A CONSTITUTIONAL CONVENTION: SCOUTING ARTICLE FIVE'S UNDISCOVERED COUNTRY

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In the near future the United States may witness the second constitutional convention in its history. Prior to the passage of the Gramm-Rudman budget-balancing bill in December 1985,¹ thirty-two states had requested Congress to call a convention to consider a balanced budget amendment to the Constitution.² If the Supreme Court upholds a district court's recent decision that Gramm-Rudman is unconstitutional,³ the convention drive may be rekindled.⁴ Only two more states need to submit requests before Congress will be required under article V to call a constitutional convention.⁵

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¹ The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038, commonly known as "Gramm-Rudman," calls for reducing the federal deficit, in annual steps, to zero by 1991. *See Congress Adopts Stopgap Measure on U.S. Spending*, N.Y. Times, Dec. 13, 1985, at A1, col. 1. If in any given year, Congress fails to meet the budgetary goals of Gramm-Rudman, the legislation requires the Comptroller General to order automatic reductions in appropriations. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, §§ 251(b)(1), 253, 99 Stat. 1038, 1068, 1078 (to be codified at 2 U.S.C. §§ 901, 903); *see also Lawmakers Challenge Scope of Budget Measure*, N.Y. Times, Dec. 13, 1985, at B9, col. 3.

² *See Constitutional Parley is Two States Away*, Nat'l L.J., Oct. 10, 1983, at 28, col. 1.

³ The district court held that the law unconstitutionally vests the executive power in the Comptroller General. *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986). The Supreme Court is expected to render a decision by July of this year. *See Judges Fault Key Part of Deficit Law*, Philadelphia Inquirer, Feb. 6, 1986, at A1, col. 1.

⁴ Even if the constitutionality of Gramm-Rudman is upheld, the impetus to call for a balanced budget through constitutional amendment may not wane. A constitutional amendment obviously has more lasting impact than a legislative act.

The present convention drive began after Congress failed to propose a balanced budget amendment. *See Constitutional Parley is Two States Away*, *supra* note 2, at col. 1. In the spring of 1983, Missouri became the thirty-second state to submit a petition. *See id.* at col. 2. The final push for a convention was underway when Gramm-Rudman was passed, although it had not met with much success. California and Montana recently attempted to hold popular referendums to request such a convention, but these referendums were declared unconstitutional by the state supreme courts. *See AFL-CIO v. Eu*, 36 Cal. 3d 684, 687, 686 P.2d 609, 613, 206 Cal. Rptr. 89, 93 (1984); *Montana ex rel. Harper v. Waltermire*, 691 P.2d 826, 828-29 (Mont. 1984), *application for stay denied sub nom. Uhler v. AFL-CIO*, 105 S. Ct. 5 (Rehnquist, Circuit Justice 1984).

⁵ *See* U.S. CONST. art. V (directing Congress to call for a constitutional convention if two-thirds of the state legislatures request one).

The possibility of a convention is not here merely for the moment—it is here to stay. Convention requests have already been filed on a variety of issues;⁶ this is the second time in the past twenty years that Congress has almost been forced to call a constitutional convention.⁷ Unfortunately, the process of amendment via a constitutional convention has never been thoroughly worked out.⁸ No one need elaborate on what may happen if Congress calls a convention while the convention process remains undefined; one need only reflect on the impact of the last convention on the Articles of Confederation to gain a sense of the magnitude of change that might occur.

The application of state legislatures for a constitutional convention raises a number of perplexing constitutional problems:⁹ whether both houses of each state legislature must take part in the convention call; whether a state's application may lapse; whether an application must be specific or general; whether state referendums in favor of convention requests are valid; whether a state may rescind its application.¹⁰ Delegate selection raises another host of problems: who is eligible to be a candidate; who may elect the delegates; how the delegates may vote in the convention; whether states can recall their delegates.¹¹ The procedures that may be adopted by a convention are also open to debate.¹²

Before these issues can be addressed, however, questions of institu-

⁶ Convention petitions have been filed on the following issues: direct election of senators, limitations on federal taxing power, prohibition of polygamy, general revision of the Constitution, repeal of the eighteenth amendment, presidential tenure, treaty making, imposition of a gasoline tax, abortion, and busing. See *Constitutional Parley is Two States Away*, *supra* note 2, at col. 3; AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, SPECIAL ANALYSIS NO. 5, A CONVENTION TO AMEND THE CONSTITUTION? (1967) (analyzing questions that would arise in the context of an article V convention).

⁷ Prior to 1963, at least 206 petitions requesting constitutional conventions were received by Congress. See AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, *supra* note 6, at 5. The Supreme Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964), holding that the fourteenth amendment requires that state legislatures be apportioned according to the "one man, one vote" rule, resulted in a convention drive by the states to propose an amendment nullifying the decision. See AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, *supra* note 6, at 10. By 1968, 33 states had submitted applications to Congress requesting a convention. See *Constitutional Parley is Two States Away*, *supra* note 2, at col. 3.

⁸ See Tribe, *Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment*, 10 PAC. L.J. 627, 632-35 (1979). The process is undefined because the matter has never been presented for authoritative resolution: the states have never amassed the two-thirds support required for calling a convention.

⁹ Lawrence Tribe has provided a long list of the questions that would be raised by the calling of a convention. See *id.* at 638-40.

¹⁰ See *id.* at 638.

¹¹ See *id.* at 638-39.

¹² See *id.* at 639-40.

tional power must be answered. There is as little consensus on who should resolve convention issues as there is on how they should be resolved.¹³ Massive institutional conflict may result from attempts to resolve the issue of who has the power to decide. The potential disputes among the branches of government over which branch has the power to decide the substantive questions threaten to undermine the legitimacy of our constitutional scheme.

This Comment answers the initial question raised by the convention process—who has the power to decide. The Comment argues that the Constitution allocates the power to decide issues arising from a constitutional convention to the states, subject to review by the Supreme Court. A resolution of all of the substantive issues raised by a constitutional convention is well beyond the scope of this Comment. But the Comment will attempt to show that the principles used to argue that article V allocates power over constitutional conventions to the states also suggest how the Supreme Court should approach review of article V activity.

Some theory of constitutional interpretation is necessarily involved in arguing about who should decide convention issues and in suggesting how such issues should be approached. This Comment adopts the theory developed by John Hart Ely in *Democracy and Distrust*,¹⁴ a theory that is based on the Constitution, on our understanding of the source of the Constitution's power, and on our understanding of its promise. This Comment answers the question of who should decide convention issues and how they should be approached by looking to Ely's understanding of the Constitution for guidance.

¹³ Tribe himself comments that these questions are unanswerable and unknowable. *See id.* at 638-40; *see also* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983) (challenging the widely held view that Congress should decide convention issues).

¹⁴ J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). In his book, Ely propounds what is easily the most influential theory of constitutional interpretation and judicial review in recent years. *See, e.g.,* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 3 (1981) ("Ely's much and deservedly heralded book . . . deals with perennial constitutional questions quite brilliantly, marking it as perhaps the most important theoretical work among the recent ones."); Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981) (Ely's book "culminates a tradition of scholarly attempts to establish modes of judicial review . . ."); Clark, *A New Theory of Judicial Review*, 11 CAP. U.L. REV. 33, 54 (1981) (Ely's book is "stimulating . . . manifesting exceptional perception, thoughtfulness, and insight."); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (Ely's book is "the most recent and lucid argument for a process-perfecting view of constitutional law . . ."). For an overview of critical responses to Ely's theory, *see Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981).

