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ATTORNEY GENERAL OPINION NO. 2019- 10

The Honorable Blake Carpenter
State Representative, 81st District
P.O. Box 350
Derby, KS 67037

Re: Constitution of the State of Kansas—Legislative—Majority for Passage of Bills; Votes to Ratify Federal Constitutional Amendments or Apply for Congress to Call a Federal Constitutional Convention

Synopsis: The supermajority requirement of Article 2, § 13 of the Kansas Constitution is precatory language. The Kansas Legislature may by rule adopt a two-thirds vote requirement to ratify federal constitutional amendments or apply for Congress to call a federal constitutional convention. Cited herein: Kan. Const., Art. 2, § 13; U.S. Const., Art. V.

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Dear Representative Carpenter:

As State Representative for the 81st District, you request our opinion regarding the supermajority requirement in Article 2, § 13 of our state constitution. Specifically, you ask whether the Kansas Constitution may "provide for additional requirements" for ratification of a federal constitutional amendment beyond what is required by Article V of the United States Constitution. For the reasons discussed below, we believe the state constitution's supermajority requirement cannot bind the Legislature when it is exercising the federally delegated power of ratifying an amendment to the federal constitution or applying for Congress to call a federal constitutional convention under Article V. Rather, the effect of the supermajority requirement is merely precatory, or in other words an expression by the people of Kansas of their desire that the Legislature muster a two-thirds vote in each house to ratify federal constitutional amendments or apply for Congress to call a convention for proposing federal constitutional amendments.

The Nature of the Power to Ratify a Federal Constitutional Amendment

Article V of the United States Constitution provides the methods for proposing and ratifying constitutional amendments:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, *on the Application of the Legislatures of two thirds of the several States*, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .[1]

Described by courts as "unwieldy and cumbrous,"[2] this process for altering the Constitution has two stages—proposal and ratification.

> In the first stage, proposal, either Congress or a national convention called for the purpose may propose an amendment or amendments. In the second stage, ratification, a supermajority of the several states, either through their legislatures or state conventions, must approve the proposal for it to become law.
>
> The Constitution identifies two explicit roles for state legislatures, one at each stage. At the proposal stage, a state legislature may apply to Congress for the calling of a national convention. At the ratification stage, if Congress chooses the legislative ratification route, a state legislature may assent to, or reject, an amendment.[3]

In 1974, the people of Kansas voted to amend the Kansas Constitution to require:

> Two-thirds (2/3) of the members then elected (or appointed) and qualified in each house, voting in the affirmative, shall be necessary to ratify any amendment to the Constitution of the United States or to make any application for congress to call a convention for proposing amendments to the Constitution of the United States.[4]

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[1] U.S. Const. Art. V (emphasis added). Alexander Hamilton viewed the Article V authority for state legislatures to call a constitutional convention for proposing amendments to be important so "the national rulers . . . will have no option" but to allow the states to consider constitutional amendments. "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." (Federalist No. 85.)

[2] *E.g.*, *Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

[3] *Howard Jarvis Taxpayers Ass'n. v. Padilla*, 363 P.3d 628, 635 (Cal. 2016).

[4] Kan. Const. Art. 2, Sec. 13; see L. 1974, ch. 458, § 1.

The Supremacy Clause[5] requires the provisions of a state constitution not to conflict with the provisions of the United States Constitution.[6] Article V does not explicitly authorize or forbid a state from adopting specific requirements for ratification of an amendment to the United States Constitution by that state's legislature. Therefore, in order to determine whether a conflict exists, we must examine the nature of the ratification power itself.

We start with a prior opinion of this Office on a closely related subject, Attorney General Opinion No. 1977-73, in which Attorney General Curt T. Schneider considered whether the people of Kansas could, by popular referendum, direct the Legislature to rescind a prior ratification of a federal constitutional amendment. That opinion includes the following helpful quotations:

> The ratification or rejection of an amendment to the federal Constitution is a federal function derived from the federal Constitution itself. . . . When a state Legislature performs any act looking to the ratification or rejection of an amendment to the federal Constitution, it is not acting in accordance with any power given to it by the state Constitution, but is exercising a power conferred upon it by the federal Constitution.[7]
>
> [T]he state Legislature in ratifying the amendment . . . is not . . . acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by [Article V].[8]

It is because the state legislature's ratification power is a grant of federal authority directly from the federal constitution that the United States Supreme Court has said it "transcends any limitations sought to be imposed by the people of a state,"[9] including limitations in a state's constitution.[10] "[T]he people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislature or upon state constitutional conventions."[11] The United States Supreme Court has explained that when the Kansas Legislature is considering ratification of a proposed federal constitutional amendment, "any or all of the questions" that may arise "are *exclusively* federal questions and not state questions."[12] This is because any such questions "ar[i]se under Article V of the Constitution . . . which

