

## CONSTITUTIONAL POLITICS: A REJOINDER

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PROFESSOR Tribe's imaginative Comment<sup>1</sup> criticizes one aspect of my recent Article<sup>2</sup> — the argument that Congress should not have exclusive authority, binding upon the courts, to determine whether a proposed constitutional amendment has been validly ratified.<sup>3</sup> Professor Tribe offers two arguments in support of the proposition that courts should continue to defer to final congressional determination of most amendment process issues. He contends, first, that even if judicial resolution could bring some certainty to the amendment process, such review would entail “enormous vices.”<sup>4</sup> But the only vice he mentions is one previously discussed in the literature<sup>5</sup> — that judicial review of amendment process questions would occasionally require the Supreme Court to oversee “the very constitutional process used to reverse [its] decisions.”<sup>6</sup> As I noted in my Article, this is undoubtedly a legitimate concern.<sup>7</sup> I also noted, however, that most constitutional amendments have not in fact been designed to

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<sup>1</sup> Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

<sup>2</sup> Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983).

<sup>3</sup> In my Article, I characterize the most widely held view of the amendment process as one that allocates to Congress rather than to the courts the authority to resolve almost all amendment process disputes. At the outset of his Comment, Professor Tribe states that this “picture” is “something of a caricature.” Tribe, *supra* note 1, at 433. I find this a curious statement, to say the least, because the conception that I undertake to criticize is one that has been expounded in the past by Professor Tribe himself. He has stated, for example, that “it has been well settled for over half a century that Congress exercises control over the mode of an amendment’s proposal and ratification, and thus has the last word on such matters as attempted rescission and the timeliness of ratification.” *Constitutional Convention Procedures: Hearing on S. 3, S. 520, and S. 1710 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 504 (1979) (testimony of Prof. Laurence Tribe, Harvard Law School). The common conception that Professor Tribe now sees as “something of a caricature” is one that he has previously defended on the ground that the federal judiciary is “hardly in a position in the ordinary case, to second-guess the basic determination of Congress that a particular ratification either is or is not timely or otherwise effective.” *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H.R.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 39 (1977–1978) (testimony of Prof. Laurence Tribe, Harvard Law School) [hereinafter cited as *House Hearings*].

<sup>4</sup> Tribe, *supra* note 1, at 435.

<sup>5</sup> See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 587–89 (1966).

<sup>6</sup> Tribe, *supra* note 1, at 435 (quoting *Goldwater v. Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring in the judgment)).

<sup>7</sup> See Dellinger, *supra* note 2, at 414.

overturn decisions of the Supreme Court.<sup>8</sup> Professor Tribe joins issue on this point by stating that the proposal of a constitutional amendment “almost inevitably reflects a deep national dissatisfaction with the way constitutional law — elaborated in our system principally by the courts — has theretofore resolved a matter.”<sup>9</sup> This observation is simply not supported by the history of the amendment process.<sup>10</sup> Only rarely has the proposal of a constitutional amendment in fact reflected “a deep national dissatisfaction” with the way the courts have previously resolved a constitutional issue.<sup>11</sup> Professor Tribe’s profoundly ahistorical evaluation of the relationship of proposed amendments to the Supreme Court’s jurisprudence gives much more weight than is appropriate to the legitimate but narrow concern that judicial review might on occasion require the Court to assess the validity of the ratification of an amendment reversing the result of a Court decision.

Professor Tribe’s second objection to judicial review of amendment process issues rests upon his highly implausible assertion that it is difficult to distinguish between disputes over the rules governing the amendment process and disputes over the merits of a proposed amendment.<sup>12</sup> Beginning with the obvious proposition that the courts should not undertake to second-guess Congress and the state legislatures about the *wisdom* of proposed amendments, Professor Tribe argues that the courts should abstain as well from adjudicating disputes over ratification procedures — disputes that, according to Professor Tribe, are “only somewhat”<sup>13</sup> different from contests over the substance of amendments.

The premise that courts have no proper role in judging the wisdom of amendments is undoubtedly correct — but for reasons that have nothing to do with the very different question of who should resolve disputes over ratification procedures. Judicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments.

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<sup>8</sup> See *id.* at 414–15.

<sup>9</sup> Tribe, *supra* note 1, at 436.

