



§ 5. Amendment and Revision of Federal Constitution

- a. In General
- b. Proposal of amendments; ratification or rejection

a. In general

The federal Constitution expressly provides the manner in which it may be amended, and amendments must be made in such manner.

Research Note

Efficacy of ratification of proposed amendment in light of previous rejection or attempted withdrawal, and what is a reasonable time for ratification, as political questions are considered infra § 177.

Library References

Constitutional Law ⇐ 10.

Amendments to the federal Constitution may be made only in the manner therein provided in Article V,⁷⁵ and the only limitation now existing on the power of amendment therein provided is that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."⁷⁶ The provisions of the federal Constitution as to amendments have the same meaning as they had when adopted,⁷⁷ and the people of any one of the several states cannot impose any limitations on the amending power established by the federal Constitution.⁷⁸

Legal and technical definition

Within legal and technical definition of term is included any amendment which adds to or in any manner changes powers granted in original Constitution.

U.S.—Ex parte Dillon, D.C. Cal., 262 F. 563, affirmed Dillon v. Gloss, 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994.

Legislative amendment

Congress having after full consideration and with acquiescence, and long practice of all branches of government, established construction of Constitution, it cannot subsequently by mere legislation reverse such construction since it is not given power by itself thus to amend the Constitution.

U.S.—Myers v. U.S., Ct.Cl., 47 S.Ct. 21, 272 U.S. 52, 71 L.Ed. 160.

76. U.S.—Dillon v. Gloss, 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 594.

77. Cal.—Barlotti v. Lyons, 189 P. 282, 182 Cal. 575.

78. Cal.—Barlotti v. Lyons, 189 P. 282, 182 Cal. 575.

Md.—Leser v. Garnett, 114 A. 840, 139 Md. 46, affirmed 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.

Limitations invalid

(1) Delegated federal power of state legislatures to ratify proposed amendments to United States Constitution may not be inhibited by state constitutional provisions which, in practical effect, by specifying majority required to pass resolution of ratification, determine whether votes of legislators opposing amendment shall be given greater, lesser, or same weight as votes of legislators who favor proposal.

74. Md.—West v. State, 238 A.2d 292, 3 Md.App. 123.

75. Cal.—Barlotti v. Lyons, 189 P. 282, 182 Cal. 575.

Mich.—Decher v. Vaughan, 177 N.W. 388, 209 Mich. 565.

Ohio—Switzer v. State, 133 N.E. 552, 103 Ohio St. 306.

Additions and removals

Nothing new can be put into the Constitution except through amendatory process, and nothing old can be taken out without same process.

U.S.—Ullmann v. U.S., 76 S.Ct. 497, 350 U.S. 422, 100 L.Ed. 511, 53 A.L.R.2d 1008, rehearing denied 76 S.Ct. 777, 351 U.S. 928, 100 L.Ed. 1457.

The people may, if they choose, take away from the powers reserved to the states by the United States Constitution and bestow the incidents thus withdrawn on the United States through the process of amendment.⁷⁹ Accordingly, various matters have been held to be proper subjects for amendment.⁸⁰ The fact that an amendment is in effect legislation controlling the conduct of private individuals, in that it ordains a final permanent law prohibiting certain acts, not alterable at the will of a majority, does not render it invalid.⁸¹

b. Proposal of Amendments; Ratification or Rejection

The methods of proposing and ratifying amendments to the federal Constitution is governed solely by that instrument.

The method of proposing amendments to the federal Constitution is governed solely by the

provisions of that instrument.⁸² In accordance with the provisions of Article V, amendments may be proposed by a vote of two thirds of both houses of Congress or by a convention called on application of the legislatures of two thirds of the states.⁸³ The proposal of amendments by Congress is independent of executive action, and joint resolutions for that purpose need not be presented to the President for his approval.⁸⁴

The method of ratifying amendments to the federal Constitution is governed by the provisions of Article V.⁸⁵ Whether proposed by Congress or by a convention, an amendment does not become a part of the Constitution unless it is 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.⁸⁶

U.S.—Dyer v. Blair, D.C.Ill., 390 F.Supp. 1291.

