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THE DOCTRINE OF THE AMENDABILITY OF THE UNITED STATES CONSTITUTION

HUGH EVANDER WILLIS*

One of the two doctrines written into the United States Constitution by the framers in the Constitutional Convention was the doctrine of the amendability of the constitution. But so many matters both of method and scope of the power of amendment have had to be worked out by the Supreme Court since the Constitutional Convention, by methods of interpretation, that a large part of the authorship of the doctrine will now have to be attributed to the justices of the United States Supreme Court.

The methods whereby the United States Constitution can be amended may be classified as legal and extra-legal or revolutionary. The framers in the Constitutional Convention were themselves exercising the revolutionary method in drafting a new constitution to take the place of the Articles of Confederation,¹ but they provided in their own new constitution for legal methods of amendment.²

Under Article V, provision is made for the proposal of amendments in two different ways, either by "two-thirds of both

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1 Cooley, Constitutional Law (3rd) 15; Federalist No. 43.
2 "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 Congress: Provided, That no amendment which may be
houses" of Congress, or by a convention called by Congress for proposing amendments "on the application of the legislatures of two-thirds of the several states." It should be observed that Congress takes the important action in the proposal of amendments. Where it does not propose the amendments itself, it is necessary to have it call a convention for proposing amendments. Where Congress itself proposes amendments, it generally does so in the form of a joint resolution, though the proposal can be in the form of a bill, but it should be observed that in the amending process Congress is not legislating but exercising a part of the peculiar amending power.

The two-thirds requirement means two-thirds of a quorum of each house. It has been argued that under the language of Article V there must be an express declaration that Congress "deems it necessary" before an amendment can be legally proposed, but the Supreme Court has held otherwise. One question which came up early was whether or not the approval of the

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." U. S. Const., Art. V.

All of the states of the Union now have constitutions in which there are provisions for amendment, but the methods of amendment vary greatly, and for this reason, in this article only the amendment of the United States Constitution will be fully considered. There is some similarity, however, among the provisions of the different state constitutions. Generally, an amendment or amendments may be proposed by either house, either by a majority vote, or a three-fifths vote, or a two-thirds vote, but such amendments are required to be passed by two successive legislatures and then ratified either by a majority vote, or a three-fifths vote, or a two-thirds vote of the people. Some state constitutions provide for a general revision by a convention. (Stimson, Federal and State Constitutions, Secs. 990-995.) Where there is no such provision, the courts generally hold that there is an implied power in the legislature to provide for the calling of a constitutional convention, or at least to provide for submission to the voters of such a question. 5 Ind. Law Jour. 329, note 1; 12 C. J. 683, 684.

Because of its power over the admission of new states, Congress has the power to control both the subject-matter and method of adoption of constitutions of new states, and if Congress admits a state into the Union with such a constitution so adopted it becomes the constitution of that state though never submitted to the people, but after admission Congress loses any further power over state constitutions. Brittle v. People, 2 Nebr. 98 (1873).

3 National Prohibition Cases, 253 U. S. 350 (1920).
4 National Prohibition Cases, supra.
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The president was necessary. The Supreme Court answered this question in the negative at an early date, and more recently confirmed its early decision.

Could Congress propose an entirely new constitution? This question has not been answered, although it would be a safe guess that if it would its action would be revolutionary and only legal when ratified by the people. After the proposal of an amendment, can Congress withdraw it? The correct view would seem to be that the proposal is an irrevocable act and that Congress cannot withdraw it. Certainly, one house of Congress could not withdraw its action.

