1-1-1983

The Supreme Court, Political Questions, and Article V - A Case for Judicial Restraint

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I. INTRODUCTION

Since the time of Marbury v. Madison, the Supreme Court has exercised the power to review the constitutionality of actions of Congress and the President. Through the exercise of the authority "to say what the law is," the Supreme Court has assumed the role of the ultimate arbiter of the meaning of the Constitution. In exercising this power of judicial review, however, the Court has also fashioned several limitations on its role. Generally, these limitations stem from the Court's interpretation of article III's requirement that litigation must involve an actual case or controversy. Thus, the Court has limited its power to say what the law is by interpreting article III to preclude consideration of cases which are not ripe, cases which are moot, or cases where the plaintiff lacks standing. Another limitation on judicial review, the political question doctrine, is one that is self-imposed. It is unique because it derives not from article III's limitations on judicial power, but from the Court's recognition of its constitutional role as but one of three co-equal branches of government in a system of separated powers.

Where power is separated in any system of government, tension, of course, exists among the centers of that power.

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1. 5 U.S. (1 Cranch) 137 (1803).
2. Id. at 176.
When one repository of that power exercises it to review the actions of another branch of government, as with the exercise of judicial review, that tension becomes manifest. Perhaps nowhere is that tension greater than in cases where the Supreme Court's judicial review power is invoked to review the actions undertaken in article V's constitutional amendment process. This tension is created by the nature of judicial review itself and the purpose of article V.

In exercising judicial review and in interpreting the Constitution, the Supreme Court adds meaning to the words of the Constitution. In a real sense, its decisions on constitutional issues are as much a part of the Constitution as the words of the document itself.

The Court's constitutional interpretations can be changed in only two ways. First, the Court can, in later cases, modify or overrule its prior decisions. Second, those decisions may be overruled in the political processes established by article V. The former method necessarily presupposes active judicial involvement. The latter method does not and is totally non-judicial, unless the Court is requested to rule on the legality of some aspect of the amendment process. When the Court is faced with an article V case, it must reconcile the polar concepts of judicial review and the constitutional power of other branches and levels of government to assert authority to amend the Constitution, including the Court's interpretations of the Constitution. In such cases, tension thus exists between the Supreme Court's role to interpret the Constitution, its duty to say what the law is, and its role as a coordinate branch of government in a system of separated powers.

Judicial resolution of article V cases can have only three

7. U.S. CONST. art. V provides:

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, which in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . .

results. First, the Court can serve to legitimize the actions of the political branch by upholding its constitutional authority to do the acts in question. In such cases, the Court's resolution prevents any present conflict with another part of the federal government by resolving the controversy in favor of that other branch. By addressing the issues at all, however, the Court can create the potential for a future conflict. Its decisions are used to measure the legality of future actions and therefore limit the authority of Congress, the states, and the public to exercise various options in amending the Constitution. Second, the Court can find the amendment process, and perhaps an amendment itself, defective in some manner, thereby thwarting amending efforts. Either of these results poses serious questions concerning the legitimacy of judicial review. By exercising review over article V cases, the Supreme Court retains not only control over the judicial process of constitutional amendment through overruling past cases, but also control over the non-judicial amendment process of article V. Potentially, the Supreme Court's ability to say what the law is would be unchecked, a result at odds with the constitutional concept of a republican government of separated powers.

A third result is possible, however. Instead of resolving disputes over the amendment process, the Court can utilize the judicial rules of self-restraint, such as the limitations on justiciability created by the Court's interpretation of article III's case or controversy limitations. Indeed, the Supreme Court recently employed this method. The Court dismissed as moot a case involving the power of Congress to extend the ratification period for the Equal Rights Amendment ("ERA") and the ability of the states to rescind their prior ratifications. Alternatively the Court can acknowledge the authority of other branches and levels of government to also add to the meaning of the Constitution by applying the political question doctrine to article V cases, as it has done on one prior occasion.

The Supreme Court's treatment of article V cases, beginning with the first amendment adopted under article V and culminating with the now-defunct ERA, reveals that the

11. 3 U.S. (1 Dall.) 379 (1798).
Court has never been willing to precipitate a conflict with another branch of government in the area of article V. Instead, the Court's practice has been one of avoiding conflict, first through legitimization and then through judicial restraint. This article traces the history of the Court's views on article V and focuses on the political question doctrine and the justification for its application in article V cases.

II. THE FIRST PHASE—LEGITIMIZATION

Although several article V cases have been decided by the Supreme Court, at no time has the Court ever exercised its power of judicial review to invalidate an amendment or any step taken by Congress in the amendment process. To the contrary, on those occasions when it has addressed the merits, the Supreme Court has consistently upheld congressional authority in article V. In Professor Black's terms, the Court's role has consistently been one of legitimization. Never has the Court expressly performed the converse role of checking congressional action.