Part I of the Comment examines Ely's premises concerning the source of the Constitution's meaning and the substance of its promise. Employing these premises in analyzing article V, Part II argues that article V allocates control over constitutional conventions to the states and that this allocation of power flows from the Constitution's commitment to representative democracy. The Comment then contends that courts should review states' article V activities to protect the individual's right of representation inherent in our constitutional scheme, a protection made explicit by the fourteenth amendment. By subjecting constitutional conventions to the standards of the fourteenth amendment, the Court can implement the procedural participatory values that underlie our system of representative democracy. The Comment concludes with an examination of one potential bar to judicial review, the political question doctrine, and a brief look at the suggested mode of judicial review in order to move toward resolution of issues in an area in which the questions seem initially—in the words of Professor Tribe—"unanswerable."¹⁵

I. ELY'S UNDERSTANDING OF THE CONSTITUTION

Ely recognizes that provisions in the Constitution may be regarded as falling along a continuum "ranging from the relatively specific to the extremely open-textured."¹⁶ The meaning of specific constitutional provisions is clear from the words of the document itself.¹⁷ For example, the Constitution's requirement that the President be thirty-five years old is not seriously open to interpretive debate. On the other hand, open-ended provisions, such as the fourteenth amendment, invite interpreters to look beyond the four corners of the document when filling in their meaning.¹⁸

Ely suggests one way of filling in the broad prescriptions of the Constitution: the Court should interpret the open-ended provisions of the Constitution to fulfill its promise of representative democracy.¹⁹ At a minimum, this requires the Court to keep clear the channels of political change by ensuring that avenues of participation within the political

¹⁵ See Tribe, *supra* note 8, at 638.

¹⁶ J. ELY, *supra* note 14, at 13.

¹⁷ See *id.*

¹⁸ See *id.* at 13-14. Ely argues that many provisions in the Constitution are broad invitations to make constitutional considerations that can not be found in the language of the amendment or the intent of the ratifiers. The restrained, "clause-bound" interpretivism of Justice Black fails, according to Ely, to take into account the fact that the Constitution contains open-ended provisions demanding references to sources beyond the document itself. See *id.* at 11-41.

¹⁹ See *id.* at 87-88.

process remain free and open,²⁰ and to facilitate the process of representation of minorities by ensuring that representatives live up to their duty to represent all their constituents fairly.²¹

Ely's approach to the Constitution and his theory of judicial review flow from his view of the document's source of power and its purpose:

We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government. The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it. . . . The Constitution . . . was submitted for ratification to "the people themselves" The document itself . . . expresses its clear commitment to a system of representative democracy at both the federal and state levels.²²

For Ely, these observations mandate a particular approach to discovering the meaning of the Constitution. First, one must focus on the ratifiers' intent to unlock the meaning of the Constitution.²³ Second, the

²⁰ See *id.* at 105-34. Ely contends that, at a minimum, each citizen is guaranteed both a voice and a vote in the political process. He views the strict scrutiny that the Court has applied in voter certification and malapportionment cases as explicit recognition of the need to keep the political process open to all citizens. See *id.* at 120-21 (discussing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964)). The Court's protection of a free and open process, according to Ely, extends beyond explicit representational interests such as voting. The first amendment rights recognized by the Court, including those not explicitly mentioned in the Constitution, such as political association rights, are best understood by a theory that these rights are "critical to the functioning of an open and effective democratic process." *Id.* at 105.

²¹ See *id.* at 135-79. Ely argues that the representational underpinnings of the Constitution demand judicial scrutiny of the distribution of legislatively created benefits as well as issues involving "a voice [or] a vote." See *id.* at 135-36, 145. To support this contention, he focuses on the government's procedure for distributing the benefits rather than on the identity of those benefits that are or should be protected. Consistent with his adoption of the ideal of "virtual representation," his touchstone for judicial review of benefit distribution schemes is the motivation of the legislators. Review of legislative procedure is appropriate even where there is a claim that a "constitutionally gratuitous" benefit—one "not essential to political participation or explicitly guaranteed by the language of the Constitution," *id.* at 136—has been improperly withheld. See *id.* at 145. Acknowledging that the Court has flip-flopped on the relevance of motivational analysis, see *id.* at 136-45, Ely argues that such analysis should be and, in fact, has been an appropriate part of judicial review of government actions. See *id.* at 145.

²² *Id.* at 5 (citations omitted).

²³ Ely states that

[s]omething that wasn't ratified can't be part of our Constitution, and sometimes in order to know what was ratified we need to know what was intended. (Unless we know . . . [what the ratifiers intended], we don't know what the ratifiers thought they were ratifying and thus what we

initial place to look for the ratifiers' intent is in the words of the Constitution.²⁴

Ely relies on his understanding of the Constitution's purpose and his method for discerning constitutional meaning to develop a theory for the Supreme Court's role in interpreting open-ended constitutional provisions whose meaning cannot be supplied solely by reliance on their language. According to Ely, the nature of the Constitution, the substance of the document's promise, is a form of representative democracy characterized by "procedural fairness in the resolution of individual disputes . . . , and . . . broad participation in the processes and distributions of government."²⁵ The Supreme Court should, therefore, interpret the open-ended provisions of the Constitution in ways that give effect to these procedural, participatory values inherent in the ratifiers' overall understanding of the Constitution.²⁶

Ely identifies two components of the Constitution's vision of a representative democracy: broad participation in the political process and protection of discrete minorities.²⁷ He argues that these two features are part of a vision of representative government that has been at the core of our Constitution from the beginning—that of "virtual representation."²⁸ "Virtual representation" was understood by the founders as the duty of representatives to govern in the interest of the whole people.²⁹ This duty, while it does not command equal treatment for all, precludes representatives refusing to represent any particular group.³⁰

The Constitution as a whole must then be understood in terms of the ratifiers' desire to implement a system of representative democracy.³¹ In Ely's view, the fourteenth amendment makes explicit this promise of representation rooted in our constitutional system.³² By ensuring access to the political process and protecting minority interests under the fourteenth amendment, the Supreme Court furthers the ideal of virtual representation.

should recognize as the constitutional command.) To frame the issue thus, however, is to bring to the fore what seems invariably to get lost in excursions into the intent of the framers, namely that *the most important datum bearing on what was intended is the constitutional language itself.*

Id. at 16.

²⁴ *See id.*

²⁵ *Id.* at 87 (citations omitted).

²⁶ *See id.* at 88.

²⁷ *See id.* at 74.

²⁸ *Id.* at 82.

²⁹ *See id.* at 83-84.

³⁰ *See id.* at 82.

³¹ *See id.* at 88-101.

³² *See id.* at 98.

The Supreme Court should not, however, interpret the fourteenth amendment and other open-ended clauses in ways that enforce any values other than those of participation and representation. Ely argues that the enforcement of procedural and participatory values are all that are promised by the Constitution, and thus, all that a court can enforce while remaining consistent with the Constitution's vision of representative democracy.³³

That substantive issues arise in considering the values of participation and process does not defeat Ely's desire to avoid judicial review of "the substantive merits of the political choice under attack."³⁴ Ely admits that his view of the Constitution requires judges to impose substantive values of a particular kind:

Participation itself can obviously be regarded as a value

If the objection is . . . that one might well "value" certain decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned³⁵

Ely thus recognizes that implementing such values involves the Court in substantive value judgments. The important point is that these substantive value judgments take place exclusively within the context of procedural and participatory questions.

Those criticizing the logic of Ely's theory attempt, at bottom, to question the distinction between the values of participation and process on the one hand, and "substantive values" on the other.³⁶ They claim

³³ According to Ely, at the core of the Constitution is a concern with ensuring broad participation in the processes and distributions of government. The selection of substantive values and ideology, however, is left to the legislature. *See id.* at 87. Judicial intervention is appropriate only when the political processes are inadequate to serve the twin goals—protection of minorities and broad participation in the political process—of the Constitution. *See id.* at 86, 103. Ely thus contends that procedural and participatory values are the only ones that judges should use to interpret the Constitution, and that legislators, not judges, are the agents for implementing society's values in a representative democracy. *See id.* at 101-02.

³⁴ *Id.* at 181.

³⁵ *Id.* at 75 n.*.

