ratification of the 18th amendment to the voters. However, each of these courts relied on an interpretation of the initiative and referendum provisions in their own state constitution, rather than on an analysis of the legislature's authority under Article V of the U.S. Constitution, to reach its conclusion.<sup>65</sup>

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<sup>60</sup> See Ohio Const. art. 2, § 1 (as amended November 5, 1918).

<sup>61</sup> *Hawke v. Smith*, 253 U.S. 221 (1920). Ohio would go on to conduct a referendum in 1933 on the proposed 21st amendment (repeal of prohibition). Its constitutional referendum language was repealed in November 1953.

<sup>62</sup> *Hawke v. Smith*, 126 N.E. 400 (Ohio 1919).

<sup>63</sup> *Hawke v. Smith*, 253 U.S. 231 (1920).

<sup>64</sup> See *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920); *Decher v. Vaughn*, 177 N.W. 388 (Mich. 1920); *State v. Morris*, 191 P. 364 (Okla. 1920); *Carson v. Sullivan*, 223 S.W. 571 (Mo. 1920); *In re Opinion of the Justices of the Supreme Court of Maine*, 107 A. 673 (Me. 1919).

<sup>65</sup> *Whittemore v. Terral*, 215 S.W. 686 (Ark. 1919); *Herbring v. Brown*, 180 P. 328 (Ore. 1919); *Prior v. Noland*, 188 P. 729 (Colo. 1920). While the Colorado Court's decision was primarily based on an interpretation of

Like Ohio’s Supreme Court, a decision of the **Washington** Supreme Court concluded that Article V does give the voters authority to review the ratification of an amendment by popular vote.<sup>66</sup> However, the U.S. Supreme Court’s *Hawke* decision means the Washington court’s analysis is likely no longer good law.

### **Proposed Equal Rights Amendment**

- **Montana.** In 1974, the Montana Supreme Court rejected an attempt to place the legislature’s prior ratification of the proposed Equal Rights Amendment on the ballot as a referendum question, based on analysis of the requirements of Article V.

In its decision, the Court noted that the referendum would “have been a useless act, since the voters cannot constitutionally compel the legislature to rescind its ratification...”<sup>67</sup>

### **Article V may permit submission of a proposed amendment to the voters in an advisory referendum.**

While a referendum that binds the acts of the legislature (either explicitly or in practical effect) is not permissible, the power of a legislature to submit a proposed amendment to the voters in a purely advisory capacity has been upheld once, but has a mixed record in state advisory opinions.

### **Proposed Equal Rights Amendment**

- **Nevada.** In 1978, the Nevada Supreme Court heard a challenge to a state statute that required a nonbinding referendum, related to ratification of the proposed Equal Rights Amendment. The law explicitly provided that the referendum did not place any legal requirement on legislators to vote on ratification in a particular way. The court upheld the referendum requirement, finding that it “simply specifies a means by which to assist the legislature whether to consent or not to consent to the proposed amendment.”<sup>68</sup>

An appeal made to the U.S. Supreme Court to prevent the referendum from occurring was rejected by Circuit Justice Rehnquist: “If each member of the Nevada Legislature is free to obtain the views of constituents in the legislative district which he represents, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort.”<sup>69</sup>

- **Virginia.** In 1977, the Virginia Attorney General advised the General Assembly that it may, as an alternative to a binding referendum on ratification of the proposed Equal

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the state constitution, the decision also notes that the referendum would have been unconstitutional under Article V, even without the state constitutional analysis.

<sup>66</sup> *Mullen v. Howell*, 181 P. 920 (Wash. 1919).

<sup>67</sup> *State ex. rel. Hatch v. Murray*, 526 P.2d 1369 (Mont. 1974).

<sup>68</sup> *Kimble v. Swackhamer*, 584 P.2d 161, 163 (Nev. 1978).

<sup>69</sup> *Kimble v. Swackhamer*, 439 U.S. 1385, 1388 (1978).

Rights Amendment, conduct a referendum that is “purely advisory and not a precondition to voting on the amendments.”<sup>70</sup>

### **27th Amendment (Congressional salaries)**

- **Idaho.** In 1988, an advisory referendum on ratification of the proposed 27th amendment (Congressional salaries) was conducted in Idaho.<sup>71</sup> The referendum occurred despite advice from Idaho’s attorney general that it likely conflicted with Article V.

The advisory opinion distinguished Idaho’s statute with the advisory referendum in Nevada on the proposed Equal Rights Amendment by noting that Idaho law required the referendum to occur prior to the legislature’s action to ratify a proposed amendment. A similar restriction did not exist in Nevada.<sup>72</sup>

### **18th Amendment (Prohibition)**

- **Massachusetts.** In 1928, the Massachusetts Supreme Judicial Court responded to a request for an opinion from the state’s House of Representatives, relating to a voter-initiated proposal that would have required a statewide advisory vote on a potential repeal of the 18th amendment (prohibition).

The Massachusetts justices found the initiative improper, because the initiative did not propose a “law” or “measure” within the meaning of the state constitution. The court reasoned that “the result of the vote...would be lacking in any effective force” and that “[s]uperficial appearances cannot clothe with the attributes of law something in substance vain and inoperative.”<sup>73</sup>

**Minnesota practice.** With the exception of Minnesota’s ratification of the 21st amendment (repeal of prohibition)—which required ratification by state conventions—all ratification activity in Minnesota has occurred within the legislative process. Minnesota does not have a constitutional allowance for either a binding or advisory citizen initiative or referendum.

During the 1919 legislative session, a bill was introduced to submit ratification of the 18th amendment (prohibition) to the voters.<sup>74</sup> The bill was not enacted.

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<sup>70</sup> *Opinion of the Attorney General to the Hon. Thomas J. Michie, Jr.*, 177-78 Va. Op. Atty. Gen. 154 (1977)

<sup>71</sup> See Idaho Senate Concurrent Resolution 132 (1988).

<sup>72</sup> *Opinion of the Attorney General to The Hon. C.A. “Skip” Smyser*, 1986 Idaho Op. Atty. Gen. 51 (1986).

<sup>73</sup> *Opinion of the Justices Relative to the Eighteenth Amendment of the Constitution of the United States*, 160 N.E. 439, 440 (Mass. 1928).

<sup>74</sup> See H.F. 31, 41st Leg., Reg. Sess. (Minn. 1919).

## **Article V does not permit voter-initiated constraints on the ratification process.**

A series of cases address attempts by the voters of a state to force their legislature to either ratify a proposed amendment, or to apply for a convention to address a particular amendment topic. These attempts have been uniformly rejected.

The proposed voter initiatives typically incorporate punitive coercive measures intended to ensure members' compliance with the voters' instructions. These additional measures have included:

- **Negative Ballot Designations for Legislators Who Fail to Comply.** During the 1990s, interest in enacting term limits for members of Congress resulted in voter initiatives in several states directing state legislative action on the issue. The placement of a negative reference on the ballot of legislators who failed to comply with the voters' instructions was a common feature of these initiatives.

Initiatives in at least seven states have been overturned as an improper constraint on the general powers of the state legislature and the individual power of legislators to exercise their own discretion and judgment in office.<sup>75</sup>

A representative example of a negative ballot designation is a **Colorado** initiative that required placement of the phrase "DECLINED TO TAKE PLEDGE TO SUPPORT TERM LIMITS" or "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" on the general election ballot, next to the name of any legislator or candidate who did not meet the demands of the initiative. Among the actions that would trigger the ballot designation was a legislator's failure to "vote in favor," failure to "second" a motion if needed, and failure to "vote against any attempt to delay, table, or otherwise prevent a vote..."<sup>76</sup>

- **Withholding Legislator Pay until Action Is Taken.** In the 1980s and 1990s, interest in enacting a federal balanced budget amendment resulted in several voter initiatives attempting to address the issue.

In **California**, an initiative directed the state legislature to apply to Congress for a convention on the topic of a balanced budget amendment. If the legislature did not approve the application within 20 legislative days, the pay and benefits of legislators

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<sup>75</sup> See *Morrissey v. State of Colorado*, 951 P.2d 911 (Colo. 1998); *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999); *Miller v. Moore*, 169 F.3d 1119 (8th Cir. 1999); *League of Women Voters of Maine v. Gwadosky*, 966 F.Supp. 52 (D.Me. 1997); *Donovan v. Priest*, 931 S.W.2d 119 (Ark. 1996); *Opinion of the Justices*, 673 A.2d 693 (Me. 1996); *In re Initiative Petition No. 364*, 930 P.2d 186 (Okla. 1996). A related case, but not impacting Article V powers, addresses application of a voter-initiated negative ballot designation requirement on candidates for Congress. *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>76</sup> See Colorado Constitution, Article XVIII, § 12, approved as "Amendment 12" on November 5, 1996. This section was later repealed and replaced with a voluntary term limits declaration. See Colorado Const. Article XVIII, section 12a (2015).

were to be withheld. If the legislature did not approve the application within 40 legislative days, the California Secretary of State was directed to transmit the resolution to Congress on behalf of the state, circumventing the legislative process.