<sup>10</sup> Of the first 12 amendments, only the 11th — which restricted suits against states in federal courts — was in any conceivable sense directed at the way the Supreme Court had elaborated constitutional law. Nor could any of the following amendments properly be seen as measures intended to overcome Supreme Court decisions: the 17th (direct election of senators), the 18th (prohibition), the 20th (shortening the lameduck session of Congress), the 21st (repeal of prohibition), the 22d (two-term presidential limit), the 23d (electors for the District of Columbia), or the 25th (presidential succession). Of the 26 amendments that have been adopted, only § 1 of the 14th amendment fully conforms to Professor Tribe’s description. I noted in my Article that several other amendments thought by some commentators to have “overruled” decisions of the Court did not in fact do so. See Dellinger, *supra* note 2, at 414–15.

<sup>11</sup> See Tribe, *supra* note 1, at 436.

<sup>12</sup> See *id.* at 444.

<sup>13</sup> See *id.*

With two express exceptions,<sup>14</sup> Congress is constitutionally free to propose, and the states to ratify, any amendment whatsoever.<sup>15</sup> Of course, as Professor Tribe correctly notes, the Constitution taken as a whole stands for certain enduring principles, and one can construct meaningful arguments that a particular proposed amendment is inconsistent with those principles. Yet it is quite clear that such arguments about the political wisdom of proposed amendments are only arguments; they can never be translated into judicial rules of positive law that confine the ultimate discretion of the proposing Congress and the ratifying legislatures. The question whether a proposed constitutional amendment *should* be adopted is, as Professor Tribe suggests, "quintessentially political."<sup>16</sup> Professor Tribe offers no persuasive reason, however, for treating a different kind of question — whether a proposed amendment has in fact been adopted in accordance with the requirements of article V — as anything other than an issue of con-

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<sup>14</sup> Article V contains the following provision:

Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

As William Frierson noted, "With this enumeration of the matters which the convention thought necessary to withdraw from the amending power, it would seem to be impossible to infer an intention that any other restrictions were intended to be placed upon the character of amendments that might be adopted." Frierson, *Amending the Constitution of the United States*, 33 HARV. L. REV. 659, 661 (1920).

<sup>15</sup> Professor Tribe is not the first to intimate that there may be implied constitutional limits on the substance of amendments. At least one scholar suggested that the 15th amendment was an improper exercise of the amending power. See Machen, *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910) (arguing that the 15th amendment deprived the states of equal representation in the Senate). Similarly, counsel and commentators urged that the amending power did not extend to the adoption of women's suffrage, see Marbury, *The Nineteenth Amendment and After*, 7 VA. L. REV. 1, 14 (1920) (arguing that forcing a state to admit a large number of persons to the franchise is "by necessary implication" invalid), or prohibition, see *National Prohibition Cases*, 253 U.S. 350, 362-63 (1920) (argument of counsel).

The courts, however, have consistently refused to accept the notion that the Constitution implicitly limits the content of amendments. In upholding the 19th amendment's grant of women's suffrage, for example, the Supreme Court rejected the contention that "so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body." *Leser v. Garnett*, 258 U.S. 130, 136 (1922). The Supreme Court also repudiated the argument that the 18th amendment was improper because of its subject matter (prohibition) and its interference with the states' exercise of their police powers. *National Prohibition Cases*, 253 U.S. at 386. As the district court in one of the *Prohibition Cases* noted:

[I]f the plaintiff is right in its contention of lack of power to insert the Eighteenth Amendment into the United States Constitution because of its subject-matter, it follows that there is no way to incorporate it and others of like character into the national organic law, except through revolution. . . . This is so startling a proposition that the judicial mind may be pardoned for not readily acceding to it . . . .

*Feigenspan, Inc. v. Bodine*, 264 F. 186, 189-90 (D.N.J. 1920).

<sup>16</sup> Tribe, *supra* note 1, at 437 n.14.

stitutional law for the courts to resolve in the same way that they resolve other issues arising under the Constitution.

I have acknowledged that judicial review of amendment process issues may not be costless. But because some institution must resolve ratification disputes, the proper question is one of comparative advantage. And Professor Tribe's alternative suggestion for resolving questions about the amendment process is itself riddled with shortcomings.