Where the other method of proposing amendments is invoked, it should be observed that neither Congress itself nor the states can call a convention on its own initiative. The legislatures of two-thirds of the states may apply for and then it is the duty of Congress to call a constitutional convention. Apparently a majority of Congress could issue the call, but suppose such a majority should refuse? Under the doctrine of separation of powers, no pressure could be brought upon Congress. There is no constitutional method of coercing Congress to perform its constitutional duty. When would two-thirds of the legislatures have made application for a call? Must the request be simultaneous or approximately so? It would seem that it should be held that they must be reasonably approximate. Must the request seek a convention for identical purposes? Perhaps the answer to this question should be in the negative. Who has the authority to fix the time and place of the convention? Should such a convention represent the states or the people as an aggregate? It would seem that because of the silence of the Constitution, these matters are left within the power of Congress. Could such a convention propose a wholly new constitution? If it should do this, it would seem that its act would be revolutionary and not legal until ratified by the people. The better view seems to be that a convention is not subject to the

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5 Hollingsworth v. Virginia, 3 Dallas 378 (1798).
6 Hawke v. Smith, 253 U. S. 221, 229 (1920). The proposed Corwin Amendment and the Thirteenth Amendment were inadvertently signed by the President.
7 Ellingham v. Dye, 178 Ind. 336, (1912).
9 Wood's Appeal, 75 Pa. 59 (1874).
legislative branch of the government, but that it is bound by
the existing Constitution.\textsuperscript{10}

Under Article V, provision is made for three different methods
of ratification. One of these relates only to depriving a state of
its equal suffrage in the Senate. An amendment of this sort
must be ratified by the state involved, as well as by the requisite
total two-thirds. As to all other matters, an amendment may be
ratified either by the legislatures of three-fourths of the states
or by conventions in three-fourths of the states, as Congress
may choose. Here is one power over ratification given to Con-
gress, but it has no others.\textsuperscript{11} But it should be noted that a
limitation may be incorporated in the submitted amendment
itself.\textsuperscript{12}

Where ratification is by convention, a question which might
arise would be, Can an amendment be ratified by conventions
when Congress submits it to the state legislatures? In the case
of the proposed Corwin Amendment, an Illinois convention
undertook to do this. But it would seem that the case of \textit{United
States v. Sprague}\textsuperscript{13} had settled this question in the negative.
Some difficulty might arise as to the power of state legislatures
and Congress over state conventions, but it should be remem-

\textsuperscript{10} In the case of a state convention, this would mean both the existing
state constitution and the federal Constitution.

On the powers of constitutional conventions, there have been two di-
vergent views. One reduces the powers of a convention below that of the
legislature. \textit{Carton v. Secretary of State}, 151 Mich. 337 (1908); \textit{In re
Op. of Justices}, 76 N. H. 612 (1889); \textit{Wells v. Bain}, 75 Pa. 39 (1874);
\textit{Ex p. Birmingham etc. R. Co.}, 145 Ala. 514 (1905); \textit{Foley v. Orleans etc.
Com.}, 138 La. 220 (1915); \textit{In re Op. of Justices}, 6 Cush. 573 (1833). The
other makes the convention independent of the legislature and a direct rep-
resentative of the people and endowed with all the powers given to it sub-
ject to the existing constitution. (Some cases even go so far as to say
that it has not even this limitation, but it would seem that when a con-
vention violates the Constitution it is doing a very revolutionary thing.)
\textit{Sproule v. Fredericks}, 69 Miss. 898 (1892); \textit{Frantz v. Autry}, 18 Okla. 561
(1907); \textit{Loomis v. Jackson}, 6 W. Va. 613 (1873).

Can such a convention promulgate a constitution without submission to
the people? Not legally, unless the Constitution so provides, but it can
as a revolutionary thing, and if such action is accepted by the people so
as to make it a success, the Constitution so promulgated becomes a valid
constitution. \textit{Miller v. Johnson}, 92 Ky. 589 (1892); \textit{Taylor v. Common-

\textsuperscript{11} \textit{United States v. Sprague}, 51 S. Ct. 220.

\textsuperscript{12} 7 A. B. A. 656.