The California Supreme Court considered a variety of issues in a legal challenge to the initiative, and ultimately prevented the proposed initiative from appearing on the ballot on other grounds. But in reviewing the Article V issues, it found that legislators must be “free to vote their best judgment...not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.”<sup>77</sup>

- **Indefinite Continuation of Legislative Session.** An initiative similar to California’s was also proposed in **Montana**. In addition to withholding legislator pay, it required the 1985 legislative session to continue indefinitely, if an application for an Article V convention was not approved within 90 days after the start of the session. Montana’s proposed initiative was declared void by its Supreme Court before appearing on the ballot. The Court held that “such coercion is repugnant to the basic tenets of our representative form of government...”<sup>78</sup>

**Minnesota Practice.** The Minnesota Constitution does not provide a process for voter-initiated action.

## Alternatives to State Ratification: Rescission and Rejection

Nothing in Article V expressly prohibits a state legislature from rejecting an amendment, or from changing its mind on ratification, but (absent litigation) whether such an action carries any legal weight would likely be determined by the Archivist of the United States, in consultation with the U.S. Congress. Although there are no definitive court rulings on this specific point, the Supreme Court’s analysis on the issue of “political questions” in *Coleman v. Miller* supports this conclusion.<sup>79</sup>

Legal scholars, advocates, and other interested groups have written extensively about this issue from a variety of perspectives. To date, a definitive ruling has not been necessary because all amendments that have become a part of the constitution were ratified by a sufficient number of states to make a small number of individual state rejections and rescissions irrelevant, and all amendments that have not been ratified have fallen well short of the required number of state

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<sup>77</sup> *AFL-CIO v. Eu*, 686 P.2d 609, 613 (Cal. 1984). The court distinguished the Article V convention application requirement with a separate provision requiring the legislature to adopt a resolution encouraging action by Congress on the balanced budget amendment. The Court noted that the latter resolution may be permissible, because the power to encourage action by Congress is not derived from Article V. Nevertheless, the whole initiative was declared invalid on substantive grounds related to the proper formatting of an initiative within the meaning of the California Constitution.

<sup>78</sup> *State ex. rel. Harper v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984).

<sup>79</sup> *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

ratifications, even if state rescissions were declared invalid. A list of state legislative actions that rescind, reject, or ratify an amendment after prior rejection is included in Appendix 2.

### **The legal status of rescission and rejection actions is unclear, but historical examples do provide some guidance on how the issue might be handled.**

Several amendments proposed to the states have presented the potential for a substantive dispute over a state legislature’s right to reject or rescind its ratification of an amendment.

**14th Amendment (Due Process, Equal Protection, and Rights of Citizenship).** The 14th amendment was proposed by Congress in June 1866. By July 1868, 28 states (which constituted the required three-fourths of states) had ratified the amendment. However, prior to the 28th state ratification, the state legislatures of both **Ohio** and **New Jersey** acted to withdraw their ratification.

The secretary of state—who, at the time, was responsible for tallying state ratifications and proclaiming amendments fully ratified—and Congress—which acted to accept the ratifications—treated the actions of Ohio and New Jersey as ineffective. The secretary of state’s official proclamation declaring the amendment ratified included Ohio and New Jersey as among the ratifying states, and noted without apparent consequence that both had submitted documentation indicating their withdrawal of consent to the amendment.

In the proclamation, the secretary of state cast doubt on the effectiveness of the withdrawals: “it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two states...”<sup>80</sup> The day following the secretary of state’s proclamation, Congress adopted a joint resolution declaring the amendment ratified, affirming the view of the secretary of state. The secretary of state then issued a new proclamation, removing any doubt as to the status of the amendment.<sup>81</sup>

Even after the amendment was proclaimed to be ratified, other states continued to submit their ratifications—ultimately making the Ohio and New Jersey dispute relevant for only a short period of time. The acts of the secretary of state and Congress in response, however, remain instructive; while the actions of one Congress cannot bind the actions of another, the precedent suggests federal skepticism about the ability of states to rescind their ratifications once submitted.<sup>82</sup>

**15th Amendment (Voting Rights Based on Race).** The 15th amendment was proposed by Congress in 1869, and by February 1870 it appeared that the required number of states had taken

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<sup>80</sup> 15 Stat. 706 (Proc. 11 – 1868).

<sup>81</sup> 15 Stat. 708 (Proc. 13 – 1868).

<sup>82</sup> For further discussion of the 14th amendment issue, including discussion of the ministerial role of the secretary of state and commentary about the validity of the action, and its relation to rescission issues surrounding the proposed Equal Rights Amendment, see *Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment*, Memorandum Opinion for Counsel to the President, Office of Legal Counsel, U.S. Department of Justice, 1 U.S. Op. Off. Legal Counsel 13, 1977 WL 18010 (O.L.C.) (February 15, 1977).

action to ratify it. However, after it had initially acted to ratify the amendment, the state of **New York** adopted a resolution withdrawing its ratification. The withdrawal occurred before the Secretary of State had proclaimed the amendment finally ratified.

The proclamation of the secretary of state certifying the amendment's final ratification noted New York's attempted withdrawal, but counted New York among the necessary three-fourths of states to ratify the amendment.<sup>83</sup> It also separately noted **Georgia's** later ratification of the amendment—making the effect of New York's withdrawal a nonissue.<sup>84</sup>

Unlike the 14th amendment procedure, Congress did not take any action in response to the secretary of state's proclamation of the 15th amendment.

**16th Amendment (Income Tax).** The 16th amendment was proposed by Congress in 1909. In 1910, the **Kentucky** Legislature acted to ratify the amendment. A variety of procedural oddities occurred in the course of the ratification—including that the legislature acted to ratify the amendment before the governor had submitted the proper paperwork to each legislative body, and an apparent effort was made to re-ratify the amendment at a later date, which succeeded in only one body of the legislature.

Confusion as to the status of Kentucky's ratification resulted in a memorandum by the Office of the Solicitor in the U.S. Department of State, addressing both the early ratification, and whether the second attempt to ratify the amendment carried any legal significance. The memorandum discussed the issue of rescission, but concluded that the unique procedural steps taken by the Kentucky Legislature did not result in any doubt about the status of Kentucky's successful ratification.<sup>85</sup>

**Proposed Child Labor Amendment.** The Child Labor Amendment was proposed by Congress in 1924. Initially, the amendment was rejected by at least 26 state legislatures and only affirmatively ratified by five. However, by the mid-1930s, support for the amendment grew, and many state legislatures that had previously rejected the amendment reversed course and took action to ratify it.

*Coleman v. Miller.* The **Kansas** Legislature was among the state legislatures that initially rejected the proposed Child Labor Amendment (in 1925) and later took action to ratify it (in 1937). The ratification after prior rejection was challenged, and the case reached the U.S. Supreme Court in 1939.

The Court reviewed the prior practice of Congress related to the 14th amendment, and held that a determination about the effectiveness of a state's ratification or rejection was an issue that could not be resolved by the judicial branch:

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<sup>83</sup> 16 Stat. 1131-1132 (1870).

<sup>84</sup> *Id.*

<sup>85</sup> See Memorandum from P.D.R., Office of the Solicitor, U.S. Department of State, to the U.S. Department of State, "Kentucky's ratification of the sixteenth amendment to the federal constitution. Power of a state to withdraw the ratification already given to a constitutional amendment." (March 21, 1912).

... the question of efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with ultimate authority in the Congress in the exercise of its control over promulgation of the adoption of the amendment.<sup>86</sup>

The Court found no basis to prevent Kansas state officers from submitting certification of the legislature's ratification to the federal government, implicitly suggesting that Congress retains the authority to determine whether the ratification was improper.

***Chandler v. Wise.*** The **Kentucky** Legislature also was among the state legislatures that initially rejected the proposed Child Labor Amendment (in 1926) and later attempted to ratify it (in 1937). A suit was filed challenging the legislature's right to act on the amendment a second time.