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[5] U.S. Const. Art. VI, Cl. 2.
[6] The Kansas Supreme Court recognized this applies to provisions of the Kansas Constitution in *Harris v. Anderson*, 194 Kan. 302, 306 (1965).
[7] Attorney General Opinion No. 77-73, quoting *State ex rel. Tate v. Sevier*, 333 Mo. 662, 667 (1933), *cert. denied*, 290 U.S. 679.
[8] *Id.*, quoting *In re Opinion of the Justices of the Supreme Court of Maine*, 118 Me. 544, 107 A. 673, 674 (1919).
[9] *Leser v. Garnett*, 258 U.S. 130, 137 (1922).
[10] *Id.* at 136-37 (holding that a state constitutional provision preventing women from voting could not prohibit a state's legislature from ratifying a federal constitutional amendment granting women suffrage).
[11] *In re Opinion of the Justices of the Supreme Court of Maine*, 107 A. at 675.
[12] *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (emphasis added).

alone conferred the power to amend and determined the manner in which that power could be exercised."[13]

The United States Supreme Court concluded the people of a state could not give this power back to themselves in their state constitutions in *Hawke v. Smith*,[14] a case regarding the Eighteenth Amendment[15] and Prohibition. In 1918, after the Eighteenth Amendment had been proposed but before it had been ratified by the requisite number of states, the people of Ohio adopted an amendment to their state constitution purporting to "reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the Constitution of the United States."[16] The Supreme Court observed the language of Article V "is plain, and admits of no doubt in its interpretation."[17] Reading the plain language of Article V, the "only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'legislatures'?"[18] In other words, could the people of Ohio reserve legislative power over ratification of amendments to the United States Constitution and become part of the "Legislature" referred to in the United States Constitution, requiring ratification to be decided by referendum? The Supreme Court concluded the answer was "no," resting on the observation that ratification is not a *legislative* action.[19] Ratification is the "expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."[20]

This distinguishes the ratification power from other federal grants of authority to state legislatures that *do* invoke legislative action, such as the Election Clause, which directs: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."[21] *Hawke* therefore recognized that redistricting is a "legislative action" which can be shared between a state's legislature and its people, notwithstanding the grant of this authority to the "Legislature" of each state.[22] This view was recently affirmed by the United States Supreme Court when it upheld the delegation of congressional redistricting in Arizona to an independent commission established by ballot initiative.[23] Because the people of Arizona "reserve the power to propose laws . . . and to enact or reject such laws" in their state constitution,[24] the U.S. Supreme Court found "the people may delegate their legislative authority over

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[13] *Coleman v. Miller*, 307 U.S. at 438 (emphasis added).
[14] *Hawke v. Smith*, 253 U.S. 221 (1920).
[15] U.S. Const. Amend. XVIII (repealed 1933).
[16] *Hawke*, 253 U.S. at 225.
[17] *Id.*, at 227.
[18] *Id.*
[19] *Id.* at 228-29. Legislative action is that "relating to, or involving lawmaking or . . . enact[ing] laws; concerned with making laws." See Black's Law Dictionary, 11th ed. (2019).
[20] *Hawke*, 253 U.S. at 231.
[21] U.S. Const. Art. I, Sec. 4, Cl. 1.
[22] *Hawke*, 253 U.S. at 231, citing *Davis v. Hildebrant*, 241 U.S. 565 (1916).
[23] *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, __ U.S. __, 135 S. Ct. 2652 (2015).
[24] Ariz. Const. Art. IV, pt. 1, § 1.

redistricting to an independent commission."[25] But the Article V ratification power, in which "no legislative action is authorized or required,"[26] may not be reserved by the people of a state.

We observe that only one court has reviewed a state constitution's supermajority requirement for ratification of a federal constitutional amendment.[27] That opinion addressed but did not rule on the constitutionality of the supermajority requirement imposed by the Illinois Constitution, noting only that "the Illinois constitutional provision may only be precatory in its effect on the federal process, and [the legislative houses] are free to accept or reject the three-fifths requirement" imposed by Article XIV, § 4 of the Illinois Constitution.[28]

Under the weight of authority described above, we conclude the two-thirds supermajority requirement in the Kansas Constitution is merely precatory, or in other words an expression by the people of Kansas of their desire that the Legislature ratify federal constitutional amendments by a two-thirds supermajority rather than by simple majority. This holding is analogous to Justice Kennedy's observation in *Cook v. Gralike* that states (and citizens through state constitutional amendment or otherwise) are free to request or urge certain actions authorized by the federal Constitution but may not impose binding requirements on the exercise of federally delegated authority.[29]

This conclusion, however, begs another question: is the Legislature free to establish by its own procedural rules a vote requirement for ratification of federal constitutional amendments that reflects the intent of the people of Kansas expressed in Article 2, § 13 of the Kansas Constitution?