(2) State constitution may not require that a new legislature be elected, subsequent to proposal of amendment to United States Constitution, before that proposal may be considered by legislature.

U.S.—Dyer v. Blair, D.C.Ill., 390 F.Supp. 1291.

(3) State constitutional provision forbidding legislature to ratify proposed amendment unless a majority of its members have been elected after submission for ratification of amendment is invalid.

U.S.—Trombetta v. State of Fla., D.C.Fla., 353 F.Supp. 575.

Tenn.—Walker v. Dunn., 498 S.W.2d 102.

79. U.S.—State of Ohio v. Cox, D.C. Ohio, 257 F. 334.

80. U.S.—Leser v. Garnett, Md., 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505—State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486, 588, 253 U.S. 350, 64 L.Ed. 946.

Ex parte Dillon, D.C.Cal., 262 F. 563, affirmed Dillon v. Gloss, 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994—State of Ohio v. Cox, D.C. Ohio, 257 F. 334.

Mass.—In re Opinion of the Justices, 135 N.E. 173, 240 Mass. 601.

Mo.—Carson v. Sullivan, 223 S.W. 571, 284 Mo. 353.

81. U.S.—Christian Feigenspan, Inc., v. Bodine, D.C.N.J., 264 F. 186, affirmed State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486, 588, 253 U.S. 350, 64 L.Ed.2d 946.

82. Me.—In re Opinion of the Justices, 107 A. 673, 118 Me. 544, 5 A.L.R. 1412.

83. Number required

Two-thirds vote in each house, which is required in proposing an amendment to Constitution, is a vote of two thirds of members present, assuming presence of a quorum, and not a vote of two thirds of entire membership.

U.S.—State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486, 588, 253 U.S. 350, 64 L.Ed. 946.

Jebbia v. U.S., C.C.A.W.Va., 37 F.2d 343, certiorari denied 50 S.Ct. 352, 281 U.S. 747, 74 L.Ed. 1159.

State of Ohio v. Cox, D.C. Ohio, 257 F. 334.

Declaration of essentiality unnecessary

A joint resolution proposing amendment to Constitution need not contain an express declaration that those voting for it regard it as essential.

U.S.—State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486, 588, 253 U.S. 350, 64 L.Ed. 946.

Congress as representative of people

In proposing constitutional amendments, Congress acts as the representative of the people.

Me.—In re Opinion of the Justices, 107 A. 673, 118 Me. 544, 5 A.L.R. 1412.

Application for convention

Resolution petitioning Congress to call national constitutional convention "for the purpose of proposing the following article as amendment to the Constitution of the United States." was adequate application, and resolution did not require signature of governor.

Mass.—Opinion of the Justices to the Senate, 366 N.E.2d 1226, 373 Mass. 877.

Referendum for instructions to Congressman

Mass.—Thompson v. Secretary of Commonwealth, 163 N.E. 192, 265 Mass. 16.

84. D.C.—Consumer Energy Council of America v. Federal Energy Regulatory Commission, C.A., 673 F.2d 425, 218 U.S.App.D.C. 34, affirmed, Process Gas Consumers Group v. Consumer Energy Council of America, 103 S.Ct. 3556, rehearing denied 104 S.Ct. 40.

Me.—In re Opinion of the Justices, 107 A. 673, 118 Me. 544, 5 A.L.R. 1412.

85. Me.—In re Opinion of the Justices, 107 A. 673, 118 Me. 544, 5 A.L.R. 1412.

Amendments validly adopted

U.S.—U.S. v. Sprague, N.J., 51 S.Ct. 220, 282 U.S. 716, 75 L.Ed. 640, 71 A.L.R. 1381—State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486, 588, 253 U.S. 360, 64 L.Ed. 946.

U.S. v. Gugel, D.C.Ky., 119 F.Supp. 897.

86. U.S.—U.S. v. Panos, D.C.Ill., 45 F.2d 888.

Fla.—Trombetta v. State of Fla., D.C.Fla., 353 F.Supp. 575.

Cal.—Barlotti v. Lyons, 189 P. 282, 182 Cal. 575.

Ky.—Wise v. Chandler, 108 S.W.2d 1024, 270 Ky. 1.