Interestingly enough, the trend of legitimization began with the first amendment adopted under article V and the first article V case to reach the Supreme Court. In Chisholm v. Georgia, the Court held that citizens of one state were not barred by sovereign immunity from suing another state. Reacting quickly to this decision, Congress proposed, and the states ratified, the eleventh amendment to bar such suits. In proposing the amendment, however, Congress did not present it to the President for approval. In Hollingsworth v. Virginia, the petitioner argued that the failure to present the proposed amendment to the President for approval or veto invalidated it. The Supreme Court, with no real explanation, ac-

14. 2 U.S. (1 Dall.) 419 (1793).
15. U.S. Const. amend. XI reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."
16. Under the Presentment Clause of article I, section 7, "every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary . . . shall be presented to the president of the United States; and . . . shall be approved by him, or being disapproved by him, shall be repassed [by two-thirds of both houses]."
17. 3 U.S. (1 Dall.) 379 (1798).
cepted the validity of the eleventh amendment. 18

The Supreme Court was not faced with another article V case until 1920. Again, however, the Court's exercise of judicial review extended only to legitimize completed amendment procedures against an effort to overturn an already ratified amendment. In Hawke v. Smith, No. 1, 19 and Hawke v. Smith, No. 2, 20 the Court considered whether the constitution of the state of Ohio could lawfully require that federal constitutional amendments be ratified through a binding popular referendum rather than through action of the state legislature, as prescribed by Congress under its article V power to designate the mode of ratification. 21 Contrary to the state constitution, the Ohio legislature ratified the eighteenth 22 and nineteenth amendments 23 without submission of those amendments to popular vote. The Supreme Court found that, under article V, designation of the mode of ratification "is left to the choice of Congress." 24 According to the Court, the states had no inherent power to depart from Congress' choice; state power to ratify amendments "derives its authority from the Federal Constitution to which the State and its people have alike assented." 25

A few months later, the Court again addressed the eighteenth amendment in the National Prohibition Cases. 26 Persons charged with violating prohibition laws challenged, inter alia, the power of Congress to propose an amendment by a two-thirds majority of a voting quorum of each house, rather than by a two-thirds vote of the entire membership of each house. They also asserted that article V did not permit the adoption of amendments relating to public health and safety, but only to the structure of government. 27 The Court upheld

18. The Court's judgment merely indicated that the amendment was "constitutionally adopted." Id. at 382. The reporter's notes indicate that Justice Chase, during argument, expressed the view that the president's veto applies only to legislation and that he has no role in the amendment process. Id. at 380 n.(a).
21. See supra note 7.
22. The eighteenth amendment banned the sale, manufacture, and transportation of intoxicating liquors.
23. The nineteenth amendment extended suffrage to women.
24. 253 U.S. at 226.
25. Id. at 230.
27. Other issues examining the preemptive effect of the eighteenth amendment
Congress' action in proposing the amendment by two-thirds majorities of the voting quorums. It also found that the amendment itself was within the power of Congress to propose. Reminiscent of its disposition in *Hollingsworth*, the majority opinion of Justice Van Devanter included only the Court's conclusions, not its reasoning.\(^{28}\)

In these first three cases, the Court exercised its judicial review role, but did so in a manner which resulted in approval of the actions of Congress. It performed Professor Black's legitimization function.\(^{28}\) By merely exerting authority to review the cases, the Court created the possibility for conflict with Congress. By legitimizing congressional action, however, present conflict was avoided.

Of the three cases, tension between judicial review and the separation of powers was greatest in *Hollingsworth*, because the eleventh amendment was plainly intended to reverse the Court's previous decision in *Chisholm v. Georgia*. Actual conflict was avoided through legitimizing the amendment process by finding the eleventh amendment valid despite Congress' failure to submit the proposal to the President for approval. Indeed, the Court's decision to affirm Congress' action without a written opinion also lessened the possibility of future conflict. Similarly, the Court's simple announcement of its conclusions in the *National Prohibition Cases*, upholding both the amendment procedures and substance of the eighteenth amendment, lessened the potential for conflict. The Court legitimized congressional actions without disclosing a rationale which could be interpreted to limit congressional power in the future.

*Hawke* presented no conflict with congressional judgments, but only an issue of state power. In protecting the primacy of federal authority, the Court was perhaps less constrained by notions of its role as a coordinate branch of government. The beginnings of a concept important to the Court's decisions in later cases emerged in *Hawke*, however. In commenting upon Congress' authority to require ratification through state legislatures, the Supreme Court noted that and the interpretation of the amendment itself, not relevant to the amendment process, were also presented. *Id.* at 386-88. An additional issue, concerning state ratification through referendum was foreclosed by the Supreme Court decision in *Hawke*.

28. *See id.* at 384; *id.* at 388 (White, C.J., concurring).
that method had been used for all amendments adopted to that point.\textsuperscript{30} As will be shown later, the use of historic and congressional precedent became important to the Court in its transition from legitimization to restraint.

III. THE SECOND PHASE—LEGITIMIZATION THROUGH DEFERENCE—THE BEGINNINGS OF JUDICIAL RESTRRAINT

The eighteenth and nineteenth amendments continued to be the source of litigation for the Supreme Court. From 1921 to 1931, the Court decided cases involving both of these amendments. Its decisions mark a turning point, however. In deciding these cases, the Court began to explicitly recognize congressional action as precedent and to explicitly defer to congressional judgments and authority.