³⁶ Almost every aspect of Ely's theory has been criticized in some respect. In a sense this is a measure of the power and resilience of Ely's theory, for despite this criticism it maintains its impact. Two recent symposiums on constitutional law offer numerous articles criticizing Ely's thought. *See Constitutional Adjudication and Democratic Theory*, *supra* note 14; *Judicial Review versus Democracy*, *supra* note 14; *see also* Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87, 129-30 (1981) (claiming that Ely's theory of virtual representation negates majority rule); Parker, *The*

that since the former values are in reality values of the latter sort, a judge can never really engage in judicial review without regard to substantive values found outside the four corners of the Constitution itself.³⁷ Ely, however, does not claim to reject substantive values; he has embraced a certain class of them. It is true that judicial review seeking to implement the participatory and procedural values required by the Constitution necessarily involves substantive judgments, but it does not follow that a judge is relegated to a wholesale implementation of extraconstitutional values. The substantive issues involved in such review must be resolved by the judge in a manner that will create the kind of representative democracy promised by the Constitution.³⁸

Past of Constitutional Theory—And Its Future, 42 OHIO ST. L.J. 223, 232-35 (1981) (arguing that Ely's theory, though less problematic than some, is nonetheless vulnerable to political controversy, thereby revealing the futility of conventional constitutional theory); Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 318-23 (1981) (claiming that Ely's approach of praising noninterpretive review of first amendment and equal protection cases and condemning substantive due process is inconsistent); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417, 426-32 (1981) (arguing that attempts to deploy utilitarian arguments in support of rights to fair treatment are unpersuasive); Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 460-68 (1981) (claiming that Ely's distrust of politics rests on unarticulated views about the proper direction of public policy); Tribe, *supra* note 14, at 1064 (arguing that Ely's process theory is meaningless unless supplemented with a full theory of substantive rights and values); Tushnet, *Darkness on the Edge of the Town: The Contribution of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1038 (1980) (claiming that "representation-reinforcing review necessarily involves judicial displacement of citizens' choices").

³⁷ Ronald Dworkin is one of the most articulate proponents of this position. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). In Dworkin's view, "Judges cannot decide . . . which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of . . . [procedural review] think judges should not make." *Id.* at 470. Dworkin believes that he uncovers a fatal flaw in Ely's argument in demonstrating that judges are forced to make substantive value judgments in choosing which process is best. *Id.* at 504. By choosing among competing notions of democracy, a judge behaves undemocratically and thus violates Ely's premise that courts should be faithful to the Constitution's promise of a representative democracy. See *id.* at 500-10.

Dworkin bases his argument on the assumption that Ely makes a distinction between substance and procedure per se. See *id.* at 501. Ely, however, distinguishes between the substantive values of process and participation and other substantive values. See J. ELY, *supra* note 14, at 75 n.*.

³⁸ Ely relies on the existence of a viable distinction between the imposition of the values of process and participation and the imposition of other substantive values. An equal protection case could serve as an example of this distinction. A judge enforcing substantive values in an equal protection case asks herself whether the impact of the law is fair; that is, whether the law treats people equally, and, if not, whether there are legitimate, permissible reasons offered for treating some individuals better than others. On the other hand, a judge enforcing only the values of process and participation asks herself how a legislature should behave in a representative democracy. She may posit that democracy requires that the legislature give equal consideration to the views of all constituents. The judge would then inquire whether in the process of legislation the legislature has in fact inadequately represented some particular group.

By adopting a "participation-oriented, representation-reinforcing approach to judicial review,"³⁹ Ely provides the Supreme Court with a role that is consonant with the text and historical development of our Constitution.⁴⁰ At the same time, by limiting the Court's concerns to those of process and participation, he avoids the problems associated with those who advocate that the Court engage in substantive review of the choices made by the political branches of the government.⁴¹

Ely's notion of a judicial review that is consonant with the overall intent of the ratifiers gives us a workable framework for analyzing particular sections of the Constitution. His emphasis on representative democracy as the cornerstone of the ratifiers' intent allows the Court to engage in historical inquiries that focus on the Constitution's underlying promise in order to discern the meaning of open-ended provisions. The Comment now turns to an analysis of the historical underpinnings of article V in order to provide a basis for understanding the allocation of institutional power in constitutional conventions.

II. THE INSTITUTIONAL POWER CONFIGURATIONS OF ARTICLE V

Article V of the Constitution serves to ensure that the federal government represents the people by providing the people with the means to change the government when it no longer meets their needs. Questions about how this change is to come about and who has the power to control the convention process are, however, not answered by the text

The difference between these approaches lies in the standard that the judge imposes. Bald appeals to substantive values impose norms rooted in the judge's own sense of morality and justice as it is shaped by the judge's community. Appeals to the values of participation and process impose norms whose locus is a constitutional vision of representative democracy.

³⁹ J. ELY, *supra* note 14, at 87.

⁴⁰ Ely explains the decisions of the Warren Court as the first time that the Court concerned itself seriously with the proper functioning of the democratic process. *See id.* at 74. Rather than interpreting the decisions of this Court as an attempt to implement fundamental values, Ely sees the Warren Court as pursuing the "participational" goal of "broadened access to the processes and bounty of representative government." *Id.* at 74 (footnote omitted). Armed with this interpretation of the Court's controversial decisions, he is able to justify them in terms of the ratifiers' intent and earlier decisions of the Court. *See id.* at 75-104.

⁴¹ Ely uses the term "noninterpretivists" to characterize those who believe that such substantive review is appropriate. *See id.* at 1. The goal of this type of review is to give content to the Constitution's open-ended provisions by enforcing "fundamental" values. *See id.* at 43. Ely contends that such an endeavor is futile, *see id.* at 71, regardless of the particular method used to determine the content of the fundamental values to be applied. *See id.* at 44-48 (judge's own values), 48-54 (natural law), 54-56 (neutral principles), 56-60 (reason), 60-63 (tradition), 63-69 (consensus), 69-70 (predicting progress). In Ely's view, the futility stems from both the impossibility of determining "fundamental" values, *see id.* at 71, and the inappropriateness of courts performing such a role in a democracy. *See id.* at 45, 70.

alone. This section argues that Congress's role in conventions is limited to calling for one. It then examines the historical context within which article V was adopted and concludes that the ratifiers intended the states to exercise initial control over the amendment process. Finally, it argues that this initial allocation of power to the states does not preclude judicial review of convention activities to assure that the process by which a proposed amendment is ratified does not violate the guarantees of the fourteenth amendment.

Let us consider first the language of 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 Congress⁴²

The article is addressed to the Congress, and the procedure is straightforward and remarkably clear. The amendment process can be triggered by only two agents: two-thirds of both Houses or two-thirds of the state legislatures. If the former acts, article V commands that Congress propose amendments; if the latter acts, Congress "shall call" a convention. All that remains for Congress is to choose a "mode" of ratification. This language, however, tells us little about article V's allocation of power to resolve issues arising out of a constitutional convention.

Congress clearly has some role to play in the amendment process. It must determine when "two thirds of both Houses . . . deem it necessary" to propose amendments or when "the Legislatures of two thirds of the several States" have made an "application."⁴³ This does not, however, give Congress much discretion in the amendment procedure.

⁴² U.S. CONST. art. V.

⁴³ Congress can refuse an application because it did not come from a state "legislature." See *Hawke v. Smith*, 253 U.S. 221, 226-27 (1920) (holding unconstitutional an attempt by Ohio to require ratification of the eighteenth amendment by referendum when Congress had submitted it to the states for ratification by state legislatures); *AFL-CIO v. Eu*, 36 Cal. 3d 687, 703-06, 686 P.2d 609, 620-22, 206 Cal. Rptr. 89, 100-02 (1984) (holding that as a matter of federal law, article V requires that applications be authorized by voting in state legislatures rather than state referendums).