\textsuperscript{13} 51 S. Ct. 220.
bered that such conventions are really instrumentalities, neither of the state governments, nor of the national government, but of the sovereign people acting under Article V of the Constitution.\textsuperscript{14}

Where the ratification is by state legislatures, the method which has so far been used, the usual procedure is for the Secretary of State to send a copy of the proposed amendment to the governor of each state, who in turn submits it to the legislature, but it would seem that a state legislature could proceed without these steps. A number of questions have arisen in connection with ratification by state legislatures. For example, Is the governor's approval necessary? Can a constitution of a state require a referendum? Can a state reject after ratifying or ratify after rejecting? It should be borne in mind that a legislature in ratifying is not legislating, but is performing a function concerning the amendment process. For this reason, it has been held that the governor's approval is not necessary,\textsuperscript{15} and that the requirement of a referendum is illegal,\textsuperscript{16} and that ratification is a final act, so that it cannot be withdrawn, but that rejection is not a final act and may be withdrawn, since the Constitution mentions only ratification and not rejection.\textsuperscript{17} A question of a little more difficulty is, Can a legislature prescribe a breathing spell before its legislatures shall act, that is, can it provide that an amendment shall be ratified only by a legislature elected after the proposal of an amendment? It has been argued that the people of a state have this power,\textsuperscript{18} but it is doubtful whether or not this argument is sound, since the state legislatures derive their authority directly from the people as a whole through Article V.\textsuperscript{19} A question arises over whether or not ratification by three-fourths of the state legislatures means three-fourths of the loyal states, or three-fourths of the whole number of states; which affects the validity of the Civil War

\textsuperscript{14} Orfield, \textit{The Procedure of the Federal Amending Power}, 25 Ill. Law Rev. 432.

\textsuperscript{15} Dodd, \textit{Amending the Federal Constitution}, 30 Yale Law Jour. 321, 346.


\textsuperscript{17} Garrett, \textit{Amending the Federal Constitution}, 7 Tenn. L. Rev. 294; Jameson, \textit{Constitutional Conventions} (4th), 575, 582-584; 30 Am. L. Rev. 894.

\textsuperscript{18} 14 Va. Law Rev. 191.

Amendments, but the Supreme Court has hinted that this is a political question rather than a judicial question.\textsuperscript{20} Five amendments proposed by Congress have not as yet been ratified by the states. Two were proposed in 1789, one in 1810, one in 1861, and the Child Labor Amendment, in 1924. Are these amendments still pending? The answer would have to be No, as to all except the Child Labor Amendment, since the Supreme Court has held that an amendment will last only a reasonable length of time.\textsuperscript{21} As to the time of the adoption of an amendment, it has been thought that it should be the time of the proclamation of ratification by the Secretary of State, but the Supreme Court has held that the amendment is adopted with the approval by the last state necessary to make up the three-fourths majority,\textsuperscript{22} since the proclamation by the Secretary of State is a congressional matter, and the law of amendment is found in Article V. But the Supreme Court has held that it would not go back of the certificate of a Secretary of State that an amendment had been ratified and inquire into the legislative proceedings.\textsuperscript{23}

The reasons for the incorporation into our Constitution of a doctrine of amendability of the Constitution are partly historical and partly philosophical. The Articles of Confederation could be amended only by unanimous consent. The Pennsylvania Charter was the only one of the colonial charters which provided for amendment. The first state constitutions made no provisions for amendment, but by 1787, eight of the state constitutions had provided for amendment. The doctrine is essentially an American doctrine. Experience with the first written constitutions showed the need of such a provision. The members of the Constitutional Convention realized that there were many matters of constitutional importance, such as the question of a dual form of government, the question of who should decide questions of constitutionality, social control of corporations, acquisition of new territory, power of taxation, control of elections, re-election of the President, removals from office, the spoils system, the