The U.S. Supreme Court ultimately upheld the state's ratification because the issue was moot—the governor had already certified the ratification to Congress. The U.S. Supreme Court decision on the issue did not directly address the ability of a state to change its position on ratification.<sup>87</sup>

The Supreme Court's decision overturned a ruling of the Kentucky Court of Appeals, which held that a state was permitted to act only once and after that, "having acted, it has exhausted its power further to consider the question without a resolution by Congress."<sup>88</sup>

**Proposed Equal Rights Amendment.** The Equal Rights Amendment was proposed by Congress in 1972, and presented the potential for a substantive dispute over the right of a state to reject or rescind its ratification of a proposed amendment. However, it resolved itself without the establishment of a clear legal principle.

During the initial ratification period, state legislatures in at least five states that had previously ratified the amendment took action to rescind their ratifications.<sup>89</sup> The constitutionality of these rescissions was hotly debated by advocates for and against the amendment.

***Idaho v. Freeman.*** The **Idaho** Legislature is among the legislatures that voted to rescind its prior ratification of the proposed Equal Rights Amendment. In 1979, the State of Idaho, along with a group of legislators representing Idaho, Arizona, and Washington filed suit in an effort to compel the federal government to recognize the Idaho Legislature's rescission as valid.

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<sup>86</sup> *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

<sup>87</sup> *See Chandler v. Wise*, 307 U.S. 474 (1939).

<sup>88</sup> *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. Ct. App. 1937).

<sup>89</sup> Rescinding states include Nebraska, Tennessee, Idaho, Kentucky, and South Dakota. Kentucky's rescission is subject to some dispute, on separate procedural grounds.

After substantial discussion of the issues, a federal district court held that a state has the power and right to rescind a ratification of a proposed constitutional amendment, if the rescission occurs before three-fourths of states act to ratify the amendment:

The states are the entity embodied with the power to speak for the people during the period in which the amendment is pending. To make a state's ratification binding with no right to rescind would give ratification a technical significance which would be clearly inappropriate... Until the technical three-fourths has been reached, a rescission of a prior ratification is clearly a proper exercise of a state's power granted by the article V phrase "when ratified," especially when that act would give a truer picture of local sentiment regarding the proposed amendment.<sup>90</sup>

The U.S. Supreme Court initially agreed to hear an appeal of the district court's ruling, but later ordered the ruling vacated and the case dismissed. Once the time period for ratification specified by Congress had expired, there was no longer an active controversy to be decided.<sup>91</sup>

**State Attorney General Opinions.** Attorneys general in several states have written advisory opinions on the topic of rescission of ratification; all are in the context of the proposed Equal Rights Amendment. These opinions include:

- **California.** In 1975, the California Attorney General noted the historic ineffectiveness of state attempts to rescind a ratification, and the case law suggesting that Congress stands as the final arbiter of the ratification process. The attorney general advised that, if California were to rescind its ratification of the proposed Equal Rights Amendment, there was no certainty that Congress would accept it as meaningful.<sup>92</sup>
- **Nebraska.** In 1973, the Nebraska Attorney General responded to concerns about apparent procedural errors in the legislature's adoption of a resolution to rescind its ratification of the proposed Equal Rights Amendment. After a review of applicable case law, the opinion noted that a review of the procedural defects by a court was unlikely, and there was no authority to suggest if or how Congress might address the apparent errors.<sup>93</sup>
- **Tennessee.** In 1973, the Tennessee Attorney General opined that the state was not permitted to rescind its ratification of the proposed Equal Rights Amendment.<sup>94</sup>

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<sup>90</sup> *Idaho v. Freeman*, 529 F.Supp. 1107, 1150 (1981).

<sup>91</sup> *See Idaho v. Freeman*, 459 U.S. 809 (1982).

<sup>92</sup> 58 Ops. Cal. Atty. Gen. 830 (November 6, 1975).

<sup>93</sup> Samuel Freedman and Pamela Naughton, *ERA: May a State Change Its Vote*, pg. 35 (Wayne State Univ. Press 1978) (*citing* Nebraska Atty. Gen. Op. 13 (February 16, 1973)).

<sup>94</sup> *See* Samuel Freedman and Pamela Naughton, *ERA: May a State Change Its Vote*, pg. 36 (Wayne State Univ. Press 1978), (*citing* Letter from Assistant Attorney General Robert H. Roberts to State Representative Victor H. Ashe (March 13, 1973)).

- **Idaho.** In 1973, the Idaho Attorney General opined that the state had no jurisdiction to rescind its ratification of the proposed Equal Rights Amendment. The opinion later clarified that while the legislature had the “power” to act to rescind, the “right” to rescind is ultimately a determination to be made by Congress.<sup>95</sup>
- **West Virginia.** In 1973, the West Virginia Attorney General opined that the state legislature was permitted to rescind, reaffirm, or reverse its position on ratification, if that act occurs prior to ratification by three-fourths of states or rejection by one-fourth of states.<sup>96</sup>

**Minnesota Practice.** There are no surviving records to indicate the Minnesota Legislature has attempted to rescind its prior ratification of a proposed constitutional amendment.

Of the amendments proposed during Minnesota’s statehood, the legislature has rejected two:

- **Proposed Corwin Amendment.** Proposed in 1861, the “Corwin” amendment (prohibiting elimination of slavery by constitutional amendment) was implicitly rejected by the legislature following its failure to take action to ratify it, and its subsequent ratification of the 13th amendment (abolishing slavery).

The legislature’s rejection of the Corwin amendment had no practical impact on that amendment’s failure to achieve full ratification: at its peak, the amendment was ratified by only three states. In the years since it was proposed, at least two of those states have taken action to rescind their ratifications.

- **Proposed Child Labor Amendment.** The proposed Child Labor Amendment was rejected by vote of the Minnesota Legislature in 1925. Eight years later the issue returned, and the proposed amendment was ratified with near-unanimous support.

The legislature’s rejection and later ratification of the proposed Child Labor Amendment had little impact on the proposed amendment’s ultimate fortunes: to date, that amendment remains at least ten states short of full ratification, and the substance of the amendment has been largely made irrelevant by subsequent U.S. Supreme Court case law.

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<sup>95</sup> For exact language and additional details see Idaho Atty. Gen. Op. 73-116 (January 24, 1973) and subsequent letter from Attorney General Wayne Kidwell to State Representatives C.L. Otter and Ralph J. Gines (January 27, 1975), as cited in Samuel Freedman and Pamela Naughton, *ERA: May a State Change Its Vote*, pg. 36 (Wayne State Univ. Press 1978).

<sup>96</sup> See Samuel Freedman and Pamela Naughton, *ERA: May a State Change Its Vote*, pg. 37 (Wayne State Univ. Press 1978) (citing Opinion of Attorney General Chauncey H. Browning, Jr. to Howard D. Kenney (April 4, 1973)).

## Ratification of Proposed Amendment by State Convention

To date, the 21st amendment (repeal of prohibition) represents the only amendment proposed by Congress that has required ratification by a convention in each state, rather than by each state's legislature.

All but one state that existed in 1933 convened some form of convention for purposes of ratifying the amendment. The conventions were organized and convened pursuant to acts of each state's legislature.<sup>97</sup>

### Several states considered submission of the ratifying convention structure to the voters.

**North Carolina.** After the 21st amendment was proposed to the states, the North Carolina Legislature presented voters with a referendum question on whether a convention should be called; on December 5, 1933, the referendum failed. As a result of the state's vote, no convention was called and the state legislature took no further action to ratify the amendment.

The statewide referendum in North Carolina followed an advisory opinion from the Justices of the North Carolina Supreme Court on the constitutionality of the legislation proposing the referendum. While noting the possibility that the issue may be a question to be decided by the U.S. Supreme Court, the advisory opinion supported the right of the legislature to choose the method of convening a ratifying convention. The Chief Justice's opinion advised that the legislature "may exercise its own judgment and provide for the submission of the question...or it may call such a convention in the exercise of its plenary powers..."<sup>98</sup>

**Alabama.** In 1933, the Alabama Supreme Court issued an advisory opinion on the constitutionality of legislation that would set the terms of the state's ratification convention. Among the requirements of the legislation was a statewide referendum on whether the amendment should be ratified, and a requirement that delegates to the convention vote according to the results of the referendum.