Shortly after its decision in the \textit{National Prohibition Cases}, the Supreme Court again faced a challenge to the eighteenth amendment in \textit{Dillon v. Gloss}.\textsuperscript{31} This time, a person arrested for violating federal prohibition laws sought habeas corpus relief, and challenged the authority of Congress to limit the ratification period for an amendment to seven years.\textsuperscript{32} Justice Van Devanter, writing for the Court, held that amendments must be ratified within a reasonable time after proposal by Congress, but that Congress may decide what that reasonable time period shall be when proposing an amendment. According to Justice Van Devanter, ratification must be "a decisive expression of the people's will."\textsuperscript{33} To be a decisive expression, state ratifications "must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period."\textsuperscript{34} Having thus established a standard of reasonableness, Justice Van Devanter went on to find that Congress could fix a reasonable time at the outset as part of its power to designate the mode of ratification "so that all may know what it is."\textsuperscript{35}

\textit{Dillon} displays an interesting blend of judicial review and judicial restraint. In deciding that proposal and ratification

\begin{itemize}
\item \textsuperscript{30} 253 U.S. at 227.
\item \textsuperscript{31} 256 U.S. 368 (1921).
\item \textsuperscript{32} Prior to the eighteenth amendment, no ratification period had been specified by Congress for any proposed amendment. \textit{Id.} at 371-72.
\item \textsuperscript{33} \textit{Id.} at 374.
\item \textsuperscript{34} \textit{Id.} at 375.
\item \textsuperscript{35} \textit{Id.} at 376.
\end{itemize}
must occur within a reasonable time, the Court opened the
door to judicial review of the reasonableness of the ratification
period. Justice Van Devanter pointed to three proposed con-
stitutional amendments which, at that time, had been pending
for nearly a century or more and intimated that these amend-
ments would not be valid if ratified after such a long period. 36

The qualified opening for judicial review of the reasona-
bleness of the ratification period contained inherent mecha-
nisms to assure a minimal amount of conflict with Congress or
the public. Indeed, this opening was confined to cases where
the Court could safely rule without fear of congressional or
popular backlash. If, for example, the Supreme Court were to
hold today that the amendment proposed in 1810 banning for-
eign titles of nobility for American citizens 37 was no longer
open for ratification, as suggested by the Dillon Court, 38 pub-
lic reaction would probably be more amused than angered. In
Dillon, where the question was a closer one, however, the
Court deferred to Congress' judgment in establishing a ratifi-
cation period at the outset.

In short, the Dillon Court assumed the authority to re-
view the reasonableness of the ratification period only in cases
where the time period since proposal was so great that popu-
lar interest would have died and the Court's ruling would not
be controversial. In closer cases, where the time period was
not clearly unreasonable, it indicated that it would defer to
Congress. In Dillon, the Court combined legitimization, by
upholding Congress' power to establish a ratification period,
with deference to Congress' judgment on what period was
reasonable.

The nineteenth amendment returned to the Supreme
Court in Leser v. Garnett, 39 a challenge by state voters to the
federal government's ability to extend suffrage to women in
the state without the state's consent. Such a great change in
the electorate, argued the voters, required the state's con-

36. Id. at 372. These proposed amendments concerned the compensation of
members of Congress, the apportionment of Representatives, and titles of nobility.
fourth proposal, preserving the institution of slavery, was effectively defeated by the
thirteenth amendment. 256 U.S. at 372. All other then-proposed amendments had
been ratified. Id.
37. Resolution of Jan. 12, 1810, Ch. 50, 2 Stat. 613 (1810).
38. 256 U.S. at 372.
39. 258 U.S. 130 (1922).
Additionally, they asserted that ratification of the nineteenth amendment violated several state constitutions; two ratifications, those of Tennessee and West Virginia, were invalid under state procedural laws. For Justice Brandeis, writing for the Court, the issue was relatively simple. If the petitioners' theory was correct, then serious doubts would be cast upon the validity of the fifteenth amendment, extending the vote to black males, which had "been recognized and acted on for half of a century" at that time. To have agreed with the petitioners would thus have meant not only thwarting the actions of Congress, the states, and the public in ratifying the nineteenth amendment, but it would also have meant vitiating the effectiveness of a long-standing amendment. Justice Brandeis refused to consider the issue, saying that "[t]he suggestion that the Fifteenth was incorporated in the Constitution, not in accordance with law, . . . cannot be entertained."

By following historic precedent, rather than reviewing the merits of the issue, the Court effectively avoided a ruling which could have invalidated two amendments at once and engendered a considerable hostile reaction by Congress, the states, and the public. By implication, the Court also accepted Congress' judgment that article V permitted it to propose amendments affecting the composition of the electorate and to enforce those amendments in states which had not ratified them. The Court could just as easily have held, without reference to the fifteenth amendment, that all the states agreed to be bound by amendments adopted under article V when they accepted the Constitution. Instead, the Court looked to Congress' past actions on the fifteenth amendment to decide *Leser*. The decision thus displayed a blend of legitimization and deference to Congress' judgments.