\textsuperscript{20} \textit{White v. Hart}, 13 Wall. 646 (1871).
\textsuperscript{21} \textit{Dillon v. Gloss}, 256 U. S. 368 (1921).
\textsuperscript{23} \textit{Leser v. Garnett}, 258 U. S. 130 (1922); 14 Va. L. Rev. 196.
control of concentration of wealth, which had been omitted from the constitution, and they also realized that there were many matters included in the Constitution which might need change with the change of conditions. One of these expressly stated in the Constitution involves the institution of slavery, but undoubtedly they also foresaw the possibility of the need of change in the method of election of a President and in the allocation of powers to the different branches of government under their doctrine of separation of powers. Hence, there was general agreement in the Constitutional Convention that some provision should be made for amendment. Dispute arose over the methods of amendment and the scope of amendment. Various proposals were made. Some provided for the proposal of amendments only by Congress; others only by the state legislatures. Others provided for ratification only by state legislatures; others by convention. Finally, due to the work of Madison, the present methods of proposal and ratification were adopted. Dispute arose also over the scope of the amending power. Sherman proposed to preserve the states against the possibility of destruction by a limitation on the amending power that no state should be affected in its internal police. This limitation was not adopted. But finally, as a result of Rutledge's work, an express limitation on the amending power prior to 1808 was made, so as to prevent a change of Article I, Sec. 9, clauses 1 and 4, relating to the slave trade and direct taxation, and as a result of the work of Gouveneur Morris, a limitation on the amending power was made "that no state, without its consent, shall be deprived of its equal suffrage in the Senate." 2

What is the scope of the amending power under Article V? Probably the correct answer to this question is that it embraces everything. In other words, that there are no legal limitations whatever upon the power of amendment. If the limitations with reference to the slave trade and direct taxation were ever true limitations they became obsolete in 1808. Otherwise, the Sixteenth Amendment would raise a question with reference to the limitation as to direct taxation. The limitation in regard to equal representation in the United States Senate, while a limitation as to legal direct method of amendment, is not a limitation upon indirect methods of amendment which would accomplish the same result. Of course, it should be observed that any state

can, by the language of the amendment itself, be deprived of its equal representation by its own vote and the vote of thirty-five others. This is apparently the only direct way of amending this part of the Constitution, but there are various indirect ways where the same result could be accomplished. It has been contended with much plausibility that this clause in Article V could itself be repealed in a legal manner. Whether or not this could be done, certainly either the Senate itself could be abolished or the states themselves could be abolished, and thereby the provision as to equal representation be made nugatory. The only argument against this is the argument that the provision in regard to equal representation implies the continued existence of the Senate and the states, but this is too heavy an implication for such a limitation, and clearly is not the view of the United States Supreme Court. This disposes of the only express limitation upon the amending power.

But it has been contended that there are all sorts of implied limitations upon the amending power. Thus, it has been suggested that no amendment is valid unless it is germaine to something else in the Constitution, or if it is a grant of a new power, or if it is legislative in form, or if it destroys the powers of the states under the dual form of government, or if it changes the protection of personal liberty; but the United States Supreme Court has brushed away all of these arguments, and has held that there is no limitation that an amendment shall be germaine,


Attorneys, in arguing cases before the United States Supreme Court also have made these points.

or not a new grant of power, because there is no test for determining when there is one and when the other; or that an amendment shall not be in the form of legislation, because although it may be impolitic to frame an amendment in this form, to forbid the sovereign people from doing so would be to make the agent greater than the principal, and the principal can legislate directly if it chooses to do so; or that an amendment shall not destroy our dual form of government, because up to the fourth period in our constitutional history it had been common to limit the powers of the federal government by amendment, and if the federal government can be limited in this way, so can the states, by future amendments, and because if the framers of the Constitution had desired to put this limitation on the amending power, they would have voted for instead of against Sherman's proposal; or that the protection of personal liberty should not be changed by future constitutional law.