First, although he has charged that judicial review of amendment process issues would entail "enormous vices" and would be difficult to distinguish from review of the merits of proposed amendments, he nonetheless now concedes that *some* article V issues ought to be subject to judicial determination. It is not entirely clear just which amendment process issues Professor Tribe would have the Court decide. He describes the judicial role variously as one of "policing the outer boundaries of the amendment process,"<sup>17</sup> resolving "antecedent" questions,<sup>18</sup> and hearing a ratification dispute when "an adjudication on the merits of the challenge would [not seriously] threaten the unique role of the amendment process."<sup>19</sup> Adoption of Professor Tribe's notion of partial justiciability of amendment process issues would add a further, confusing layer to the decisional process. Professor Tribe's standard would require that some institution (presumably the Court) determine whether a given article V issue fell within one of his vaguely defined categories of justiciable questions. This judicial determination would itself be subject to the same objections Professor Tribe levels at judicial review of amendment process issues generally. If, as Professor Tribe implies, the Court cannot be trusted to interpret article V disinterestedly (because an amendment whose adoption was disputed might "overrule" an earlier judicial decision), why should we entrust to judicial resolution Professor Tribe's preliminary inquiry into whether the particular challenge is a properly reviewable "outer boundary" or "antecedent" question? The vitality of the Court's prior decision would be no less affected by resolution of the "antecedent" issues than by direct review of the amendment process.

Whatever the scope of the article V issues Professor Tribe would submit to judicial review, it is apparent that he would retain for final resolution by Congress many (if not most) important constitutional issues pertaining to the adoption of amendments. I undertook to demonstrate in my Article that congressional authority to resolve constitutional questions arising out of the amendment process has no basis in the text of article V or in settled congressional practice and that such authority is inconsistent with judicial precedents from 1798 to

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<sup>17</sup> *Id.* at 434.

<sup>18</sup> *Id.* n.4.

<sup>19</sup> *Id.* at 445.

1939. I also argued that congressional resolution of ratification disputes is highly dysfunctional and is responsible for much of the uncertainty and confusion that currently afflict the amendment process.<sup>20</sup> Professor Tribe's suggested resolution of the rescission issue provides an apt example of the inadequacies of his congressionally centered conception of how amendment process questions should be resolved. Professor Tribe believes that there should be no final answer to the question whether states may rescind ratifications. For each amendment, the issue should be left to the Congress that happens to be sitting when thirty-eight states have (arguably) ratified an amendment. That Congress, according to Professor Tribe, should decide whether to "promulgate" the amendment and, in so doing, should decide "what the significance of the rescission was in light of all the circumstances."<sup>21</sup> Such a "delicate congressional judgment" would depend upon "a wide variety of facts and circumstances in each case,"<sup>22</sup> including "the political structure of a particular ratification battle."<sup>23</sup> If, for example, the Congress sitting at the moment of the thirty-eighth purported ratification resolved to honor rescissions rather than "proclaim" the amendment, its determination would not be binding even on the next Congress, which could reconsider the "facts and circumstances," decide not to give effect to rescissions, and proclaim the amendment valid.<sup>24</sup> The final congressional decision to promulgate the amendment would, however, be binding upon the courts. In my view, the important goal of having relatively clear rules for ascertaining whether the Constitution has been validly amended is poorly served by such an ad hoc and politicized process for resolving article V disputes.<sup>25</sup>

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<sup>20</sup> See Dellinger, *supra* note 2, at 392-96.

<sup>21</sup> *House Hearings, supra* note 3, at 45 (testimony of Prof. Laurence Tribe, Harvard Law School).

<sup>22</sup> *Id.*

<sup>23</sup> Tribe, *supra* note 1, at 435 n.6.

<sup>24</sup> See *House Hearings, supra* note 3, at 55 (testimony of Prof. Laurence Tribe, Harvard Law School).

<sup>25</sup> The question whether a state may rescind its ratification seems to me to be a question of constitutional law that ought to be resolved definitively, one way or the other. If an amendment were ratified by 38 states, but three of those states withdrew their ratifications before completion of the process, the courts could resolve the issue if the amendment were invoked as a cause of action or defense in litigation. In my view, judicial resolution of the rescission issue should not be controlled by congressional resolution; a congressional judgment about whether the power to ratify under article V includes the power to rescind is no more entitled to dispositive weight than is Congress' opinion about whether a fetus is a "person" within the meaning of the 14th amendment.