As in *Hawke*, however, the *Leser* Court was willing to exert judicial review over assertions of state power. It found that state constitutional limitations had no effect on the ability of

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40. Petitioners were a group of qualified voters from Maryland, a state which rejected the nineteenth amendment. *Id.* at 135-36. A similar challenge by voters of the District of Columbia was dismissed for lack of standing in *Fairchild v. Hughes*, 258 U.S. 126 (1921). A Maryland statute, however, specifically gave Maryland voters standing to challenge the registration of voters. *Leser v. Garnett*, 258 U.S. 130 (1922).

41. 258 U.S. at 136.

42. *Id.*
a state to ratify an amendment to the federal Constitution. Additionally, the Court found that the federal government need not have looked behind the face of ratifications received from the states to determine their validity.\footnote{Id. at 137. Previously, the Supreme Court had summarily affirmed a decision by the District of Columbia Circuit, reaching the same result. United States ex rel. Widenmann v. Hughes, 265 F. 998 (D.C. Cir. 1920), aff'd, 257 U.S. 619 (1921).} On such questions, of course, the issue is one of federalism—federal versus state power—not separation of powers within the federal government.

The treatment of historic congressional precedent as binding on the Supreme Court continued in United States v. Sprague.\footnote{282 U.S. 716 (1931).} There, persons charged with violating prohibition laws argued that amendments affecting individual rights could only be ratified through state conventions and not by the state legislatures. The Court cited its earlier holding in Hawke that article V allowed Congress alone the power to designate the ratification mode. It went on, however, to point out that the defendants' theory called into question the validity of the thirteenth, fourteenth, fifteenth, sixteenth, and nineteenth Amendments, each of which affected individual rights and each of which was ratified through action by state legislatures.\footnote{Id. at 734.} Again, the Court accepted Congress' prior judgments and refused to consider invalidating six amendments at once.

Dillon, Leser, and Sprague indicate a transition in the Supreme Court's article V analysis and its views on its own role in the amendment process. The Court continued to legitimate the steps in that process. For the first time, however, the Court began to disclose reasoning which betrayed a willingness to defer to congressional judgments in the amendment process and a recognition of the consequences of disagreeing with those judgments. In Leser and Sprague, the Court explicitly recognized that contrary rulings would have created legal chaos by invalidating prior amendments. The Court was unwilling to do so. In Dillon, the Court opened the door to striking down an amendment which had lost vitality over time, but did so in a manner unlikely to create a confrontation. Rather, it expressly deferred to Congress' judgment concerning the appropriate period for ratification. Taken together, these three cases set the stage for the application of
the political question doctrine to article V cases, which soon followed.

IV. THE THIRD PHASE—JUDICIAL RESTRAINT THROUGH THE POLITICAL QUESTION DOCTRINE.

The trend toward deferral of article V questions to Congress reached its peak seventeen years after Dillon when the Supreme Court decided Coleman v. Miller. Faced with the questions of whether a state may ratify the Child Labor Amendment after having already rejected it fifteen years after its proposal, and whether the proposal remained alive despite the time lapse, the Supreme Court held that the political question doctrine applied to bar judicial consideration of the issue. The Court reserved the question exclusively for Congress.

On the issue of ratification following initial rejection by a state, the Court once again looked to past congressional action for precedent, as it had in Leser and Sprague. The Court found that, with the fourteenth amendment, Congress had counted states which ratified after initial rejections and states which passed rescissions of prior ratifications as among those states comprising the necessary three-fourths majority. Rather than raising doubts over the validity of the fourteenth amendment, the Court, as in Leser and Sprague, chose to accept Congress’ judgment on the issue. The Coleman Court then went one step further. Not only did it defer to Congress’ judgment, but it also found that such issues were more appropriately decided by Congress. Thus, the Coleman Court labelled the issue a political one:

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control

46. 307 U.S. 433 (1939).
47. Three states, North Carolina, South Carolina, and Georgia initially rejected the fourteenth amendment. They later ratified, however, giving the amendment a three-fourths majority. Two states, Ohio and New Jersey, then rescinded their prior ratifications. Congress adopted a resolution declaring the amendment ratified, effectively deciding the questions of rescission and ratification following rejection. Id. at 448-49.
over the promulgation of the adoption of the amendment.48

Concerning the question of whether the Child Labor Amendment could still be ratified despite the lapse of time, the Court recognized the opening for judicial review over the reasonableness of the ratification period provided by its decision in Dillon. It, however, declined the opportunity to exercise judicial review. Instead, it found that the issue of the reasonableness of the ratification period involved considerations more appropriately addressed by Congress:

[T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable.49

Justice Black's concurring opinion went even further, finding that "Congress has sole and complete control over the amending process, subject to no judicial review . . . "50

The facts in Coleman presented the potential for direct conflict with Congress, and the prevailing political climate was one of hostility toward judicial activism. The Supreme Court had just recently invalidated much of President Roosevelt's New Deal legislation, prompting him to respond with his famous "Court-packing" scheme.51

The Coleman facts and the political climate explain, at least in part, why the Court went further in deferring to Congress in Coleman than it had in previous cases. The case itself was one which presented a high level of tension between judicial review and separation of powers. Previously, in Bailey v.