There are other more general reasons why there are no implied limitations upon the amending power. The enumeration of three express limitations (two now obsolete), as a matter of construction, should be held to negative any implied limitations. This is especially so when the records of the Constitutional Convention show that the framers anticipated a wide use of the amending power and even voted down suggestions for further express limitations. The fact that there are no implied limitations is further shown by the fact that Article V is independent of all the other articles in the Constitution, both so far as concerns the procedure of amendment and the substance of amendment. The 10th Amendment did not reserve the amending power which had already been delegated, but only the non-delegated powers, and hence, it must be held, as it has been held, that the 10th Amendment is not an amendment of Article V. Hence, any implied limitations upon the amending power would have to be made by the Supreme Court itself. The exercise of such a power would be a dangerous thing for the court.


29 Ibid.

30 Ibid.

31 Ibid.
to do, since it would violate the doctrine of the sovereignty of the people and would be an unwarranted usurpation of power by the Supreme Court when such a power had not been delegated to it. This would not only discredit the court, but would tend to discredit our constitutional system. The amending power, it should be noted, is not a power delegated to the federal government, nor a power delegated to the states, in either of which cases limitations on the power might be presumed, but the amending power is an independent and absolute power granted to different branches of both governments, free from any limitations in other parts of the Constitution upon the branches of the federal government as such or the branches of the state government as such, and unlimited except by the limits upon the procedure of amendment set forth in Article V. The possibility of abuse of the amending power is not a test of its existence. Sovereignty certainly has such a power. If sovereignty desired to delegate the power, it certainly could do so, and if sovereignty desired directly to exercise the power, it certainly could do so. The 5th Article has not only delegated such a broad power as this, but has provided for direct action by sovereignty itself. Abuse by a principal is a different thing from abuse by an agent, and an agent cannot be guilty of abuse when he exercises only a power which has been given to him. There is no power above the people, and the amending power of the Constitution does not recognize any power above them. Sovereignty certainly does not. The wonder is not that the amending power is so broad as we have just indicated but that any members of the legal profession or pseudo-constitutional lawyers should ever have thought otherwise.\textsuperscript{32}

Does the power of amendment include the power to repeal a provision in the Constitution as well as the power to change or add to such provision? While there is no direct Supreme Court authority on this point, state courts have answered this question in the affirmative, and it would seem that the question should be so answered. The amending power is broad enough so that it includes the power to repeal both expressly and impliedly.\textsuperscript{33}

When is a provision in the Constitution self-executing? It is

\textsuperscript{32} Note 27, supra.

\textsuperscript{33} Ex parte Kerby, 103 Ore. 612 (1922); Lovett v. Ferguson, 10 S. D. 44 (1897); 15 Minn. Law Rev. 224.
self-executing if it lays down a rule sufficient for application by the courts without supplementary legislation.\textsuperscript{34}

As we have already noted, an amendment will take effect from the time it is adopted by the last state necessary to make up the three-fourths majority, not from the time of the proclamation by the secretary of state, although so far as state action is concerned, the Supreme Court will not go back of the certificate of a secretary of state and inquire into legislative proceedings.\textsuperscript{35}

Is the validity of an amendment or a series of amendments a judicial question for the courts, or a political question for the legislature or executive? So far as concerns substance, it is clearly a judicial question. But the courts have held, as we have seen, that there are no limitations of this sort. So that in the future no questions involving substance ought to arise.\textsuperscript{36} So far as concerns procedure, the answer to the question depends upon whether or not a legal method or a revolutionary method is employed, and whether the question is raised before adoption or success, or after adoption or success. Where an attempt is made to follow the legal method of amendment, whether one amendment or a whole Constitution is proposed, before adoption the question would seem to be largely a political question, because the courts would not enjoin the legislature itself, probably because of the doctrine of separation of powers, in spite of the fact that in such a case the legislature would be exercising the amending power and not the power of legislation. But the court might enjoin ministerial acts by officers of the executive branch of the government.\textsuperscript{37} But after adoption, the question of the validity of an amendment is certainly a judicial question, and the validity of a whole Constitution thus adopted would also be a judicial question, unless it was called a revolution. The United States Supreme Court evidently was at first inclined to regard both aspects of this question as a political question, but the state courts have taken the opposite position, and now