As James Iredell noted in the ratification debates:

[I]t was very evident that [whether the Constitution was amended] did not depend on the will of Congress; for . . . the legislatures of two thirds of the states were authorized to make application for calling a convention to propose amendments, and, on such application, it is provided that Congress *shall* call such a convention, so that they will have no option.⁴⁴

It thus appears that Congress's role in the amendment process is very limited. Article V instructs Congress that it must call for a constitutional convention if two-thirds of the state legislatures request one.⁴⁵ John Dickinson worded this idea more forcefully in stating:

It cannot be with reason apprehended, that Congress will refuse to act upon any articles calculated to promote the *common* welfare, though they may be unwilling to act upon such as are designed to advance *partial* interests: but, whatever their sentiments may be, they *must* call a convention for proposing amendments, on applications of two-thirds of the legislatures of the several states.⁴⁶

Given the limited discretion of Congress in calling for a constitutional convention,⁴⁷ it would be surprising if the ratifiers intended Congress to control the convention. Although there was little discussion of the convention process at the first constitutional convention or during the ratification debates, it is possible to discern from the ratifiers' general conception of the relationship between state and federal power and their general understanding of the nature of constitutional revision that they saw the states as the political body that would exercise power in constitutional conventions.

The ratifiers saw article V's convention process as a constitutional provision offering the states the power to protect themselves from the

⁴⁴ 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 178 (J. Elliot ed. 1836) [hereinafter cited as ELLIOT'S DEBATES].

⁴⁵ The term "legislature" as used in article V has been interpreted to mean "the representative body which ma[kes] the laws of the people." See *Hawke v. Smith*, 253 U.S. 221, 227 (1920). If the application does not come from such a body, Congress need not act on it.

⁴⁶ Dickinson, *Letter VIII* in PAMPHLETS ON THE CONSTITUTION 204, 210 (P. Ford ed. 1888).

⁴⁷ In the words of Alexander Hamilton, "Nothing in this particular is left to the discretion of [Congress]." THE FEDERALIST No. 85, at 526 (C. Rossiter ed. 1961).

evils of a central government.⁴⁸ Although the ratifiers recognized that the states would have to surrender some of their power to the federal government in order to develop an effective union, there was wide disagreement over how much power the states should retain.⁴⁹ Many of the

⁴⁸ Pelatiah Webster, a Philadelphia merchant writing in favor of ratification, wrote that

[critics] . . . sound[] objections, and fears on *extreme cases* of abuse or misapplication of supreme powers, which may *possibly* happen, under the administration of a wild, weak or wicked Congress; . . . [but abuses] do not often appear . . . [and] if they should happen . . . there is a remedy pointed out, in the Constitution itself.

'Tis not supposeable that such abuses could arise to any ruinous height, before they would affect the States so much, that at least two-thirds of them would unite in pursuing a remedy in the mode prescribed by the Constitution, which will always be liable to amendment . . .

Webster, *The Weakness of Brutus exposed: or some Remarks in Vindication of the Constitution*, in PAMPHLETS ON THE CONSTITUTION 119, 126 (P. Ford ed. 1888).

Concern for the prevention of tyranny, as well as for the creation of national unity, led to a desire to balance the powers of the federal government and the states. This is evidenced by Number 51 of the Federalist Papers, which claimed that "[i]n the compound republic of America, the power surrendered by the people is first divided into two distinct governments . . . The different governments will control each other, at the same that each will be controlled by itself." THE FEDERALIST No. 51, at 323 (A. Hamilton or J. Madison) (C. Rossiter ed. 1961).

⁴⁹ Nearly everyone conceded the weakness of the Confederation and recognized the need for change. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 471 (1969). As Merrill Jensen has explained, however,

[T]he best of the [Antifederalists] agreed that the central government needed more power, but they wanted that power given so as not to alter the basic character of the Articles of Confederation. Here is where they were in fundamental disagreement with the [Federalists] who wanted to remove the central government from the control of the state legislatures.

M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789, at 424-25 (1950). The Antifederalists warned that a central government, independent of the states, would inevitably become a tyranny. Centinel complained, "From this investigation into the organization of this government [under the Constitution], it appears that it is devoid of all responsibility or accountability to the great body of the people, and that so far from being a regular balanced government, it would be in practice a *permanent* ARISTOCRACY." Centinel, *Letter I*, in THE ANTIFEDERALIST 13, 19 (1985) (abridgement by M. Dry of THE COMPLETE ANTIFEDERALIST (H. Storing ed. 1981)). Others voiced fears that a single government presiding over such a large territory could never truly serve the people:

[A] free republic cannot succeed over a country of such immense extent, containing such a number of inhabitants, and these encreasing in such rapid progression as that of the whole United States. . . . "In a large republic, the public good is sacrificed to a thousand views . . . In a small one, the interest of the public is easier perceived, better understood, and more within reach of every citizen . . ."

Brutus, *Essay I*, in THE ANTIFEDERALIST, *supra*, at 108, 113 (quoting C. MONTESQUIEU, I THE SPIRIT OF LAWS, Book VIII, ch. 16, at 120 (T. Nugent trans. 1900)).

In contrast, the Federalists perceived the states to be the cause of factionalism that could be controlled only by forming a stronger centralized government. To Madison, this was one of the most important goals of a new Union: "Among the numerous ad-

participants in the debates viewed assertions of power by a central government with deep suspicion, believing that the federal government would inevitably encroach upon the sovereignty of the states.⁵⁰ Centinel, one of the most forceful critics of the Constitution, wrote that

whatever taxes, duties and excises that [the Congress] may deem requisite for the *general welfare*, may be imposed on the citizens of these states, levied by the officers of Congress, [and] distributed through every district in America; and the collection would be enforced by the standing army, however grievous or improper they may be. The Congress may construe every purpose for which the state legislatures

vantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction." THE FEDERALIST No. 10, at 77 (C. Rossiter ed. 1961). Later Madison wrote, "An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and . . . the great body of them . . . will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State administrations." *Id.* No. 37, at 226-27. For a further elaboration on the opposing views of the Federalists and Anti-federalists, see G. WOOD, *supra*, at 516-36.

⁵⁰ The proposed constitution was viewed by many as an instrument that would destroy the independence of the states and individual liberties. In the Maryland debates, Luther Martin focused almost exclusively on the threat posed to the states:

When I took my seat in the Convention, I found [the Federalists] attempting to bring forward a system which . . . I considered not only injurious to the interest and rights of this state, but also incompatible with the political happiness and freedom of the states in general. . . .

. . . [S]o destructive do I consider the present system to the happiness of my country, I would cheerfully sacrifice the share of property with which Heaven has blessed a life of industry . . . and those who are dearer to me than my own existence I would intrust to the care and protection of that Providence . . . if on *those terms only* I could procure my country to reject those chains which are forged for it.

1 ELLIOT'S DEBATES, *supra* note 44, at 388-89.

Thomas Tredwell, in the New York debates, took up the fear of many that their liberties were being encroached upon:

Is this, sir, a government for freemen? Are we thus to be duped out of our liberties? I hope, sir, our affairs have not yet arrived to that long-wished-for pitch of confusion, that we are under the necessity of accepting a system of government such as this.

. . . We are called upon at this time (I think it is an early day) to make an unconditional surrender of those rights which ought to be dearer to us than our lives.

. . . We ought, sir, to consider . . . that we may now give away, by a vote, what it may cost the dying groans of thousands to recover; that we may now surrender, with a little ink, what it may cost seas of blood to regain; the dagger of Ambition is now pointed at the fair bosom of Liberty, and, to deepen and complete the tragedy, we, her sons, are called upon to give the fatal thrust. Shall we not . . . all cry out with one voice, "Hands off!" . . . A moment's hesitation would ever prove us to be bastards, not sons.

2 ELLIOT'S DEBATES, *supra* note 44, at 403-04.

now lay taxes, to be for the *general welfare*, and thereby seize upon every object of revenue.