Comparing the ratification process to the process of electors casting ballots for president in the Electoral College, the Alabama justices opined that the legislation proposed was permissible according to the requirements of Article V.<sup>99</sup>

**Missouri.** In 1933, the Missouri Supreme Court was presented with a challenge to its referendum requirement, as applied to the laws governing the ratifying convention. The Court held that the state's referendum laws did not apply, because the ratification process remains a

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<sup>97</sup> While not expressly stated in Article V or in Congress's proposal of the 21st amendment, an advisory opinion in at least one state implicitly holds that an act of the legislature is required to organize and convene a state ratifying convention. See *In re Opinion of the Justices*, 148 So. 407 (Ala. 1933).

<sup>98</sup> *In re Opinions of the Justices*, 172 S.E. 474, 479 (N.C. 1933).

<sup>99</sup> *In re Opinions of the Justices*, 148 So. 107 (Ala. 1933).

federal function under Article V, even if the method chosen for ratification is by state convention:

The calling of such convention is but a step necessary and incidental to the final action of the convention in registering the voice of the state upon the amendment proposed by Congress...it is a federal function which, in the absence of action by the Congress, the state Legislature is authorized to perform.<sup>100</sup>

**Maine.** In 1933, Maine's Senate requested an advisory opinion on its legislation establishing a process for convening a state ratifying convention. Among many procedural questions presented was whether the following acts could be subject to a referendum vote: (1) an act of the convention to ratify an amendment; and (2) the act of the legislature to establish the convention.

The justices opined that a referendum on ratification by the convention would be invalid, as a violation of the requirements of Article V.<sup>101</sup> However, the justices also opined that a referendum on the act of the legislature to establish the convention would be permissible, according to the provisions of Maine's state constitution.<sup>102</sup>

### **Some states have enacted permanent statutes governing ratifying conventions.**

Several states have enacted permanent statutes designed to govern the process of ratifying a proposed constitutional amendment by state convention, in anticipation of the possibility that Congress may choose that method of ratification again. Examples of these statutes include:

- **Florida.**<sup>103</sup> Florida statutes provide for an election of 67 statewide delegates to form its state ratifying convention. The governor is required to call the election, which may coincide with the state's general election. The eligibility standards that apply to candidates for the Florida House of Representatives apply to candidates to serve as delegates at a ratifying convention.

To be a candidate for delegate, an individual must file an application that attests to the candidate's position on ratification (for, against, or unpledged). The candidate's position on ratification is required to appear on the election ballot.

The Florida statutes provide a modest level of detail about procedures of the convention, including the power of delegates. A majority vote of all delegates elected is required for the convention to finally ratify or reject a proposed amendment. Except for the officers of the convention, no compensation for delegates is provided.

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<sup>100</sup> *State ex. rel. Tate v. Sevier*, 62 S.W. 2d 895 (Mo. 1933); see also *Donnelly v. Myers*, 186 N.E. 918 (Ohio 1933).

<sup>101</sup> *In re Opinion of the Justices*, 167 A. 176, 179 (Me. 1933).

<sup>102</sup> *Id.* at 180.

<sup>103</sup> See Fla. Stat. § 107.01 *et seq.* (2015).

The Florida statutes appear to have been first enacted in 1933—coinciding with its ratification convention on the 21st amendment (repeal of prohibition). The provisions appear largely unchanged since that time.

- **New Mexico.**<sup>104</sup> New Mexico statutes require the governor to call a ratifying convention within ten days after a constitutional amendment is proposed. The state’s lieutenant governor is designated as president of the convention, and each member of the state legislature is automatically appointed as a delegate. The law does not provide for election of any other delegates. Per diem and mileage expense reimbursements are provided for delegates, for no more than three days.

The New Mexico statutes appear to have been in place since at least 1953.

- **Ohio.**<sup>105</sup> Upon proposal of an amendment to be ratified by conventions, Ohio law requires the governor to call an election to be held for the purpose of electing delegates. A total of 52 delegates, elected statewide, constitute Ohio’s ratifying convention.

Candidates for delegate must be nominated by petition signed by at least 5,000 voters. Candidates may list a position on ratification of the proposed amendment (for, against, or unpledged) but may not indicate a political party designation. A majority vote of all delegates elected is required for the convention to finally ratify or reject a proposed amendment.

The Ohio provisions appear to have been first enacted in 1953.

- **Vermont.**<sup>106</sup> Vermont statutes require the governor to call a convention for the purpose of ratification within 60 days of the date Congress transmits a proposed amendment, if ratification requires a convention. The governor is also required to call an election at which 14 delegates to the convention will be chosen.

Candidates for delegate are required to be chosen by Vermont’s governor, lieutenant governor, and speaker of the House. Fourteen candidates must be chosen based on their position “in favor” of ratifying the proposed amendment, and 14 candidates must be chosen based on their position “against” ratifying the amendment. One candidate representing each position must be chosen from each county in the state. At the election of delegates, a voter is permitted to vote for a full slate of candidates, either in favor of or against ratification, or the voter may vote for up to 14 individual candidates.

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<sup>104</sup> See N.M. Stat. § 1-18-1 *et seq.* (2015).

<sup>105</sup> See Ohio Rev. Code § 3523.01 *et seq.* (2015).

<sup>106</sup> See Vt. Stat. § 1811 *et seq.* (2015).

**Minnesota Practice.** In 1933, the Minnesota Legislature enacted laws related to the formation and operation of the state’s ratifying convention on the proposed 21st Amendment.<sup>107</sup>

The state ratification convention process approved by the legislature required a convention of 21 at-large delegates. Delegates were chosen by the voters at a special election.

To appear on the ballot as a delegate nominee, potential delegates were required to be nominated by a petition signed by at least 100 voters. Candidates for delegate were grouped into two categories: those who supported ratification, and those who did not support ratification. The names of the 21 delegate nominees within each group who received the most petition signatures were designated to appear on the ballot.

The special election ballot listed the delegate nominees according to their group: those “for repeal” (in favor of amendment ratification) and “against repeal” (not in favor of amendment ratification). Except for the position of each group of nominees on the amendment proposal, no other partisan affiliation was listed on the ballot. Voters were not permitted to cast votes for individual nominees, but instead cast one vote: either for the group of nominees in favor of repeal of prohibition, or for the group of nominees against repeal of prohibition.

The Minnesota ratification convention process does not appear to have resulted in any reported litigation, and Minnesota has not enacted any general statutes on the operation of state ratifying conventions.

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<sup>107</sup> See [Minn. Laws 1933, ch. 214](#).

## Part 3: Article V Convention Process

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A federal constitutional convention has not been held in the United States since the original convention of 1787 was convened to establish a constitution. However, Article V provides for a convention upon application to Congress by two-thirds of state legislatures for the purpose of proposing constitutional amendments.

There are many unresolved questions surrounding an Article V convention: how it would be convened, its authority, and how it would operate, among other issues. Academics, advocates, and other interested groups have written extensively about the possibilities and risks of a convention, and have speculated on various theories surrounding convention operations and procedure, how Congress should tabulate state applications, and various other related issues.

This part does not analyze those theories, but instead describes what is known about a potential convention process based on authority derived from case law and federal and state laws, rules, and past legislative practices. Particular attention is paid to the role and experience of state legislatures. While not intended to resolve issues that remain unknown and unresolved, possible policy questions that legislators may wish to consider related to conventions are suggested.

A comprehensive review of all state applications for an Article V convention is outside the scope of this publication. However, a number of private advocacy organizations have made efforts to bring attention to the number of applications submitted to Congress. At least one of these organizations, the “Friends of the Article V Convention,” maintains a website that purports to list each application submitted to Congress, organized by topic.<sup>108</sup>

This part is divided into the following sections:

- (1) [State Procedures in Article V Convention Process](#)
- (2) [Federal Procedures in Article V Convention Process](#)
- (3) [State Perspectives on Organizing a Convention](#)

### State Procedures in Article V Convention Process

Because an Article V convention has never been convened on the application of state legislatures, there is little precedent to suggest the form or content required for an application to be accepted by Congress.

Some state constitutional provisions and legislative rules do provide explicit procedures for convention applications similar to rules applicable to constitutional amendment ratifications. A list of these rules is provided in Appendix 1.

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<sup>108</sup> See Friends of the Article V Convention, [www.foavc.org](http://www.foavc.org).

## **There are no clear requirements establishing the required content or process for an Article V convention application.**

**Content.** Some states have applied for an Article V convention in general terms, citing only the legislature’s authority without providing an indication of the legislature’s desired amendments. Other state applications provide much more detail.