48. Id. at 450.
49. Id. at 454.
50. Id. at 459.
51. The "Court-packing" plan was proposed in 1937, two years before the Coleman decision. E. Eriksson, The Supreme Court and the New Deal 4 (1940).
Drexel Furniture\textsuperscript{52} and Hammer v. Dagenhart,\textsuperscript{53} the Supreme Court had found that congressional efforts to limit the use of child labor were unconstitutional.\textsuperscript{54} The Child Labor Amendment would have overruled these decisions by giving Congress the power to regulate or prohibit child labor.\textsuperscript{55} For the first time since Hollingsworth, the Supreme Court was asked to oversee the amendment process in the context of a proposed amendment aimed at overruling the Court’s prior constitutional interpretation.

Given this background, it is hardly surprising that the Coleman Court refrained from the conflict and invoked the political question doctrine. If the Court had reviewed the case on its merits and decided in favor of the petitioners on either of the article V issues presented, it would have created serious obstacles to ratification and possibly ended any hope of ultimate ratification.\textsuperscript{56} In light of its recent controversies over President Roosevelt’s New Deal legislation, a hostile reaction by the political branches and the public would have been likely.\textsuperscript{57}

Moreover, by controlling the very process employed to overrule the Court’s interpretation of the Constitution, the Court would have asserted ultimate authority to control and interpret the Constitution. Congress and the public would have been without recourse. The Court’s dilemma in such cases is compounded when this ultimate authority is asserted by the least democratic branch of the federal government against whom the sanction of the ballot box is not available. The Court’s powers become unchecked and, in the context of

\begin{itemize}
  \item \textsuperscript{52} 259 U.S. 20 (1922).
  \item \textsuperscript{53} 247 U.S. 251 (1918).
  \item \textsuperscript{54} In Bailey, the court invalidated a federal tax on employers who utilized child labor. In Hammer, the Court found a federal statute prohibiting commerce in goods made by child labor to be unconstitutional.
  \item \textsuperscript{55} The proposed amendment provided that “[t]he Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.” Joint Resolution of June 7, 1924, ch. 379, 43 Stat. 670 (1924).
  \item \textsuperscript{56} At the time of the decision in Coleman, ten of twenty-seven ratifying states had ratified following initial rejections. P. Strum, The Supreme Court and “Political Questions”: A Study in Judicial Evasion 106 (1974). Thus, a decision finding that ratification could not follow rejection would have had drastic results for the amendment.
  \item \textsuperscript{57} One commentator explains Coleman’s result entirely on this basis. See Comment, Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court, 37 LA. L. REV. 896, 913-14 (1977).
\end{itemize}
amendments, counter-majoritarian.\(^{58}\)

Several views on the application of the political question doctrine in article V cases have been advanced. One view is that the doctrine should not apply and that the Supreme Court should treat all article V cases as justiciable in order to protect against an abuse of power by Congress.\(^{60}\) While having the virtue of consistency, this view fails to adequately deal with the result in *Coleman* or the conflict between judicial review and separation of powers in *Coleman*-like cases.

A second view, the "present conflict" view, first advanced by Professor Scharpf\(^{60}\) and later cited by Justice Powell,\(^{61}\) would apply the political question doctrine only in article V cases where, as in *Coleman*, the underlying amendment would reverse a decision of the Supreme Court. This view does resolve the conflict in *Coleman*-type situations. It, however, is too narrow in scope because it fails to deal with questions of either past or future conflicts. As shown above, the Supreme Court has on several occasions accepted historic precedent rather than legal precedent to resolve article V cases in order to avoid invalidating amendments of long-standing, as well as proposed or newly-adopted, amendments. The "present conflict" view of Professor Scharpf and Justice Powell does not address the Court's history in dealing with these past conflicts. It also does not recognize that decisions in article V cases can create conflicts by narrowing the powers of Congress, the states, and the public to amend the Constitution in the future.

A third view seeks to pick and choose among the possible article V issues which may arise and allows the Court to adjudicate cases of clear abuse of power\(^{62}\) or cases involving procedural issues.\(^{63}\) Whatever the merit of this view, no principled

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\(^{58}\) Cf. P. Strum, *supra* note 56; Comment, *supra* note 57.

\(^{59}\) This school fears a "parade of horribles" which could follow through an abuse of article V power by Congress if the Supreme Court does not act as a check on that authority. See, e.g., Comment, *supra* note 57, at 923-25. See also Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 957, 959 (1963).


\(^{62}\) P. Strum, *supra* note 56, at 103.

manner exists to make such distinctions under article V.

The final view is, of course, that of Coleman itself. Coleman presented a case of past conflict with congressional action over the fourteenth amendment and present conflict in the Child Labor Amendment itself. The Coleman Court chose to abstain entirely and leave the issues for resolution in the political arena. It chose to abstain instead of legitimizing congressional action, as it had always done up to that time, or precipitating a confrontation during a time when the Court was already under fire. This result removed all possibility of conflict with amendment efforts and recognized the rights of Congress, the states, and the public to override the Court's views of the Constitution.