\textsuperscript{34} Tampa Water Works Co.\textit{ v.} Tampa, 199 U. S. 241 (1905); \textit{Davis v. Burke}, 179 U. S. 399 (1900); \textit{Hyatt v. Allen}, 54 Cal. 353 (1880); \textit{Newport News v. Woodward}, 104 Va. 58 (1905); \textit{Willis v. Mabon}, 48 Minn. 140 (1892); 15 Minn. Law Rev. 227.

\textsuperscript{35} Note 22, \textit{supra}.

\textsuperscript{36} Note 24; \textit{Contra, Livermore v. Waite}, 102 Cal. 113 (1894).

Where state constitutions impose limitations on the scope of amendments, probably a judicial question is raised. 14 Minn. Law Rev. 381-382.

\textsuperscript{37} Ellingham\textit{ v.} Dye, 178 Ind. 336 (1912); \textit{Loring v. Young}, 239 Mass. 349 (1921).
the Supreme Court has taken the same position. Where a revolutionary rather than a legal method of amendment is followed, different considerations are involved. Before the success of the revolution it would seem to be a judicial question, whether an amendment or an entire constitution is proposed, and any persons not protected by the doctrine of the separation of powers could be restrained by the courts. After the success of a revolution, the question of the validity of the whole Constitution is a political question, and it would seem that this should be the view, though only one amendment is thus adopted by the people. The reason for this is found in the doctrine of the sovereignty of the people. If people who have all sovereign power actually adopt a new Constitution as was done in the case of the United States Constitution, and as has been done in the case of most of the early state constitutions, such new constitution becomes the new fundamental law and the measure of the powers of the different branches of government, and supersedes any old constitution, and this result should also be true if only one amendment instead of an entire constitution is adopted.

Can an amendment, invalid because not adopted in the legal way when a legal method has been attempted, become a constitutional amendment by acquiescence? This is a very important question, since it affects the slavery amendments, which, it has been contended, were never ratified by three-fourths of the legislatures of the states. While there may be some doubt on the point, the safest answer is that such an amendment or amendments can become constitutional by acquiescence provided such acquiescence is for a considerable period and by the people as a whole, though acquiescence of the people might be implied from acquiescence by the different branches of the government. This would seem to follow from the power to make or amend constitutions by revolution.

Could an amendment to the federal Constitution be attacked collaterally? This question should be answered in the affirma-
tive, and it would seem as though it is almost the only way that an amendment can be attacked, because of the difficulty of making a direct attack.\textsuperscript{44}

In providing for the amendment of the Constitution, the sovereign people should make the power to amend neither too easy nor too difficult. It would seem as though in the case of the United States Constitution a fairly happy mean had been struck. During the first 140 years since the adoption of the United States Constitution, 3113 proposals of amendment have been made, but only 24 have so appealed to Congress as to secure their proposal by Congress, and only 19 have made a sufficient appeal to people to secure ratification. This would seem to indicate that the method of amendment is not too easy. Yet, during a 9 year period, the last four amendments of the United States Constitution were proposed and ratified, which would seem to indicate that the power of amendment is not too difficult.\textsuperscript{45}

Of course, the Supreme Court has made many more changes and additions to the Constitution than have been made by all the nineteen amendments to the Constitution. Perhaps, if the Supreme Court did not have this power, the present express Constitutional provision for amendment would be inadequate. But, on the whole, it probably works better to allow the Supreme Court to do most of the work of remodeling the Constitution to keep it abreast with new conditions and new times, and to allow the agencies expressly endowed with the amending process to act only in extraordinary emergencies or when general opinion disagrees with the opinion of the Supreme Court.

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\item[44] Minn. Law Rev. 383.
\item[45] Tenn. Law Rev. 299-300.
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