Examples of additional detail contained in prior applications include:

- a request for a convention limited to a specific stated purpose. In some cases, these applications have provided the exact text of the constitutional amendment the applying legislature would like the convention to propose<sup>109</sup>
- assurances to Congress that the applying state will seek to restrain its delegates to only the subject matter described in the application<sup>110</sup>
- a request for Congress to adopt specific procedures for selection of delegates to a convention<sup>111</sup>
- an effective duration of the application (often an application is specified as “continuing” in its effectiveness until a sufficient number of states have applied for a convention, or until Congress has proposed an amendment on its own)<sup>112</sup>
- a listing of other states known to have applied for a convention on the same topic<sup>113</sup>
- direction that the resolution be delivered to specific individuals. While there appears to be no specific requirement beyond an application “to Congress,” state applications have been specifically addressed to a variety of individuals—including the President and Vice President of the United States, the Clerk of the United States House of Representatives and the Secretary of the Senate, the Speaker of the House and President of the Senate, the houses of each state legislature nationwide, and members of the applying state’s congressional delegation. Political and other considerations beyond the legal requirements for submission may also help inform a list of intended recipients.

**Signature of Governor.** In 1977, the **Massachusetts** Senate requested an opinion of the state’s supreme judicial court, related to a resolution before the legislature applying for a convention to consider an amendment to “protect the right to life of human beings.” Among the questions, the

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<sup>109</sup> See Minnesota’s legislative apportionment application, [Minnesota Laws 1965, Resolution No. 5](#).

<sup>110</sup> See Alabama’s balanced budget application, 2015, available at <http://clerk.house.gov/legislative/memorials.aspx>.

<sup>111</sup> See New Jersey’s “*Citizens United*” application, 2015, available at <http://clerk.house.gov/legislative/memorials.aspx>.

<sup>112</sup> See *Id.*

<sup>113</sup> See Utah’s balanced budget application, 2015, available at <http://clerk.house.gov/legislative/memorials.aspx>.

Senate requested advice on the need for the governor to sign the resolution.

Relying on case law related to the Article V amendment ratification process, the justices reasoned that the convention application was similar—in their view, Article V only requires an application by the state’s legislature, and not implementation of the entire legislative process. It advised the Senate that the signature of the governor was not necessary.<sup>114</sup>

**Minnesota Practice.** Since statehood, the Minnesota Legislature has submitted three applications to Congress for Article V convention:

- **Direct Election of Senators.** In 1901, a joint resolution requested a convention for purpose of proposing an amendment to provide for election of U.S. senators by popular vote.
- **Polygamy.** In 1909, a joint resolution requested a convention for the purpose of proposing an amendment that would prohibit polygamy.
- **Legislative Apportionment.** In 1965, a memorial resolution was adopted, applying for a convention for the purpose of proposing an amendment that would allow state legislatures to apportion one body on a basis other than population.<sup>115</sup>

In 1999, the legislature adopted a joint rule exempting Article V convention applications from presentment to the governor, if the application is styled as a joint resolution. No applications have been made in the intervening years since adoption of the rule. Each of Minnesota’s three applications were presented to, and approved by, Minnesota’s governor.<sup>116</sup>

### **A legislature made of unconstitutionally apportioned districts may not apply for a convention.**

There appears to be only one case addressing the right of a legislature to apply for a convention, where the legislature has been declared unconstitutionally malapportioned. The court rejected the action of the malapportioned legislature.

***Petuskey v. Rampton.*** In 1965, the legislature then-sitting in **Utah** adopted a resolution applying for a convention, seeking proposal of an amendment that would permit state legislatures to apportion one body on a basis other than population. However, the makeup of Utah’s legislative districts had been declared unconstitutional a year earlier, in 1964.

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<sup>114</sup> *Opinion of the Justices to the Senate*, 366 N.E.2d 1226, 1228 (Mass. 1977).

<sup>115</sup> For more detail on these applications, see [United States Constitutional Amendments: Minnesota’s Legislative History](#), House Research Department (2016).

<sup>116</sup> See 88th Legislature, Minnesota’s Joint Rule of the House and Senate 2.07 (2013).

The federal district court judge hearing the case expressed frustration that the legislature had acted in an attempt to retroactively validate the existing districts by constitutional amendment, rather than apportion them differently. After addressing a number of procedural issues related to the case, the judge rejected what he viewed as an attempt by the legislature to “suspend” operation of the equal protection clause of the Constitution:

During the time the procedure for amending the Constitution is being pursued, the provision sought to be amended ... remains in effect until the amending process is completed. It shocks one to suppose that the operation of the bill of rights would be suspended during a time an amendment to alter or repeal it was being considered.<sup>117</sup>

Extending the U.S. Supreme Court’s prior interpretation of the term “legislatures” in Article V, the judge held that the term means “state legislatures constituted in compliance with applicable federal constitutional requirements.”<sup>118</sup> Because the legislative districts of Utah had not met these requirements at the time the resolution was adopted, the court declared the convention application of the 1965 Legislature to be invalid.

### **Several state attorneys general have issued advisory opinions discussing whether a legislature may rescind a convention application.**

Like many other issues related to Article V convention applications, there is no clear guidance on whether a state is permitted to rescind its application for a convention. However, a number of state attorneys general have issued opinions on the topic.

Attorneys General in **South Carolina, Iowa, Florida, Maryland, Nevada, and Louisiana** have all issued opinion advising that a rescission of a convention application is generally permissible.<sup>119</sup>

## **Federal Procedures in Article V Convention Process**

Congress has historically appeared to have no formal mechanism for organizing, tracking, or tabulating Article V convention applications received from state legislatures. However, many applications are officially published in the Congressional Record.

**2015 House Rule.** In 2015, the U.S. House of Representatives adopted a procedural rule designed to provide better transparency for select convention applications. The rule provides authority for the chair of the House Committee on the Judiciary to make memorials presented to

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<sup>117</sup>*Petuskey v. Rampton*, 307 F.Supp. 235, 251 (D.Utah, 1969) (*rev’d* on other grounds, *Petuskey v. Rampton*, 431 F.2d 378 (10th Cir. 1970)).

<sup>118</sup> *Id.* at 257.

<sup>119</sup> See 1989 S.C. Op. Atty. Gen. 98 (No. 89-35); Op. Atty. Gen. Iowa (Feb. 28, 1984); Op. Atty. Gen. Fla. (Apr. 22, 1985); Op. Atty. Gen. Md. (No. 83-006, Jan. 31, 1983); Op. Atty. Gen. Nev. (Feb. 13, 1987); Op. Atty. Gen. La. No. 86-326 (June 6, 1986).

Congress that purport to apply for an Article V convention more readily available to the public.<sup>120</sup>

The rule requires the Clerk of the House to provide access to publicly available memorials electronically. As of April 2016, more than 20 applications have been posted on the Office of the Clerk's website: <http://clerk.house.gov/legislative/memorials.aspx>.

**Additional Analysis of Federal Issues.** Comprehensive analysis of Article V convention history and current issues for Congress is provided in the following reports of the nonpartisan Congressional Research Service:

- Thomas H. Neale, "The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives of Congress," Congressional Research Service, October 22, 2012
- Thomas H. Neale, "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress," Congressional Research Service, April 11, 2014<sup>121</sup>

Additionally, the following Opinions of the Office of Legal Counsel, at the U.S. Department of Justice, provide comprehensive analysis of issues that may arise in the convention process:

- Memorandum Opinion for the Attorney General, Office of Legal Counsel, U.S. Department of Justice (3 U.S. Op. Off. Legal Counsel 16, January 16, 1979) (addressing general issues related to the convening of a convention, and processing of state applications)
- Memorandum Opinion for the Attorney General, Office of Legal Counsel, U.S. Department of Justice (3 U.S. Op. Off. Legal Counsel 390, October 10, 1970) (addressing the limitations of Congress in directing the conduct of a convention, including whether a convention may be limited to a specific purpose)

While these reports and opinions are written from the federal perspective, state legislators may also find the issues and questions discussed, and the historical perspective on the role of conventions in Article V, valuable in understanding what is known about the Article V convention process and in considering whether a state application for a convention is appropriate in a particular circumstance.

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<sup>120</sup> H.R. 5, 114th Congress (2015).

<sup>121</sup> While the Congressional Research Service only distributes its reports to members of Congress and congressional staff, many reports—including those cited here—are posted online by private organizations and can be found via a basic internet term search.

## **State Perspectives on Organizing a Convention**

This section provides some basic questions that legislators may wish to consider when deciding whether to pursue an application for an Article V convention, or in the event Congress acts to convene a convention in a manner that requires a state legislative response.