While the Supreme Court has not addressed any article V cases on the merits since Coleman, it has considered the political question doctrine on several occasions. It remains, then, to determine the vitality of Coleman under the Supreme Court's present view of the political question doctrine.

V. THE POLITICAL QUESTION DOCTRINE TODAY

In 1962, the Supreme Court decided Baker v. Carr, a case which remains the leading one on the political question doctrine. In Baker, the Court held that the political question doctrine does not bar an equal protection challenge to malapportionment in a state legislature. Unfortunately, the opinion in Baker both clarified and confused the nature of the political question doctrine and clouded its applicability to article V cases.

One important aspect of the political question doctrine clarified in Baker is the doctrine's source in the separation of powers principle. As the court stated, the political question doctrine "is primarily a function of the separation of powers." It represents a self-imposed rule of restraint on the exercise of judicial review in recognition of the fact that certain powers are committed exclusively to another branch of government. Thus, when a case involves a state power controversy, the separation of powers is not involved and the political doctrine is inapplicable: "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Gov-
ernment, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.') 66

While thus clarifying one point, 67 the Baker Court went on to foster considerable confusion by outlining the earmarks of political question cases:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. 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 unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. 68

The listing of the characteristics of political questions in Baker has, unfortunately, served to confuse the doctrine's true nature as an aspect of the separation of powers. Often, analysts have engaged in the mechanistic ritual, applying these characteristics as determinative factors, rather than descriptive characteristics, in ascertaining the presence or absence of a political question. 69 Clearly, the Baker Court identi-

66. Id.
67. The recognition of the political question doctrine as a separation of powers principle explains the result in two recent district court cases, Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975), and Trombetta v. Florida, 353 F. Supp. 575 (M.D. Fla. 1973), two cases involving state legislative voting procedures for amendment ratification. Because the issues were ones of federalism and not separation of powers, the political question doctrine was irrelevant.
68. 369 U.S. at 217.
69. See, e.g., Edler, Article V, Justiciability, and The Equal Rights Amend-
fied these factors as signals for the potential presence of a political question in a given case and not determinative criteria for all cases. The common thread underlying these factors is that they serve to identify a potential conflict between the exercise of judicial review and the constitutional powers of another branch of government. It is the confrontation between the judiciary and another branch of government created by the exercise of judicial review over the actions of the other branch which lies at the root of any political question. As said in Baker, the doctrine is "essentially a function of the separation of powers." 

The Supreme Court's application of the political question doctrine since Baker demonstrates that the Baker criteria are not mechanical formulations, but simply descriptive of recurring characteristics which indicate a potential separation of powers issue. For example, application of the "textually demonstrable commitment" factor to the provision of article I, section 5, that "[e]ach House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . . ," would certainly lead to the conclusion that controversies over the qualifications of members of Congress were committed to each House and, consequently, were non-justiciable. Yet, the Supreme Court held just the opposite in Powell v. McCormack.

While acknowledging the Baker factors, the Court in Powell held that the judiciary must first determine the meaning of the Constitution before ascertaining whether the Constitution committed a particular power to another branch. Through engaging in this inquiry, the Court, in essence, ruled

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70. As Professor Strum observed, "Any student of the Court can demolish this list by pointing out cases in which all of these criteria have been present, and that were nonetheless decided by the Court." P. STRUM, supra note 56, at 63.
71. 369 U.S. at 217.
73. Id. at 519.
upon the merits of the case. By answering the broader question of whether the action was within the constitutional power of another branch, the Court was also required to answer the narrower inquiry of whether the exercise of that power was lawful.

Thus, in Powell, the Court found that article I, section 5, only granted Congress the power to decide if members were duly elected and met the criteria for age, residence, and citizenship established elsewhere in the Constitution. Upon ascertaining what power was committed to Congress, the result on the merits was also clear. Indeed, the Court explicitly recognized that its political question analysis controlled the outcome on the merits.

More recently, in Goldwater v. Carter, the Court discussed the applicability of the political question doctrine to a case involving the right of the Senate to participate in the termination of a treaty. The plurality opinion of Justice Rehnquist found that the political question doctrine barred consideration of the case. Justice Rehnquist relied upon Coleman v. Miller; like article V's silence on rescission or ratification following rejection, the Constitution was silent on the issue of the termination of a treaty. Nowhere, however, did Justice Rehnquist refer to Baker or its factors. Justice Powell, on the other hand, applied the Baker factors and found that interpretation of the Senate's treaty powers under article II, section 2, would resolve both the political question issue and the merits of the case.