Me.—In re Opinion of the Justices, 167 A. 176, 132 Me. 491.

Md.—Leser v. Garnett, 114 A. 840, 139 Md. 46, affirmed 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.

Thus, it is generally held that the question of ratification or rejection cannot be determined by referendum,⁸⁷ but it has been held that a statute which provides for the submission to the voters of a state of an advisory referendum as to whether a specified proposed amendment should be ratified, it being expressly stated that the result of the referendum would place no legal requirement on the legislature or any of its members, is not invalid as a limitation on the power of the legislative power under the federal Constitution.⁸⁸

Accordingly, the particular method of ratifying amendments is determinable by Congress and is limited to the method specified,⁸⁹ and, when Con-

gress has selected the method to be used, all other modes of ratification are excluded.⁹⁰ It is not within the power of courts or legislature bodies to alter the method proposed or to prescribe a different method,⁹¹ nor can the people of any one of the several states take away or limit the rights of legislatures or conventions to ratify a proposed amendment under the method prescribed by the Congress.⁹² While a state legislature or convention may ratify an amendment by a bare majority, whether some other vote shall be required to pass a ratifying resolution is a matter which each state legislature or convention may specify for itself.⁹³

Mich.—Decher v. Vaughan, 177 N.W. 388, 209 Mich. 565.

N.D.—State ex rel. Askew v. Meier, 231 N.W.2d 821.

Federal function

Function of convention or state legislature in ratifying proposed amendment to federal Constitution, like function of Congress in proposing amendment, is a federal function derived from federal Constitution.

U.S.—Leser v. Garnett, Md., 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505—
Hawke v. Smith, Ohio, 40 S.Ct. 495, 253 U.S. 221, 64 L.Ed. 871, 10
A.L.R. 1504—State of Rhode Island v. Palmer, Ky., 40 S.Ct. 486,
588, 253 U.S. 350, 64 L.Ed. 946.

Colo.—Prior v. Noland, 188 P. 729, 68 Colo. 263.

Me.—In re Opinion of the Justices, 107 A. 673, 118 Me. 54, 5 A.L.R.
1412.

Mass.—Opinion of the Justices to the Senate, 366 N.E.2d 1226, 373
Mass. 877.

Mo.—State ex rel. Tate v. Sevier, 62 S.W.2d 895, 332 Mo. 662, 87
A.L.R. 662, certiorari denied Tate v. Sevier, 54 S.Ct. 102, 290 U.S.
679, 78 L.Ed. 586.

N.C.—In re Opinions of the Justices, 172 S.E. 474, 204 N.C. 806.

Ohio—State ex rel. Donnelly v. Myers, 186 N.E. 918, 127 Ohio St. 104.

87. U.S.—Hawke v. Smith, Ohio, 40 S.Ct. 495, 253 U.S. 221, 64 L.Ed.
871, 10 A.L.R. 1504—State of Rhode Island v. Palmer, Ky., 40 S.Ct.
486, 588, 253 U.S. 350, 64 L.Ed. 946.

Me.—In re Opinion of the Justices, 167 A. 176, 132 Me. 491.

Mass.—Opinion of the Justices Relative to the Eighteenth Amendment
of the Constitution of the United States, 160 N.E. 439, 262 Mass. 603.

Mo.—Carson v. Sullivan, 223 S.W. 571, 284 Mo. 353.

Okl.—State v. Morris, 191 P. 364, 79 Okl. 89.

Referendum or straw vote

(1) Submission of resolution of legislature ratifying amendment to referendum would be unlawful and useless.

Mont.—State ex rel. Hatch v. Murray, 526 P.2d 1369, 165 Mont. 90.

(2) Referendum petitions whose language was indicative of intent to suspend operation of resolution approving amendment to United States Constitution were ineffectual to either require a referendum under state constitution of legislature's ratification of amendment to United States Constitution or to authorize nonbinding plebiscite or straw vote.

U.S.—State ex rel. Askew v. Meier, 231 N.W.2d 821.