### **Can the process of organizing an Article V convention be informed by the history of state constitutional conventions?**

The experience of states in convening state constitutional conventions may be instructive in thinking about how a federal convention might be organized.

Many state constitutions provide detail on the process for convening a state constitutional convention. The level of detail included ranges from very little to a great deal.<sup>122</sup> The experience of states and state legislatures in implementing their convention procedures provide a useful model to consider how conventions typically operate.

### **What are the procedural rules of the convention? Are delegates permitted to propose or discuss any potential amendment, or is discussion limited to a single topic?**

One of the most frequently raised unknown issues related to an Article V convention is whether the scope of the convention can be limited to a single topic (or set of topics). If restricted, is the restriction imposed by Congress, or by procedural rules adopted by the convention itself?

Academics and advocates have raised concern about the potential for a “runaway” convention if the substance of potential amendments cannot be limited. If discussion at the convention is limited to specific topics, what is the position of the state legislature on the issue or amendment to be discussed, and what weight does the legislature’s position carry with the states’ delegates to the convention?

### **How many delegates will represent each state, and how are they selected? What are the qualifications for being selected as a delegate, and what are the powers of an individual delegate?**

Delegates to the constitutional convention of 1787 were appointed by the legislatures of each individual state. States were not restricted in the number of delegates at the convention, but each state was allowed only one collective vote at the convention (delegates did not vote individually).

An alternative method of selecting delegates could be to apportion a set number of delegates among the states, based on population (or some other proportional metric) and permit each delegate an individual vote at the convention. This model is consistent with the method of

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<sup>122</sup> For relatively simple provisions, see Wis. Const., art. XII, and [Minn. Const., art. IX](#). For more complex examples, see NY Const., art. XIX; Mo. Const., art. XII, and Mont. Const., art. XIV.

voting used by the Electoral College, and is also consistent with the method many states use in organizing state constitutional conventions.

Under most current state constitutional convention models, delegates to state conventions must be qualified voters of the state and are elected by the people; in many states, the number of delegates to a convention is set in relation to the number of members of one body of the state legislature.

**If each state is permitted autonomy to select delegates in its own way, what will the selection process look like?**

Does the selection process result in delegates who adequately reflect all geographic regions of the state? Are other regional interests reflected (urban v. rural, majority and minority communities, economic regions, and other communities of interest)? If delegates are to be elected, should the ballot indicate a candidate's party affiliation? If the convention is limited to a single issue, should the ballot indicate a candidate's position on the issue to be discussed?

Many state constitutions provide for election of delegates to a state convention based on legislative district; a similar model could be applied to election of delegates to a national convention.

Once delegates are selected, what authority (if any) remains with the state to oversee the action of the state's delegates? If the state submitted an application for a specific amendment, what obligations do the state's delegates have to support a proposed amendment on that topic once the convention begins?

Many states have enacted laws to ensure the votes of electors selected to the Electoral College are consistent with the outcome of the statewide vote for president. What authority, if any, would a state have to enact similar requirements to be applied to the vote of state delegates to an Article V convention?

**What is the relationship between delegates and the state legislature?**

Are state legislators (or other state elected officials) permitted to be seated as delegates? Determining the answers to these questions may depend on the details contained in the act of Congress to call the convention.

State constitutional requirements may also apply—for example, provisions that prohibit elected officials from serving in dual offices may impact whether a legislator or other official may be seated as a delegate, even if doing so is permitted by Congress. As described earlier in this publication, at least one state (**New Mexico**) provides by law that its state ratifying convention is made up of its members of the legislature. It is unclear whether a similar principle could be implemented for a federal convention.

**Are delegates subject to any state economic interest disclosure, ethics, or gift ban laws? If delegates are to be elected within states, what is their relationship to federal and state campaign finance law?**

If a state determines that ethics and integrity laws should apply, does the state legislature have the authority to extend laws that apply to state elected officials to convention delegates, or are delegates subject to laws that apply to federal officials?

**What role does the state's governor play in the convention process?**

Case law interpreting the requirements of Article V have consistently restricted authority to act under Article V to state legislatures only—exempting these procedures from a state's full lawmaking process. To the extent that organization of a convention requires states to adopt procedures for selecting delegates, do these procedures require participation of the governor? May the governor veto an act of a state legislature adopting a process for electing delegates to an Article V convention?

## Part 4: Procedural Issues in Litigation Involving Constitutional Amendments

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The unique nature of the Article V convention amendment process—and the high stakes’ nature of the amendments themselves—results in a climate where litigation regarding the amendment process is common. And unlike a legislature’s deliberation and ultimate enactment of laws and other state policy, ratifying a federal constitutional amendment or applying for a convention is a process that exists and remains entirely within the legislative branch.

This means that legal challenges are likely to name one or more state legislative bodies in the litigation. It also means that a person seeking to challenge an aspect of the amendment process might be a legislator. In some cases, constitutional amendment law has developed as the result of individual legislators suing their own legislative body and legislative leadership.

### **For a legal challenge to proceed, the case must be “justiciable.”**

This section describes the basic procedural tests that courts use to determine whether a lawsuit is appropriate, and how those tests have been applied in the context of constitutional amendment litigation. Courts apply these initial tests to a case before reaching the actual substance of a challenger’s claims.

If the court is satisfied that each of the tests has been met, the case is considered “justiciable” and the lawsuit is allowed to proceed. If one of the tests fails, the lawsuit is likely to end before reaching the substance of the claims.

Each of the principles is based on law that is more complex and far-reaching than a constitutional amendment proceeding. The brief summaries provided are intended to highlight how the principles have applied in the context of constitutional amendment cases, and are not intended to be a comprehensive analysis of a principle’s application or development in other contexts.

**Standing.** In order for a lawsuit to proceed, the person filing the suit must demonstrate sufficient “standing” to bring the suit. The doctrine of standing requires that the plaintiff have a sufficient particular interest in the controversy, demonstrated by actual or threatened harm caused by the defendant, in order for the case to proceed.

- **Standing for State Legislators.** State legislators have successfully demonstrated a sufficient interest in controversies surrounding the procedure used to ratify (or reject) a proposed constitutional amendment in the legislative process. State legislators have originated complaints and have been found to have standing in the following contexts:
  - In *Coleman v. Miller*, a suit brought by a group of 20 **Kansas** senators challenging their legislature’s process to ratify the proposed Child Labor Amendment was allowed to proceed, because of their “plain, direct and adequate

interest in maintaining the effectiveness of the senator's votes.”<sup>123</sup> In particular, the Court noted the voting power of the group of senators would have been sufficient to defeat the ratification, if their legal claims succeeded.<sup>124</sup>

- In *Idaho v. Freeman*, a suit brought by the State of **Idaho** and a group of legislators representing the legislatures of **Idaho, Arizona, and Washington**, was allowed to proceed against the administrator of the General Services Administration. The suit sought to require the GSA Administrator to recognize the Idaho legislature's act to rescind its ratification of the proposed Equal Rights Amendment.<sup>125</sup>
- In *Dyer v. Blair*, a suit brought by a group of **Illinois** legislators against the Illinois Speaker of the House and Senate President, was allowed to proceed challenging the legislature's process to ratify the proposed Equal Rights Amendment.<sup>126</sup> Standing was included in discussion of other procedural issues in the context of this case.
- **Standing for Private Citizens.** In cases where private citizens have challenged the amendment ratification process, the U.S. Supreme Court has reached the opposite view, where the challenge is based on a general objection to the process. According to the Court, a private citizen “has only the right, possessed by every citizen, to require that the government be administered according to law and that public moneys not be wasted...this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.”<sup>127</sup>

However, if a claim is framed correctly, a private citizen may be able to demonstrate proper standing for a case to proceed to the substance of the claims. Cases have moved forward without apparent objections to standing in the following circumstances:

- In *Leser v. Garnett*, a suit brought by male voters against the local board authorized to register voters in **Maryland**. The suit alleged that the board's registration of female voters was invalid because the 19th amendment (women's suffrage) was not properly adopted.<sup>128</sup>

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<sup>123</sup> *Coleman v. Miller*, 307 U.S. 433, 438 (1933).

<sup>124</sup> *Id.* at 447.

<sup>125</sup> *Idaho v. Freeman*, 529 F.Supp. 1107 (D. Idaho, 1981). The district court in this case undertook an extensive review of issues of justiciability. The U.S. Supreme Court agreed to review the district court decision, but later dismissed the case as moot.