. . . .
 . . . [T]he all-prevailing power of taxation, and . . . extensive legislative and judicial powers are vested in the general government, [and] must in their operation, necessarily absorb the state legislature and judicatories⁵¹

Those who argued for ratification were able finally to persuade the majority that the federal government's powers under the Constitution were limited in nature,⁵² and that those powers not claimed in the language of the Constitution for the federal government were reserved to the states.⁵³ As James Wilson explained:

"In delegating federal powers, another criterion was necessarily introduced, and the congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the [federal government] . . . everything which is not given is reserved."⁵⁴

Since control over the conventions is not given to Congress, it is reasonable to conclude that the ratifiers assumed that the states retained the power to control constitutional conventions.

The ratifiers read article V in accordance with their overall under-

⁵¹ Centinel, *Letter I*, in *THE ANTIFEDERALIST*, *supra* note 49, at 13, 17.

⁵² James Wilson, in a speech widely circulated throughout the states, argued to his fellow Pennsylvanians that governments were of two kinds, those that hold every power not explicitly reserved to the people, and those that hold only those powers expressly delegated to them by the people. The Constitution, he argues, was established as a government of the latter kind. See J. McMASTER & F. STONE, *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788*, at 143 (1888) (quoting J. Wilson, Speech at the Pennsylvania State House, *quoted in* Pennsylvania Packet, Oct. 10, 1787).

Wilson also developed the argument that the limited powers of the federal government made a bill of rights unnecessary. According to this view,

"[In a government of enumerated powers], nothing more is intended to be given than what is so enumerated, unless it results from the nature of government itself. . . . [I]n a government like the proposed one, there can be no necessity for a bill of rights. For, on my principle, the people never part with their power."

Id. at 314. This argument was adopted as the central federalist explanation for the lack of a bill of rights. See G. WOOD, *supra* note 49, at 539-40.

⁵³ Madison claimed that "the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *THE FEDERALIST* No. 39, at 245 (C. Rossiter ed. 1961).

⁵⁴ J. McMASTER & F. STONE, *supra* note 52, at 143 (quoting J. Wilson, Speech at the Pennsylvania State House, *quoted in* Pennsylvania Packet, Oct. 10, 1787).

standing of the relationship between state and federal power and as the ultimate protection for state sovereignty. Supporters of the Constitution presented article V as a safety mechanism controlled by the states.⁵⁵ As Alexander Hamilton explained, article V allowed "the State legislatures to erect barriers against the encroachments of the national authority."⁵⁶ Similarly, James Iredell attempted to reassure those skeptical of the purportedly limited nature of the federal government by explaining that if Congress proved unresponsive to the people's desire to change, then "two thirds of the legislatures of the different states may require a general convention . . . in which case Congress are under the necessity of convening one."⁵⁷

That the ratifiers construed article V to allocate power over a convention to the states should not be surprising in light of the historical context in which the Constitution was adopted. The states had established their own independent governments in the years following the Declaration of Independence⁵⁸ and jealously guarded their powers.⁵⁹ Although many were willing to concede the need for a stronger central government than that which the Articles of Confederation had pro-

⁵⁵ Consider the comment of J.C. Jarvis of Massachusetts:

I have found complete satisfaction [in article V]: this has been a resting place, on which I have reposed myself in the fullest security, whenever a doubt has occurred, in considering any other passage in the proposed Constitution. . . . When we shall have adopted the Constitution before us, we shall have in this article an adequate provision for all the purposes of political reformation. If . . . this government shall appear to be too severe, here are the means by which this severity may be assuaged and corrected.

2 ELLIOT'S DEBATES, *supra* note 44, at 116-17.

⁵⁶ THE FEDERALIST No. 85, at 526 (C. Rossiter ed. 1961).

⁵⁷ 4 ELLIOT'S DEBATES, *supra* note 44, at 176-78.

⁵⁸ See, e.g., M. JENSEN, *supra* note 49, at 127 (explaining that during the Confederation "the separate American states were sovereign and independent").

⁵⁹ Alexander Hamilton saw the inability of the states to reach agreement as one of the major flaws of the Articles of Confederation:

In our case, the concurrence of thirteen distinct sovereign wills is requisite under the Confederation to the complete execution of every important measure that proceeds from the Union. . . . Each State yielding to the passionate voice of immediate interest or convenience has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads and to crush us beneath its ruins.

THE FEDERALIST No. 15, at 112-13 (C. Rossiter ed. 1961). At the same time, he saw the jealousy of the states as threatening the passage of the Constitution. See THE FEDERALIST No. 1.

The fight against the factionalism caused by the conflicting interests of the various states became the "center of the Federalist perception of politics." G. WOOD, *supra* note 49, at 502. The institution of a national government independent of, and superior to, the states was seen as an essential part of the solution to the problem of factionalism. See, e.g., THE FEDERALIST No. 10 (J. Madison).

vided,⁶⁰ they were unwilling to surrender their sovereignty completely to a higher government.⁶¹

In short, article V provided the ratifiers with a constitutional cure-all, a security blanket that gave them the courage to consent to a central government. A provision understood by those who ratified the Constitution to be special protection from the evils of centralized government would not be effective if it were controlled by the central government. Article V had to leave one avenue of amendment almost entirely within the realm of state power.

This allocation of power to the states, however, must be read in light of the general revolution in thought that occurred during the seventeenth and eighteenth centuries.⁶² The atmosphere of revolution and upheaval gave the American people as a whole a sense of their own

⁶⁰ See J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at 113-14 (1961). All participants in the debates agreed that change was necessary. See, e.g., 2 ELLIOT'S DEBATES, *supra* note 44, at 385 (statement of T. Tredwell) ("It is on all hands acknowledged that the federal government [under the Articles of Confederation] is not adequate to the purpose of the Union."); 4 *id.* at 25 (statement of James Galloway) ("As to the weakness of the Confederation, we all know it.").

⁶¹ The very terms of the ratification debates illustrate the assumptions made about the powers of the states. The debates focused on whether the states would be giving up too much power under the Constitution, with all participants assuming that the states must maintain some sovereignty. See, e.g., A. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION 1783-1789*, at 164 (1962) ("This new political idea [of two sovereign governments] . . . did not involve the establishment of a national government which was to be superior to the state governments."). Madison tried to assure the skeptics with the following:

The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

THE FEDERALIST No. 45, at 293 (C. Rossiter ed. 1961). The means chosen to select members of the Senate serves to illustrate further the desire to maintain the sovereignty of the states. Madison remarked that

[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

Id. No. 62, at 378 (C. Rossiter ed. 1961).

⁶² See B. BAILYN, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22-54* (1967) (examining the American colonists' use of European, and in particular, British, thinkers of the seventeenth and eighteenth centuries).

power. As Gordon Wood has explained:

Transferring sovereignty from the legislative bodies to the people-at-large outside of all governmental institutions represented far more than simply an intellectual shift of a political conception. . . . [T]he Americans were fundamentally unsettling the traditional understanding of how the people in a republic were to participate in the government. . . . All that had begun in the 1760's with the debate with England was now being brought to a head. A series of tiny, piece-meal changes in thought, no one of which seemed immensely consequential, was preparing Americans for a revolution in their conceptions of law, constitutionalism, and politics.⁶³

The ratifiers' general understanding of the nature of government must have influenced their reading of article V. They believed that the people were the foundation of all governments, and that the individual was the essential political unit.⁶⁴ The uncontroverted remarks of James Wilson in the Pennsylvania debates indicate how these beliefs influenced the ratifiers' understanding of the process of change:

Perhaps some politician, who has not considered with sufficient accuracy our political systems, would answer that, in our governments, the supreme power was vested in the constitutions. This opinion approaches a step nearer to the truth, but does not reach it. The truth is, that, in our governments, the supreme, absolute, and uncontrollable power *remains* in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions. Indeed, the superiority, in this last instance, is much greater; for the people possess over our constitutions control in *act*, as well as right.

⁶³ G. WOOD, *supra* note 49, at 383.

⁶⁴ James Wilson, one of the principal federalists, asked:

Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now if there can not, my position is, that the sovereignty resides in the people. They have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare. This constitution stands upon this broad principle.