The mechanistic application of the Baker factors was most confused by Justice Brennan's Goldwater dissent. As in Powell, Justice Brennan found the case did not involve a political question. Instead, he believed that the issue was controlled by the doctrine which grants the President the sole power to recognize foreign governments. This further confused the utility of the Baker factors because in Baker Justice

75. 395 U.S. at 549.
77. Id. at 1002-03.
78. Id. at 1003.
79. Id. at 998-1000 (Powell, J., concurring). He went on to find, however, that the controversy was not ripe for judicial review.
80. Id. at 1007.
Brennan, writing the majority opinion, listed cases involving this same principle of executive power to recognize foreign governments, as examples of political questions.\(^{81}\)

The Court's handling of the political question doctrine since *Baker* indicates that the fundamental inquiry is whether the principle of separation of powers is implicated in a particular case. The *Baker* factors are useful guideposts in ascertaining the existence of a separation of powers issue, but are not determinative on the ultimate issue of whether or not a case presents a non-justiciable political question. The answer to this inquiry alone, however, is not determinative. If it were so, then judicial review itself would have no foundation, for routine cases of judicial review over ordinary legislation implicates separation of powers to some degree. Instead, some additional factor militating for an extraordinary need for judicial restraint must also be present. The *Baker* factors give some indication of the types of cases where that need exists. Those factors, however, are descriptive. It thus must be determined if some additional factor exists requiring the application of the political question doctrine to article V cases.

**VI. Article V and Political Questions**

Recognizing the political question doctrine as an aspect of the separation of powers goes a long way toward determining whether cases under article V are not justiciable. The first step in deciding whether the doctrine applies to article V cases is determining whether adjudication of an article V case involves a potential conflict with another branch of government. As stated previously, such a conflict is necessarily presented whenever a proposed amendment is intended to affect a prior Supreme Court constitutional interpretation. By controlling the amendment process through the adjudication of cases, the Court retains for itself the power to frustrate the amendment effort and leaves the judicial review power unchecked. As indicated by Justice Powell in *Goldwater*\(^{82}\) and by Professor Scharpf,\(^{83}\) it is entirely appropriate for the Court to abstain from such a case through the invocation of the political question doctrine. The consequences of ruling in such

\(^{81}\) 369 U.S. at 211-13.
\(^{82}\) 444 U.S. at 996.
\(^{83}\) Scharpf, *supra* note 60, at 517.
cases could be serious indeed for the legitimacy of the Court in a republican government of separated powers. A ruling by the Court which blocks a proposed amendment aimed at overturning a prior decision of the Court leaves Congress and the public with no option but to accept the Court’s ruling. Such a result would do violence to the notion of popular sovereignty, which, as noted by Alexander Hamilton, is the stream from which legitimate national power ought to flow.

Both the framers of the Constitution and the Supreme Court have expressed the view that the amendment process of article V is an important instrument of popular sovereignty. In the debates on article V, Hamilton expressed the view that “the people would finally decide in the case” of proposed amendments. In Dillon v. Gloss, Justice Van Devanter observed that “amendments must have the sanction of the people” and that ratification is an “expression of the people’s will . . . .” In United States v. Sprague, the Court held that article V is a grant of authority by the people to Congress. Professor Bickel has gone even further and suggested that judicial review in general weakens democratic principles by showing distrust of the legislature.

Allowing the least republican branch to review cases involving amendments intended to overrule that branch’s opinions gives the Court the unchecked power to thwart those efforts. This is contrary to the notions of popular sovereignty contained in article V and inherent in the entire Constitution. It is also contrary to article V itself, which, according to Madison, allows for “useful alterations [which] will be suggested by experience [and which] could not be foreseen.” Application of the political question doctrine in such cases of present conflict is a forthright recognition of the Court’s role as a co-equal branch of government. It is also a recognition of the ability of Congress and the public to change the Constitution in reaction to the Court’s interpretations.

Where there is no present conflict, however, a different

84. P. Strum, supra note 56, at 103.
85. The Federalist No. 22 (A. Hamilton).
87. 256 U.S. 368, 374 (1921).
88. 282 U.S. 716, 733 (1931).
89. A. Bickel, The Least Dangerous Branch 21 (1962).
90. The Federalist No. 43 (J. Madison).
consideration is involved. Since the initial inquiry is always the existence of a potential conflict with Congress, the Court would not be barred from enforcing a prior Congressional judgment. Indeed, the Supreme Court followed such a course in *Leser, Sprague,* and, to a lesser extent, in *Coleman.* If, for example, Congress were to enact a statute governing the conduct of a constitutional convention or the effect of rescissions, there would be no conflict with Congress if the Court were to apply such a law to an appropriate article V case. In such a circumstance, the Court would be free to interpret and apply such a law without fear of generating a separation of powers issue.

Where, however, Congress has not previously made a judgment on a particular article V issue, a potential for conflict arises even when the underlying proposed amendment is not directed at a prior opinion of the Court. A decision by the Court in such cases has the potential for limiting congressional power in future amendment efforts. Because a decision in a case of potential conflict would not show a "lack of the respect due coordinate branches of government," one of the *Baker* factors, the Court may feel less constrained in addressing the merits of the case. If, however, judicial restraint is appropriate in cases of direct conflict, under the political question doctrine, there appears no basis for distinguishing cases of potential conflict through any interpretation of the political question doctrine or article V. Without such a principled mode of distinction, the existence of potential conflict in cases of future amendment efforts militates in favor of the application of the political question doctrine in those cases as well.