<sup>126</sup> *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975).

<sup>127</sup> *Fairchild v. Hughes*, 258 U.S. 126 (1922).

<sup>128</sup> *Leser v. Garnett*, 258 U.S. 130 (1922).

- In *Chandler v. Wise*, a suit brought by citizens, taxpayers, and voters of **Kentucky**, against the state’s governor and General Assembly, to prevent certification to the U.S. Secretary of State that the legislature had ratified the proposed Child Labor Amendment. The suit alleged that the action was improper, because the legislature had previously rejected the amendment and a reasonable time had passed for ratification.<sup>129</sup>
- In *Dillon v. Gloss*, a suit brought by an individual convicted and taken into custody for violation of laws adopted following ratification of the 18th amendment (prohibition). The suit alleged that Congress did not properly propose the amendment to the states, and alternatively, if the proposal and ratification was proper, it had not gone into effect at the time of the individual’s arrest.<sup>130</sup>
- In *Hawke v. Smith*, a suit brought by a private citizen against the **Ohio’s** secretary of state, to prevent the secretary of state from expending public money on a referendum on the question of a constitutional amendment ratification.<sup>131</sup>

**Ripeness.** In addition to proper “standing” of a plaintiff, a lawsuit must be “ripe” for action. This means that it must present a concrete legal issue to be decided; a case may not be based on an abstract theory or hypothetical situation that might arise at some point in the future, and it may not be based on a previous action for which a remedy is no longer available.

In the context of constitutional amendments, courts have consistently held (explicitly or implicitly) that issues of constitutional amendment procedure and substance are ripe for review and determination while the ratification process is ongoing.

Cases have been rejected when the ratification process has proceeded far enough from the alleged violation that a remedy is no longer available:

- ***Idaho v. Freeman***: A suit related to the actions of the **Idaho** Legislature on the proposed Equal Rights Amendment. The Supreme Court initially agreed to hear the claims, but later rejected it once the ratification period for the amendment had expired. At that point, the case left no legal issue that could be provided an adequate remedy—because the amendment’s effectiveness did not turn on whether Idaho had ratified it or not, the issue was no longer ripe for review.<sup>132</sup>
- ***Chandler v. Wise***: A suit brought by citizens, taxpayers, and voters of **Kentucky**, against the state’s governor and General Assembly, to prevent certification to the U.S. Secretary

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<sup>129</sup> *Chandler v. Wise*, 307 U.S. 474 (1939). The Court seems to have resolved the standing issues in this case differently than it did in *Fairchild v. Hughes*, although the opinion did not directly discuss the reason for the distinction or whether the *Fairchild* analysis remains good law.

<sup>130</sup> *Dillon v. Gloss*, 256 U.S. 368 (1921).

<sup>131</sup> *Hawke v. Smith*, 253 U.S. 221 (1920).

<sup>132</sup> *National Organization for Women v. Idaho*, 459 U.S. 809 (1982).

of State that the legislature had ratified the proposed Child Labor Amendment. The Supreme Court ordered the claim dismissed because the governor had already forwarded the certification of ratification to the federal government. At that point, in the Court's opinion, the issue was moot—there was no longer a controversy to be resolved.<sup>133</sup>

**Political Question.** Even if a court determines that a proper person has filed a suit, and the claims being made are sufficiently ripe for review, the case may still be rejected if it presents a “political question.”

The political question doctrine is a test based on the principle of separation of powers. In basic terms, courts tend to reject issues that interfere with the balance of power among the branches of government, or that require a subjective policy or political judgment that the judicial branch does not have the expertise to provide.

The political question test presents the highest procedural barrier to a lawsuit involving constitutional amendment process, and its exact application is unsettled. Over time, the test has evolved through a wide-ranging set of decisions by the U.S. Supreme Court. Very few of the decisions address constitutional amendment procedures specifically.

A full review of the political question doctrine is outside the scope of this publication. This section describes the case law on the political question doctrine, as applied in cases involving constitutional amendment procedure.

***Coleman v. Miller.*** The most frequently cited case on the issue of political questions in constitutional amendment law is *Coleman v. Miller*. As described previously, in *Coleman*, a group of **Kansas** legislators challenged their legislature's process to ratify the proposed Child Labor Amendment.

The Court held that the group of legislators had proper standing to bring the suit. However, the Court's analysis on whether their legal claims were appropriate for review was much more complex. On the political question doctrine, the case generally stands for the principle that many—perhaps most—matters of constitutional amendment law are political questions that must be resolved by Congress, and not by the courts.

However, the full scope of this holding is unclear. While a majority of the justices agreed that at least some judicial review of constitutional amendment procedure was barred by the political question doctrine, a majority of justices could not agree on exactly which particular procedures should be barred from review: a minority suggested there was no procedure in the constitutional amendment process that a court should ever review, while others were open to reviewing some procedures, such as the ability of Kansas's lieutenant governor to cast a tiebreaking vote on ratification. Discussion of the various dynamics of the court's decision is the subject of many scholarly articles on the case.

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<sup>133</sup> *Chandler v. Wise*, 307 U.S. 474 (1939).

In general, the *Coleman* case suggests that courts are likely to not review procedural issues in the amendment process, if making a decision requires an analysis of the prevailing national policy or political climate. For example, in *Coleman*, the Court refused to rule definitively on what constitutes a “reasonable time” for ratification of an amendment, finding that doing so would require:

an appraisal of a great variety of relevant conditions, political, social, and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice...they can be decided by Congress with the full knowledge and appreciation ascribed to the national legislature of the political, social, and economic conditions which have prevailed since the submission of the amendment.<sup>134</sup>

***Dyer v. Blair***. In 1975, a district court in **Illinois** heard a dispute involving the Illinois Legislature’s process for ratifying the proposed Equal Rights Amendment. At issue were certain procedural rules of the legislative process—such as a supermajority vote requirement—that were alleged to violate Article V.

The district court reviewed the political question precedent established by *Coleman* and other subsequent cases, and determined that judicial review of the claims presented in this case were permitted. In the opinion of the court:

The word ‘ratification’ as used in Article V of the federal constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making. We conclude ... that meaning must be constant for each question that Congress may propose.<sup>135</sup>

This analysis distinguished the *Coleman* precedent—which required Congress to gauge the evolving political, social, and economic climates—with a need for a consistent standard among all states and all amendments about what “ratification” means as a matter of law. As a result, the political question doctrine did not present a barrier to judicial review.

***Idaho v. Freeman***. In 1981, a district court in **Idaho** heard a dispute involving the federal government’s recognition that the Idaho Legislature had rescinded its ratification of the proposed Equal Rights Amendment.

Despite the *Coleman* precedent, and after substantial discussion, the district court determined that the political question doctrine did not prevent it from affirming the right

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<sup>134</sup> *Coleman v. Miller*, 307 U.S. 433, 454-55 (1939). The political question doctrine has evolved substantially since the *Coleman* decision was issued. As a result, the principles in the case, if litigated today, could come out differently. For example, the Supreme Court cited the *Coleman* precedent favorably, but may have narrowed its reach somewhat, in another major case addressing the scope of the political question doctrine, *Baker v. Carr*, as applied to a dispute over redistricting. See *Baker v. Carr*, 369 U.S. 186, 214 (1962). However, the basic holding of the *Coleman* case has never been explicitly overruled or questioned on a fundamental level.

<sup>135</sup> *Dyer v. Blair*, 390 F.Supp. 1291, 1303 (D. Ill. 1975).

of a state to rescind its ratification, or from reviewing whether Congress followed the proper procedure in enacting an extension of the ratification period.<sup>136</sup>

The Supreme Court agreed to hear an appeal of these issues, but later ordered the district court order vacated and the case dismissed as moot.<sup>137</sup> As a result, there is no indication how the Supreme Court would have reacted to the lower court's analysis.

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<sup>136</sup> *Idaho v. Freeman*, 529 F.Supp. 1107, 1150 (D.Idaho 1981)

<sup>137</sup> *Idaho v. Freeman*, 459 U.S. 809 (1982).