J. McMASTER & F. STONE, *supra* note 52, at 301-02; *see also* G. WOOD, *supra* note 49, at 530-36 (examining the Federalists' position on the primacy of the individual and the use to which they put this belief in the debates over the ratification of the Constitution).

The consequence is, that the people may change the constitutions whenever and however they please. This is a right of which no positive institution can ever deprive them.

. . . .
 . . . In this Constitution, *all authority is derived from the people*.⁶⁵

Thus, although article V may be read to allocate power over conventions to the states, ultimately this power is vested in the the people themselves. Wilson proclaimed the power of the people in the strongest of terms:

That the supreme power, therefore, should be vested in the people, is . . . the great panacea of human politics. It is a power paramount to every constitution, inalienable in its nature, indefinite in its extent. For I insist, if there are errors in government, the people have the right not only to correct and amend them, but likewise totally to change and reject its form; and under the operation of that right, the citizens of the United States can never be wretched beyond retrieve, unless they are wanting to themselves.⁶⁶

The practical political consequence of locating power in the individual was the development of a system of representative democracy. As Madison explained:

[W]e may define a republic to be . . . a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices . . . for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise, a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic.⁶⁷

Only a representative democracy was acceptable to the ratifiers;⁶⁸ by

⁶⁵ 2 ELLIOT'S DEBATES, *supra* note 44, at 432-34.

⁶⁶ J. MCMASTER & F. STONE, *supra* note 52, at 230.

⁶⁷ THE FEDERALIST No. 39, at 241 (C. Rossiter ed. 1961).

⁶⁸ As Madison wrote, "It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all

dividing the powers of government between the states and a central government, the Federalists saw themselves as assuring that the interests of the people were fully represented.⁶⁹

The same view of the individual that led the founders to embrace a representative democracy resulted in a concern for the protection of individual rights. One of the criticisms of the Confederation was that the state legislatures had not properly protected the rights of individuals.⁷⁰ The federal government was seen as providing protection from the majoritarian tyrannies threatened by the power of the state legislatures.⁷¹ The federal judiciary served, in the founders' eyes, as a further safeguard for individual rights. As Hamilton noted, limits on legislative authority "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."⁷²

It is the perception of the individual as the locus of all political power that gives the Supreme Court the authority to review states' article V activities. The fourteenth amendment extended to the states the duty to adhere to the Constitution and made explicit the promise of representative democracy envisioned by the ratifiers.⁷³ By adopting the fourteenth amendment, therefore, the states subjected their activities to review by the Supreme Court.

Ely's argument that the Court should protect the procedural and participatory values that fulfill the Constitution's promise of a representative democracy applies with special force to issues arising under article V, for it is article V that provides the people with the ultimate voice in their government—the ability to change it. Through the amendment process, the people come to form the foundations of their society. The legitimacy of the Constitution is rooted in the document's

our political experiments on the capacity of mankind for self-government." *THE FEDERALIST* No. 39, at 240 (C. Rossiter ed. 1961).

⁶⁹ Madison explained the balance between the two types of governments as a means to protect representational government. In his view:

By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

Id. No. 10, at 83 (C. Rossiter ed. 1961).

⁷⁰ See G. DIETZE, *THE FEDERALIST: A CLASSIC ON FEDERALISM AND FREE GOVERNMENT* 130-37 (1960).

⁷¹ See *THE FEDERALIST* No. 10 (J. Madison).

⁷² *THE FEDERALIST* No. 78, at 466 (C. Rossiter ed. 1966).

⁷³ See J. ELY, *supra* note 14, at 98.

promise of a government that represents the collective will of the people and respects the sovereignty of the individual. It is entirely appropriate, therefore, that the process of amending the Constitution be susceptible to attack under the fourteenth amendment should it stray from the standards of representative democracy. Judicial review of states' article V activities would impose democratic standards on these activities and would allow amendments resulting from undemocratic and unrepresentative processes to be declared void.

III. JUDICIAL REVIEW OF ARTICLE V ACTIVITY

Any suggestion for judicial review of attempts to amend the Constitution must address the problems raised by the political question doctrine, in general, and the particular approach to constitutional amendments articulated by the Court in *Coleman v. Miller*.⁷⁴ This Comment argues that neither *Coleman* nor the political question doctrine in general presents a complete barrier to judicial review of article V activities. It then suggests that the Court review the states' article V activities, including issues such as delegate selection, to ensure that the process by which an amendment is adopted by a state adheres to the procedural requirements of the fourteenth amendment.

A. *The Political Question Doctrine*

Although there are a number of cases supporting a Supreme Court review of issues arising out of constitutional conventions,⁷⁵ it could be

⁷⁴ 307 U.S. 433 (1939). In addition to the political question doctrine, standing is a potential problem for litigants contesting the constitutionality of the amendment process. An analysis of the issue of standing is beyond the scope of this Comment. The legal tests adopted by the Court to determine standing fail to provide litigants with a reliable test for predicting whether a plaintiff will have standing in a particular case. As Professor Nichol has written, "[T]he Court's existing body of law [on standing] reflects a state of intellectual crisis. . . . The result is a schizophrenic body of law in which the Court announces that one set of interests are dispositive . . . while in the bulk of the major cases other factors appear to prevail" Nichol, *Rethinking Standing*, 72 CALIF. L. REV. 68, 69-70 (1984). For other recent discussions of the standing issue, see, for example, Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 34 (1984); *The Supreme Court, Leading Cases of the 1983 Term*, 98 HARV. L. REV. 87, 236-46 (1984).

⁷⁵ See *United States v. Sprague*, 282 U.S. 716 (1931) (rejecting the argument that the eighteenth amendment had to be adopted via a constitutional convention and upholding the validity of the amendment); *Leser v. Garnett*, 258 U.S. 130 (1922) (upholding the validity of the nineteenth amendment against attacks directed at the ratification process and allegations that the ratification by certain states was invalid); *Dillon v. Gloss*, 256 U.S. 368 (1921) (upholding the ability of Congress to limit the time in

argued that the political question doctrine bars a fourteenth amendment challenge to a state's article V activities. In a nutshell, the problem is that the Court's review of constitutional convention activity must not threaten or undermine "either the *independence and integrity* of one of the branches or levels of government, or the ability of each to fulfill its mission in checking the others so as to preserve the *interdependence* without which independence can become domination."⁷⁶ Contrary to the contentions of some commentators,⁷⁷ however, the political question doctrine does not present an absolute bar to judicial review of article V activity. Thus, a plaintiff should be able to challenge a state's selection of delegates to a constitutional convention, for example, on the grounds that the selection process did not provide for the adequate representation of minorities.

The political question doctrine is one aspect of the separation-of-powers principle of justiciability. A political question is nonjusticiable because it does not present a "case" or "controversy" in the sense that the constitutional provision on which the litigants rely in pressing a political question does not implicate judicially enforceable rights.⁷⁸ As the Supreme Court explained in *Baker v. Carr*:⁷⁹

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for

which a proposed amendment can be ratified by the states); *The National Prohibition Cases*, 253 U.S. 350 (1920) (rejecting procedural challenges to the validity of the eighteenth amendment); *Hawke v. Smith*, 253 U.S. 221 (1920) (holding that the power of a state legislature to ratify a proposed amendment to the Constitution is derived from the Federal Constitution and therefore holding unconstitutional a provision in a state constitution that reserved to the people of the state the power to ratify a proposed amendment to the federal Constitution by way of referendum); *Hollingsworth v. Virginia*, 3 U.S. (1 Dall.) 378 (1798) (holding that the eleventh amendment was constitutionally adopted even though the amendment was never presented to the President for his approval).

⁷⁶ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 2-2, at 15 (1978) (footnote omitted).

⁷⁷ See, e.g., Goldberg, *The Proposed Constitutional Convention*, 11 HASTINGS CONST. L.Q. 1, 2-3 (1983); Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 SANTA CLARA L. REV. 745, 755-68 (1983).