88. Nev.—Kimble v. Swackhamer, 584 P.2d 161, 94 Nev. 600, appli-
cation denied 99 S.Ct. 51, 439 U.S. 1385, 58 L.Ed.2d 225, appeal dis-
missed 99 S.Ct. 713, 439 U.S. 1041, 58 L.Ed.2d 700.

Delay of action by legislature not required.

Statute, calling for submission of advisory referendum, does not require legislature to defer action on ratification until it receives the results of the referendum.

U.S.—Kimble v. Swackhamer, 99 S.Ct. 51, 439 U.S. 1385, 58 L.Ed.2d
225 (per Mr. Justice Rehnquist as Circuit Justice).

Freedom to obtain views of constituents

Since each member of legislature is free to obtain views of constituents, no constitutional obstacle was apparent in respect to statute requiring submission of nonbinding, advisory referendum as to whether amendment should be ratified.

U.S.—Kimble v. Swackhamer, 99 S.Ct. 51, 439 U.S. 1385, 58 L.Ed.2d
225 (per Mr. Justice Rehnquist as Circuit Justice).

89. U.S.—U.S. Sprague, N.J., 51 S.Ct. 220, 282 U.S. 716, 75 L.Ed.
640, 71 A.L.R. 1381—Hawke v. Smith, Ohio, 40 S.Ct. 495, 253 U.S.
221, 64 L.Ed. 871, 10 A.L.R. 1504.

90. U.S.—Ex parte Dillon, D.C.Cal., 262 F. 563, affirmed Dillon v.
Gloss, 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994.

N.D.—State ex rel. Askew v. Meier, 231 N.W.2d 821.

91. U.S.—Ex parte Dillon, D.C.Cal., 262 F. 563, affirmed Dillon v.
Gloss, 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994.

Participation of federal judges

Federal judges may not participate in preliminary stages of state's legislative process with respect to ratification of a proposed amendment to United States Constitution.

U.S.—Dyer v. Blair, 390 F.Supp 1287.

Source of ratification power

While power of state legislature to legislate in enactment of laws for states is derived from people of the state, power to ratify proposed amendment to federal Constitution has its source in such Constitution.

U.S.—Hawke v. Smith, Ohio, 40 S.Ct. 495, 253 U.S. 221, 64 L.Ed. 871,
10 A.L.R. 1504.

Mass.—Opinion of the Justices to the Senate, 366 N.E.2d 1226, 373
Mass. 877.

N.D.—State ex rel. Askew v. Meier, 231 N.W.2d 821.

92. U.S.—Dyer v. Blair, D.C.Ill., 390 F.Supp. 1291.

Md.—Leser v. Garnett, 114 A. 840, 139 Md. 46, affirmed 42 S.Ct. 217,
258 U.S. 130, 66 L.Ed. 505.

Mont.—State ex rel. Hatch v. Murray, 526 P.2d 1369, 165 Mont. 90.

93. Three-fifths

Where state house of representatives and senate adopted rules requiring three-fifths vote to pass resolutions of ratification of proposed amendments to United States Constitution, action taken by general as-

A vote of rejection on the part of a state is no bar to a subsequent reconsideration and adoption of a proposed amendment.⁹⁴ According to some authority, however, where a proposed amendment has once been rejected by a state, a resubmission of the amendment by Congress is necessary to further consideration, particularly where the proposed amendment has been rejected by more than one fourth of the states.⁹⁵ Where one house of a bicameral legislature adopts a resolution for ratification of an amendment, and there is no action by the other house within the session of the legislature, the resolution is of no effect, and the ratification process must begin anew in a later session.⁹⁶ A court has jurisdiction to review the acts performed by the legislature.⁹⁷

Although the regulation as to method of adopting amendments does not prescribe any limit to the time within which ratification of a proposed amendment must be completed, it is implied thereby that such ratification must be completed within a reasonable time,⁹⁸ and Congress has the authority to fix a time within which a proposed amendment shall be ratified, provided the time fixed is a reasonable one.⁹⁹