## Appendix 1: Explicit State Constitutional Provisions and Legislative Rules Related to U.S. Constitutional Amendment Procedure<sup>138</sup>

State	Vote Required	Style of Ratification	Other Procedural Requirements	Authority
<b>Alabama</b>	Three-fifths of elected membership	N/A	N/A	Ala. Const. § 284; House Rule 15
<b>Alaska</b>	Majority of elected membership	Joint Resolution	N/A	Uniform Rules, No. 49
<b>Arkansas</b>	N/A	Joint Resolution	Committee referrals required	House Rule 50; Senate Rule 14.12 (a); Senate Rule 14.15 (c)
<b>California</b>	N/A	Joint Resolution	Treated as bill	Joint Rule 4; Joint Rule 6; Assembly Rule 46(b)
<b>Colorado</b>	Two-thirds of elected membership (House)  Majority of elected membership (Senate)	Concurrent Resolution	N/A	House Rule 26(a)(1); Senate Rule 17(f)(4)
<b>Florida</b>	N/A	N/A	Intervening election required between proposal by Congress and ratification by legislature <sup>139</sup>	Fla. Const. art. 10, § 1

<sup>138</sup> Cited provisions are current as of January 2016, based on review of state constitutions and rules as posted on applicable legislative websites. Generally applicable provisions that do not explicitly reference U.S. constitutional amendment procedures are not included in this chart. Portions of the data were originally collected in a survey conducted by the National Conference of State Legislatures in March 2007. States that are not included in this chart do not appear to have enacted any relevant rules or constitutional provisions.

<sup>139</sup> This requirement was declared unconstitutional by a federal district court in 1973. *See Trombetta v. State of Florida*, 353 F.Supp. 575 (M.D. Fla. 1973).

State	Vote Required	Style of Ratification	Other Procedural Requirements	Authority
<b>Illinois</b>	Three-fifths of elected membership	N/A	<p>Intervening election required between proposal by Congress and ratification by legislature, if consistent with federal requirements<sup>140</sup></p> <p>Illinois statute appears to provide for a vote on ratification by constitutional majority</p> <p>Requirements also apply to applications for a constitutional amendment convention</p>	Ill. Const. art. 14, § 4; Senate Rule 6-3; House Rule 47; 5 ILCS 5/1
<b>Kansas</b>	Two-thirds of elected membership	Concurrent Resolution	<p>Vote must be printed in journal; other miscellaneous procedural rules</p> <p>Requirements also apply to applications for a constitutional amendment convention</p>	Kan. Const. art. 2, §§ 10; 13; Senate Rule 55; House Rules 901, 2707, 2901, 3907
<b>Kentucky</b>	N/A	N/A	Mandatory referral to specified committees: Elections, Constitutional Amendments, and Intergovernmental Affairs (House); State and Local Government (Senate)	Senate Rule 40, No. 10; House Rule 40, No. 6
<b>Maine</b>	<p>Majority of members present (ratification)</p> <p>Two-thirds of members present (constitutional convention application)</p>	N/A	Approval of Legislative Council is not required prior to introduction	Joint Rule 215
<b>Maryland</b>	N/A	Joint Resolution	N/A	House Rule 25; Senate Rule 25

<sup>140</sup> This requirement was declared unconstitutional by a federal district court in 1975. See *Dyer v. Blair*, 390 F.Supp. 1291 (N.D. Ill. 1975).

State	Vote Required	Style of Ratification	Other Procedural Requirements	Authority
<b>Michigan</b>	Majority of elected membership	Joint Resolution	Roll call vote and journal printing required	Senate Rule 3.503; Joint Rule 18
<b>Minnesota</b>	N/A	N/A	Joint resolutions ratifying amendment or applying for a constitutional convention are exempt from presentment to governor; Revisor of Statutes deposits with secretary of state	Joint Rule 2.07
<b>Missouri</b>	Majority of elected membership	Concurrent Resolution	Treated as bill  Amendments to text of proposed amendment prohibited	House Rule 59
<b>Montana</b>	N/A	Joint Resolution	Bills ratifying amendments are exempt from presentment to governor	Mont. Const. art. 6, § 10; Joint Rule 40-60(i); Joint Rule 40-210(b)
<b>Nebraska</b>	N/A	N/A	Treated as bill  Includes resolutions memorializing Congress with regard to U.S. constitutional amendments	Rule 4, § 2
<b>Nevada</b>	Majority of elected membership	Joint Resolution	N/A	Nev. Const. art. 4, § 18; Joint Rule 7
<b>New Hampshire</b>	N/A	N/A	Senate Rules limit the types of resolutions that may be introduced; ratification of proposed constitutional amendments by resolution is permitted	Senate Rule 3-26
<b>New Jersey</b>	Majority of elected membership	Concurrent Resolution	A public hearing on the proposed amendment is required	Assembly Rule 24:1; Senate Rule 17:6; Joint Rule 8B
<b>New Mexico</b>	N/A	N/A	Treated as bill (Senate)	Senate Rule 11-22-2

State	Vote Required	Style of Ratification	Other Procedural Requirements	Authority
<b>North Carolina</b>	N/A	N/A	Electronic voting system must be used on second and third reading (House)  Committee deadlines do not apply (House)	House Rules 20, 31.1
<b>North Dakota</b>	Majority of elected membership	Concurrent Resolution	Senate President (Lt. Governor) may vote to break tie; two readings on different days required; other miscellaneous procedural rules	House Rules 325, 339; Senate Rules 323, 325, 339
<b>Ohio</b>	N/A	Joint Resolution	Treated as bill	House Rule 77, 78
<b>Oregon</b>	Majority of elected membership	N/A	N/A	NCSL Survey, 2007
<b>Tennessee</b>	N/A	N/A	Intervening election required between proposal by Congress and ratification by legislature <sup>141</sup>	Tenn. Const. art. 2, § 32
<b>Texas</b>	Majority of members present (House)	Joint Resolution	Treated as bill, except adoption on second reading. If vote fails to receive majority vote, it may not be considered again except on a motion to reconsider (House)  Record vote in journal (Senate)	House Rule 9, § 2; Senate Rule 6.15 (a)(1)
<b>Vermont</b>	Majority in each chamber	Joint Resolution	N/A	NCSL Survey, 2007
<b>Washington</b>	Simple majority	N/A	N/A	NCSL Survey, 2007
<b>Wisconsin</b>	Majority of a quorum	Joint Resolution	Three readings in each house required; adoption on roll call vote entered in journal  Amendments to text of proposed amendment prohibited	Joint Rule 12, Joint Rule 58

<sup>141</sup> This requirement was declared unconstitutional by the Tennessee Supreme Court in 1972. See *Walker v. Dunn*, 498 S.W.2d. 102 (Tenn. 1972).

## Appendix 2: State Legislative Actions to Rescind Ratification, Ratify Following a Rejection, or Reject a Proposed Amendment

Except where otherwise noted, the data in this chart are based on state legislative records and records as reported in Constitution of the United States of America: Analysis and Interpretation, *Amendments to the Constitution of the United States of America*.<sup>142</sup> States listed in italics reflect legislative actions reported by secondary sources that appear reliable, but which have not been independently verified with the state’s official legislative record.

“Rejection” includes acts of a legislature adopting a resolution to reject a proposed amendment, and resolutions to ratify a proposed amendment that were voted down. The “Rejection” column does not include state legislatures that have implicitly rejected an amendment by not taking any action on the proposal.

Amendment	Rescission of prior ratification	Ratification after prior rejection		Rejection (no subsequent action)
12th	N/A	<i>Massachusetts</i>		Delaware Connecticut
13th	N/A	New Jersey Delaware Kentucky <i>Mississippi</i>		N/A
14th	New Jersey Ohio Oregon	North Carolina Louisiana South Carolina Georgia <i>Maryland</i>	Virginia Texas Delaware Kentucky	N/A
15th	New York	Ohio New Jersey Delaware	Tennessee <i>Maryland</i> <i>California</i>	N/A

<sup>142</sup> U.S. Government Printing Office (2014), available at: <https://www.congress.gov/constitution-annotated/>.

Amendment	Rescission of prior ratification	Ratification after prior rejection	Rejection (no subsequent action)
		Kentucky	
16th	N/A	Arkansas New Hampshire	Connecticut Rhode Island Utah
17th	N/A	N/A	Utah
18th	N/A	N/A	Rhode Island
19th	N/A	Virginia Alabama Georgia Louisiana	South Carolina <i>Delaware</i> <i>Maryland</i> <i>Mississippi</i>
21st	N/A	N/A	South Carolina North Carolina
22nd	N/A	N/A	<i>Oklahoma</i> <i>Massachusetts</i>
23rd	<i>New Hampshire</i>	N/A	<i>Arkansas</i>
24th	N/A	N/A	<i>Mississippi</i>

For more information about constitutional amendments, visit the legislature area of our website, [www.house.mn/hrd/](http://www.house.mn/hrd/).