⁷⁸ See L. TRIBE, *supra* note 76, at § 3-16.

⁷⁹ 369 U.S. 186 (1962).

unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸⁰

When the issue involved does present the Court with questions about judicially enforceable rights and does not intrude into the other branches of the federal government, it is not a political question and may be decided by the Court.

Coleman v. Miller,⁸¹ in which the Court refused to decide a dispute over a proposed amendment, may present an obstacle to judicial review of states' article V activities.⁸² Two factors, however, diminish the potential impact of this case on the issues addressed in this Comment. First, *Coleman* may be easily distinguished from the kind of case that this Comment suggests is appropriate for the Court's review. Second, the Court's willingness to avoid the political question doctrine in certain situations since the *Coleman* decision indicates that the review suggested here would not run afoul of the Court's present understanding of the doctrine.⁸³

Coleman involved the validity of Kansas' ratification of a proposed child labor amendment. The Kansas legislature had initially rejected the amendment in 1925, but it was reintroduced in the state Senate in 1937. When the Senate vote split evenly, the Lieutenant Governor broke the tie with a vote in favor of ratification.⁸⁴ The Kansas senators who voted against the amendment filed a suit questioning the Lieutenant Governor's right to cast the deciding vote in favor of ratification and arguing that the ratification was invalid because it was previously rejected and because of the lapse of time between the two considerations of the amendment.⁸⁵

⁸⁰ *Id.* at 217.

⁸¹ 307 U.S. 433 (1939).

⁸² Professor Walter Dellinger provides a powerful criticism of the *Coleman* decision in his recent article, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, *supra* note 13. As he explains, *Coleman* essentially precludes judicial review of amendment disputes and adopts the position that congressional promulgation is the mechanism to resolve such disputes. Dellinger argues that such congressional authority is not supported by the text of article V, is contrary to pre-1939 judicial precedent, is consistent with only one example of prior congressional practice, is "dysfunctional," and is a source of uncertainty about the amendment process. *Id.* at 389-405.

⁸³ See *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that Congressman Powell's challenge to his exclusion from the House of Representatives did not raise a political question); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that Tennessee's apportionment of voting districts did not raise a political question).

⁸⁴ See *Coleman*, 307 U.S. at 435-36.

⁸⁵ See *id.* at 436.

The Supreme Court split evenly over the justiciability of the challenge to the Lieutenant Governor's vote and expressed no opinion on the matter.⁸⁶ The Court also declined to decide the effect of Kansas' prior rejection and the lapse of time between the proposal of the amendment and its ratification. Relying on "historic precedent,"⁸⁷ the Court tied its own hands with the political question doctrine: these issues were found nonjusticiable.⁸⁸

Coleman, however, does not address whether the Court's review of the amendment process violates the political question doctrine. The decision holds merely that whether a ratification has occurred is a political question. *Coleman* does not preclude the judicial review of all article V activity, because the Court did not address the justiciability of the petitioners' attack on the manner of ratification. The Court may concede that the effect of prior rejection and the reasonableness of the time lapse between proposal and ratification are political questions and still maintain that questions arising out of a constitutional convention are reviewable under the fourteenth amendment.⁸⁹

The issues declared nonjusticiable in *Coleman* involved whether ratification had occurred as a matter of law: the petitioners sought a

⁸⁶ See *id.* at 447.

⁸⁷ *Id.* at 450. The "historic precedent" on which the *Coleman* Court based its position was the refusal by Congress to recognize New Jersey's and Ohio's withdrawal of approval of the fourteenth amendment when Congress adopted a joint resolution to promulgate that amendment. See *id.* at 448-49. Professor Dellinger has criticized this reliance very successfully, pointing out that this "historic precedent" lost any practical significance two years later, when Congress debated but never adopted a resolution to promulgate the fifteenth amendment. Dellinger contends that Congress has never passed a resolution promulgating any of the other amendments, and even the resolution promulgating the fourteenth amendment was passed with little debate. Moreover, the *Coleman* Court, according to Dellinger, ignored a prior Supreme Court ruling that the amendment process is complete as soon as the required number of states have voted for ratification. See Dellinger, *supra* note 13, at 397-403.

⁸⁸ See *Coleman*, 307 U.S. at 450-51, 453-54.

⁸⁹ A strong indication that the Court understands this to be the case is found in *Uhler v. AFL-CIO*, 105 S. Ct. 5 (Rehnquist, Circuit Justice 1985), in which Justice Rehnquist was asked to stay a decision of the California Supreme Court. The California court held that an initiative to force the California legislature to request Congress to call a constitutional convention could not be placed on California's November 1984 ballot, because to do so would violate the California constitution as well as article V of the United States Constitution. See *AFL-CIO v. Eu*, 36 Cal. 3d 684, 687, 686 P.2d 609, 613, 206 Cal. Rptr. 89, 93 (1984). Justice Rehnquist declined to review the federal part of the California court's opinion because he found that the decision could stand independently on its state law grounds and that any review of the federal law holdings would thus be no more than "advisory opinions." Furthermore, he specifically rejected the argument advanced by the petitioner that the state court lacked jurisdiction because the referendum issue was a nonjusticiable political question; "I do not think a majority [of the present Court] would subscribe to petitioners' expansive reading of the 'political question' doctrine in connection with the amending process." *Id.* at 6 (citing *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962)).

declaration that the contested ratification either occurred too late or was precluded because it has been rejected previously. The convention issues discussed in this Comment involve whether the article V activities of the states violate the fourteenth amendment. *Coleman* tells us that the Court is not to involve itself in the political struggles of the states, but it does not prohibit judicial scrutiny to ensure that the rights of the citizens of the states are protected. Moreover, two more recent cases on the political question doctrine, *Baker v. Carr*⁹⁰ and *Powell v. McCormack*,⁹¹ suggest that the doctrine would not bar judicial review of convention issues involving representational concerns.

Baker held that an attack on a Tennessee statute apportioning representatives over the state's ninety-five counties was justiciable.⁹² The Court rejected the contention that the political question doctrine barred review of cases involving political rights, finding such an argument "little more than a play upon words."⁹³ That the case involved political rights in fact legitimated review by the Court. By challenging the Tennessee state legislature's apportionment of representatives, the plaintiffs were challenging "the consistency of state action with the federal constitution."⁹⁴ Because the issue was not "to be decided by a political branch of government coequal with [the] Court,"⁹⁵ was not likely to cause embarrassment abroad or great disturbance at home,⁹⁶ and was not an issue for which "the Court lacked judicial standards,"⁹⁷ the case was not barred by the political question doctrine.

In *Powell v. McCormack*,⁹⁸ the Court further demonstrated its reluctance to invoke the political question doctrine when political rights not delegated to another branch of the government by the Constitution are involved. *Powell* involved Adam Clayton Powell's claim that the House of Representatives had unconstitutionally excluded him from his

⁹⁰ 369 U.S. 186 (1962).

⁹¹ 395 U.S. 486 (1969).

⁹² 369 U.S. at 237 (referring to provisions of the Tennessee Code set forth in *Baker*, 369 U.S. at 237 app.). The plaintiffs claimed that the apportionment of representatives by the Tennessee state legislature violated their rights under the equal protection clause. Since no reapportionment proposals had passed in both houses of the state's legislature since 1901, the composition of the state legislature did not reflect the large changes in population that occurred from 1901 to 1961. The plaintiffs sought to enjoin further elections under the 1901 apportionment scheme and to have a new apportionment enacted according to the most recent federal census figures. See *id.* at 191-95.

⁹³ *Id.* at 209 (quoting *Nixon v. Herndon*, 273 U.S. 536, 540 (1927)).

⁹⁴ *Id.* at 226.