When an amendment is proposed for ratifica-

tion by means of conventions, the direction of Congress necessarily implies to the states authority to provide for the assembling of such conventions, and any state act providing for the assembling of such a convention is not an "act of the legislative assembly" within the state referendum provisions.¹ However, the method of calling a state convention to ratify or reject an amendment to the federal Constitution must comply with the laws of the state relative thereto,² and the convention itself has the sole power to act on questions with respect to matters of fraud, irregularity, or illegal practices in the conduct of the election of delegates.³

Proclamation of adoption. Congressional legislation has placed with a specified official the duty of issuing a proclamation declaring the amendment to be a part of the federal Constitution, on receiving official notice of adoption from three fourths of the several states,⁴ and that officer has no discretion to determine the truth of the facts stated in the notice from the states, but with respect to such proclamation merely acts ministerially.⁵ The proclamation is conclusive on the courts, so that the validity of the ratifications cannot be questioned therein.⁶ The statute pre-

sembly whereby each house approved by a majority vote but less than three-fifths proposed amendment did not constitute an effective ratification.

U.S.—Dyer v. Blair, D.C.Ill., 390 F.Supp. 1291.

94. Md.—Leser v. Garnett, 114 A. 840, 139 Md. 46, affirmed 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.

Reconsideration after twelve years

Kan.—Coleman v. Miller, 71 P.2d 518, 146 Kan. 390, affirmed 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695.

95. Ky.—Wise v. Chandler, 108 S.W.2d 1024, 270 Ky. 1.

96. U.S.—Dyer v. Blair, D.C.Ill., 390 F.Supp. 1287.

97. Tenn.—Walker v. Dunn, 498 S.W.2d 102.

98. U.S.—Dillon v. Gloss, Cal., 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994.

Reasonable time for ratification of amendment to federal Constitution as political question for determination by Congress see *infra* § 177.

Time not important

Time of adoption of constitutional amendment is not important unless a period of limitation is fixed by Congress in the act submitting amendment to several states.

U.S.—U.S. v. Gugel, D.C.Ky., 119 F.Supp. 897.

Twelve years

(1) Held reasonable.

Kan.—Coleman v. Miller, 71 P.2d 518, 146 Kan. 390, affirmed 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695.

(2) Held unreasonable.

Ky.—Wise v. Chandler, 108 S.W.2d 1024, 270 Ky. 1.

99. U.S.—Coleman v. Miller, Kan., 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695.

Seven-year period held reasonable

U.S.—Dillon v. Gloss, Cal., 41 S.Ct. 510, 256 U.S. 368, 65 L.Ed. 994.

1. Mo.—State ex rel. Tate v. Sevier, 62 S.W.2d 895, 333 Mo. 662, 87 A.L.R. 662, certiorari denied Tate v. Sevier, 54 S.Ct. 102, 290 U.S. 679, 78 L.Ed. 586.

2. Ala.—In re Opinions of the Justices, 148 So. 107, 226 Ala. 565. Me.—In re Opinion of the Justices, 167 A. 176, 132 Me. 491.

Two-thirds vote required to call convention

Ala.—In re Opinions of the Justices, 146 So. 407, 226 Ala. 168.

Preconvention consideration by public

N.C.—In re Opinions of the Justices, 172 S.E. 474, 204 N.C. 806.

Date of ballot on amendment

N.C.—In re Opinions of the Justices, 181 S.E. 557, 207 N.C. 879—In re Opinions of the Justices, 172 S.E. 474, 204 N.C. 806.

3. Me.—In re Opinion of the Justices, 167 A. 176, 132 Me. 491.

4. Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149.

5. U.S.—Leser v. Garnett, Md., 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.

D.C.—U.S. v. Colby, 265 F. 998, 49 App.D.C. 358, affirmed U.S. ex rel. Widenman v. Hughes, 42 S.Ct. 169, 257 U.S. 619, 66 L.Ed. 400.

Vt.—Chase v. Billings, 170 A. 903, 106 Vt. 149.

6. U.S.—Leser v. Garnett, Md., 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.

Dyer v. Blair, D.C.Ill., 390 F.Supp. 1291—Maryland Petition Committee v. Johnson, D.C.Md., 265 F.Supp. 823, affirmed 391 F.2d 933,

supposes official notice to the specified official when a state legislature has adopted a resolution of ratification.⁷