Such an approach, however, has been criticized as going too far toward restraining judicial power, resulting in no check

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93. 369 U.S. at 217.
upon congressional authority. Without such a check, these commentators maintain that Congress can abuse its powers. For example, Congress can propose an amendment and immediately declare it ratified before the states have considered the amendment. This view has two shortcomings. First, it assumes that Congress would intentionally violate article V for political expediency. While Congress is certainly capable of doing so, intentional violation of the Constitution is hardly something which Congress can be expected to do lightly. Second, it ignores the fact that political checks exist on Congress through the ballot box, which do not play a role in the judiciary. A Congress which intentionally violates article V is subject to the ultimate sanction of voter disapproval.

VII. Carmen v. Idaho—The ERA Case.

Carmen v. Idaho, involved the validity of attempted rescissions of ERA ratifications and the validity of the congressional extension of the ratification period. It would seem to be a clear example of a case involving a direct, present conflict between judicial review and separation of powers. The effect of the ERA would have been to overrule the Court’s application of the equal protection clause to cases of sex discrimination. While the Supreme Court has applied equal protection analysis to gender discrimination cases, it has never elevated sex to the status of a suspect class. Both Congress and members of the Supreme Court acknowledged that ratification of the ERA would affect the level of scrutiny required in cases of gender discrimination. A dispute over the mechanics of the amendment process for the ERA placed the

94. See supra note 60.
95. Comment, supra note 57 at 923-25.
96. To the contrary, Congress has undertaken novel actions, such as extension of the ERA ratification period, only after serious debate over the legality of such an action. See generally, Hearings On S.J. Res. 134 Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. (1978); Hearings on H.J. Res. 638 Before The Subcomm. on Civil and Constitutional Rights, 95th Cong., 2d Sess. (1978).
97. Of course, if the public were to favor the proposed amendment, there would be no need for Congress to circumvent article V.
98. 103 S. Ct. 22 (1982).
100. See, e.g., Hearings on S.J. Res. 134, supra note 96, at 282-83; Frontiero v. Richardson, 411 U.S. at 691-92 (Powell, J., concurring).
judiciary squarely in the position of exerting control over the process designated to overrule the Supreme Court's earlier decisions. Even under the more narrow view of the role of the political question doctrine in article V cases suggested by Justice Powell in *Goldwater* and by Professor Scharpf, *Idaho* seemed a logical case for the application of the political question doctrine.

The district court, however, felt otherwise. The district court recognized that a question of separation of powers was presented by the plaintiffs' request that the judiciary invalidate Congress' actions. It fell prey however, to the mechanistic application of the *Baker* factors. The court used an analysis similar to the one employed in *Powell v. McCormack*. It found that there was no textually demonstrable commitment of these matters to Congress. Since the issues, according to the district court, were not committed to Congress, the court had little trouble disposing of the remaining factors; by default, the case must therefore be one for the judiciary. Moreover, because the district court viewed the issues of extension and rescission as questions of constitutional power, they could be susceptible of only one answer, and thus were justiciable.

Shortly after the district court's ruling, the Supreme Court agreed to hear the case. The Court, however, was not required to address the issue of the applicability of the political question doctrine because an equally effective and less controversial justiciability doctrine soon became available. The extended ratification period for the ERA passed on June 30, 1982 without the necessary three-fourths of the states ratifying prior to the Court's full consideration of the case. Thus, the Court was able to dismiss the case as moot.

The Court's handling of the case, however, indicated that it intended to allow the political processes to proceed to their conclusion without judicial interference. The Court first denied the Solicitor General's motion to immediately vacate the district court's judgment without further argument or briefing. The Court's basis for the denial was that the case would not become ripe until three-fourths of the states had ratified the ERA. The Court thus declined to enter the controversy

during the ratification period.

Simultaneously, however, the Supreme Court, *sua sponte*, took the unusual step of staying the district court's declaratory judgment pending review of the entire case by the Supreme Court.\(^\text{104}\) The Court thus removed any legal impediment to further deliberation by the states on the ratification of the ERA. Having freed the political process from immediate judicial review or control, the Court allowed itself the opportunity of not addressing the case at all by permitting the passage of time to moot the controversy.

The Supreme Court's handling of *Idaho* can only be seen as an exercise in judicial restraint. This restraint could be viewed simply as an application of the Court's long-standing practice of deciding constitutional issues only when there is a strict necessity for their resolution.\(^\text{105}\) Such an explanation, however, does not explain the Court's decision to stay the lower court's declaratory judgment. That action can only be viewed as a conscious decision of the Court to allow the political processes to continue free of judicial interference. Such an action bears some similarity to the political question doctrine itself, which also relegates certain issues and processes to the political branches free from judicial influence or control.

**VIII. Conclusion**

At no time in history has the Supreme Court ever invalidated a constitutional amendment or overruled a congressional action taken during the amendment process. For it ever to do so, or even assert the power to do so, would engender a most serious conflict between its role as the arbiter of the meaning of the Constitution and its role as a coordinate branch of government in a system of separation of powers. The assertion of such power would leave the Court's authority to define the Constitution unchecked, a result at odds with the system of government created by the Constitution. Recognition of the consequences of this result compels the conclusion that the judiciary should refrain from constitutional amendment cases through the political question doctrine.

\(^{104}\) 102 S. Ct. 1272; 102 S. Ct. 1273.

\(^{105}\) *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549 (1947).