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ 395 U.S. 486 (1969).

seat.⁹⁹ Although the Court found a “‘textually demonstrable commitment’ to Congress to judge . . . the qualifications [of members of the House] expressly set forth in the Constitution,”¹⁰⁰ it held that Powell’s exclusion from the House was not a political question reserved to Congress, because Powell had met the Constitution’s express qualifications.¹⁰¹ Powell’s suit against the House of Representatives “require[d] no more than an interpretation of the Constitution.”¹⁰² Such a determination fell “within the traditional role accorded courts to interpret law”¹⁰³ and was not political in any of the senses suggested by the *Baker* decision.

The Court’s criteria in *Baker* and *Powell* for determining whether an issue is justiciable under the political question doctrine indicate that issues arising out of constitutional conventions would not necessarily be political issues. Challenges to a state legislature’s article V activities would arise under the fourteenth amendment, and would concern the consistency of the state’s activities with the Constitution. For example, a plaintiff may allege a lack of representation in the state body deciding whether to adopt a specific constitutional amendment. Issues such as this are not relegated to the political branches of government. Rather, the protection of political rights is the Court’s function.¹⁰⁴ The Constitution does not textually commit any of the issues arising out of a constitutional convention to any branch of the federal government, and it limits Congress’s role to proposing amendments or calling for a convention.¹⁰⁵ Deciding what standards the fourteenth amendment imposes on constitutional conventions requires an “interpretation of the Constitution,” and the Court has been developing standards under the fourteenth amendment for over a century.

The Court’s development of the political question doctrine since *Coleman* indicates that review of article V activities under the fourteenth amendment would not violate the Court’s present understanding of the political question doctrine. The political questions in *Coleman* are legitimately distinguishable from a challenge to a state’s actions to

⁹⁹ See *id.* at 489. Although Congressman Powell met all the qualifications listed in article I, section 2, as to age, citizenship, and residency, the ninetieth Congress excluded him from his seat presumably because of his unacceptable, if not illegal, activities as Chairman of the Committee on Education and Labor during the eighty-ninth Congress. See *id.* at 489-95. The Congressman was seated as a member of the ninety-first Congress. See *id.* at 495.

¹⁰⁰ *Id.* at 548 (quoting *Baker*, 369 U.S. at 217).

¹⁰¹ See *id.* at 549-50.

¹⁰² *Id.* at 548.

¹⁰³ *Id.*

¹⁰⁴ See J. ELY, *supra* note 14, at 101-04.

¹⁰⁵ See *supra* text accompanying notes 42-61.

amend the Constitution that is based on the claim that the state body violated the rights of some of its citizens. The issues involved in this Comment are more similar to the apportionment challenge in *Baker* than to the institutional power questions that the plaintiffs attempted to have the Court address in *Coleman*. Even if the Court were to continue to adhere to *Coleman*, therefore, it could hear a case concerning the representational rights of citizens in a constitutional convention. Such issues do not fall into the political question rubric as it is described recently in *Baker* and *Powell*.

A number of cases, moreover, indicate that the Court may articulate constitutional standards for the amendment process. In *Hollingsworth v. Virginia*,¹⁰⁶ the Court decided that the Constitution does not require the President's approval of amendments.¹⁰⁷ In *Hawke v. Smith*,¹⁰⁸ the Court found that when Congress proposes ratification of an amendment by state legislatures, the Constitution prohibits the states from requiring ratification by any body other than the state legislatures. The Court therefore held unconstitutional Ohio's attempt to add as an additional ratification requirement that amendments be submitted to a state referendum.¹⁰⁹ In the *National Prohibition Cases*,¹¹⁰ the Court interpreted article V's requirement that amendments be proposed when "two thirds of both Houses shall deem it necessary." The Court held that the requirement is satisfied when two-thirds of both houses adopt a resolution to propose an amendment,¹¹¹ and decided that the constitutional standard of "two thirds" meant two-thirds of

¹⁰⁶ 3 U.S. (3 Dall.) 378 (1798).

¹⁰⁷ See *id.* at 380 n.(a) (Chase, J.) ("The negative of the president applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution.").

¹⁰⁸ 253 U.S. 221 (1920).

¹⁰⁹ See *id.* at 227-28. The Court found that since the method of ratification is specifically fixed in the Constitution;

[i]t is not the function of courts or legislative bodies, national or state, to alter the method

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? . . . Congress and the States understood that election by the people was entirely distinct from legislative action

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which the instrument referred to the action of the legislatures of the States. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

Id.

¹¹⁰ 253 U.S. 350 (1920).

¹¹¹ See *id.* at 386.

those present in each house, assuming a quorum in both houses, and not two-thirds of each house's entire membership.¹¹² In *United States v. Sprague*,¹¹³ the Court found that article V gave Congress discretion in deciding whether amendments are ratified in state conventions or by state legislatures.¹¹⁴ There is thus substantial precedent justifying the Court's articulation of constitutional standards for the amendment process.

B. *Review by the Supreme Court*

By reviewing states' article V activities, the Supreme Court can ensure that states adhere to the values of participation and process in attempts to amend the Constitution. For an amendment to be valid, the amendment process must comport with the fourteenth amendment. If a state's article V activities violate the fourteenth amendment, the state's ratification should be declared void.

Ely's representation-reinforcing view of judicial review suggests a number of ways in which the amendment process might fall short of the standards imposed by the fourteenth amendment.¹¹⁵ First, the method used by a state to select its delegates may be susceptible to attack. If the delegate selection process did not enable the people of a state to choose their delegates, for example, the Court might hold that the process failed to adhere to the participatory values inherent in our constitutional scheme.¹¹⁶ Second, the ratification of the amendment by the state legislature may be unconstitutional because the legislators did not adhere to their duty of "virtual representation."¹¹⁷ Thus, it could be argued that an amendment repealing the fifteenth amendment was invalid on the grounds that the legislators had purposely discriminated against the interests of their minority constituents in ratifying the amendment.

How the Supreme Court would ultimately resolve issues such as these depends on their version of the Constitution's promise of representative democracy. The choices that the Supreme Court may be forced to make clearly involve substantive judgments that impose values. The values imposed, however, are the values of participation and process embodied in the Constitution.

An amendment itself cannot violate the Constitution. The Consti-

¹¹² See *id.*

¹¹³ 282 U.S. 716 (1931).

¹¹⁴ See *id.* at 730.

¹¹⁵ See *supra* text accompanying notes 27-32.

¹¹⁶ See *supra* text accompanying notes 25-26.

¹¹⁷ See *supra* text accompanying notes 29-30.

tution, however, both defines and governs the process by which states can propose and ratify amendments. Should a state ratification fail to meet the standards of the fourteenth amendment, that state's ratification should be declared invalid. If enough ratifications of a particular amendment were invalidated by the Supreme Court, the remaining valid ratifications might total less than the three-quarters required for the amendment to become effective.

CONCLUSION

Constitutional convention drives will not disappear from American history, nor should they. The convention process is a legitimate, if little understood and potentially disruptive, means of amending the Constitution.

Understanding the article V convention process requires an understanding of the Constitution itself. The Constitution promises the people of the United States a particular form of government—representative democracy. This principle requires the Court to reveal the Constitution's promise when interpreting the open-ended provisions of the document. Although article V allocates initial control over constitutional conventions to the states, the Court must hold states' article V activities to a constitutional standard: it must insure that the people receive the process "due" them from the Constitution's promise of representative democracy in terms of both participation and representation. The political question doctrine should not be used to foreclose court review of the procedural and participatory questions that may be raised by a convention.

There are many ways in which the Court might play out this Comment's broad prescriptions. Review of attempts to amend the Constitution under the "open-ended" provisions of the fourteenth amendment imports a constitutional standard of representative democracy to article V activity. Such review would allow the Court to sculpt a constitutional law for the convention process that would insure that when and if the Constitution is reconstructed by the American people under article V's convention provision, the product of that reconstruction is born of the representative, democratic process that the Constitution promises. Perhaps the best way to insure the preservation of democratic values in our culture is to insure that widespread, radical changes occur democratically.