The panel in *Dyer* concluded the procedural supermajority imposed by the rules of the Illinois Legislature passed constitutional muster:

> If the framers had intended to require the state legislatures to act by simple majority, we think they would have said so explicitly. When the Constitution requires action to be taken by an extraordinary majority, that requirement is plainly stated. While the omission of a comparable requirement in connection with ratification makes it quite clear that a bare majority is permissible, it does not necessarily indicate that either a simple majority or a constitutional majority must be accepted as necessary. We think the

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[25] *Arizona State Legislature*, 135 S. Ct. at 2671.
[26] *Hawke*, 253 U.S. at 231.
[27] See *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (approving the results of the Illinois House and Senate votes regarding ratification of the Equal Rights Amendment, even though both houses adopted rules that imposed a three-fifths vote requirement that could not be found in the United States Constitution).
[28] *Id.* at 1309. The panel avoided ruling on the constitutionality of Illinois Const. Art. XIV, Sec. 4 under the doctrine of constitutional avoidance because the issues presented in the case could be decided on the Illinois Legislature's failure to pass the subject resolution under its own procedural rules. The panel's decision rests on the conclusion that those procedural rules are constitutional.
[29] *Cook v. Gralike*, 531 U.S. 510, 527-530 (2001) (Kennedy, J, concurring).

> omission more reasonably indicates that the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself.[30]

We find this analysis persuasive. Although we note the United States Supreme Court warned "[t]he choice of means of ratification was wisely withheld from conflicting action in the several states,"[31] this statement appears to be used to buttress the court's conclusion that ratification is not a legislative action. The panel in *Dyer* noted that "the several states have actually adopted a wide variety of ratification requirements,"[32] and included a list demonstrating that a bare majority of states had in place ratification requirements *other than* a "constitutional majority," or a simple majority of the elected representatives:

> [Twenty four] states require a majority of the elected representatives (a constitutional majority); 17 states require a majority of those present and voting (a simple majority); 3 states require a majority of those elected to the state senate and two-thirds of those elected to the state house of representatives; 2 states require two-fifths of the members elected and a majority of those voting; Louisiana requires a majority of those elected to the state senate and a majority of those present and voting in the state house; Tennessee requires a majority of the authorized membership of each house notwithstanding the possible existence of vacancies; Idaho requires two-thirds of those elected.[33]

As the panel in *Dyer* wryly observed, "were we to conclude that Article V does mandate a particular majority vote in each state legislature, we would then have to choose among the myriad of possibilities set forth above."[34] Instead, we conclude Article V allows each house of the Legislature to choose its own vote threshold.[35] This conclusion is analogous to, and consistent with, the holding of the United States Supreme Court in *Coleman v. Miller* , a case involving the Kansas Legislature's attempt to ratify a child labor amendment to the United States Constitution twelve years after rejecting the same amendment. The U.S. Supreme Court held that the final determination whether a proposed federal constitutional amendment has been properly ratified by a state's legislature is a political question reserved for Congress, not for the judiciary.[36] So too, it seems to us, the vote

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[30] *Dyer*, 390 F.Supp. at 1306.
[31] *Hawke*, 253 U.S. at 230.
[32] *Dyer*, 390 F. Supp. at 1307 (citing n. 34 at 1305).
[33] *Id.* at n. 34. The figures, prepared by the Illinois Legislative Council and submitted to the panel by the legislator-defendants, presumably omit Illinois itself.
[34] *Id.*, at 1307.
[35] The United States Supreme Court has not approved a ratification vote threshold lower than a simple majority. See *Dyer*, 390 F. Supp. at 1305-06.
[36] *See Coleman v. Miller*, 307 U.S. at 452-456. In *Coleman*, the U.S. Supreme Court considered whether Congress had authority to establish a time limit within which an amendment proposed by Congress must receive the required state ratification. The Court's reasoning, that Congress and not the judiciary has "the final determination" of whether a time limit for ratification may be imposed, seems to us similarly applicable here. Just as Article V grants Congress "the final determination" how to exercise its power to propose

threshold required for ratification of a federal constitutional amendment is a political question reserved to the ratifying body, or perhaps to Congress, but not to the judiciary or to a state's constitution.

In summary, the case law indicates that the Kansas Constitution cannot impose a supermajority voting requirement on the Legislature's decision to ratify a proposed amendment. Although the people of Kansas have expressed their desire that the Legislature not ratify amendments to the United States Constitution except by a vote of at least two-thirds of the members of each house, that expression is precatory. Nevertheless, the Kansas House of Representatives and the Kansas Senate have both adopted a two-thirds vote requirement for a resolution ratifying an amendment to the United States Constitution, and those rules appear to be constitutionally sound.[37] Thus, the Kansas Legislature is in fact required to attain a two-thirds vote to ratify a proposed federal constitutional amendment, but the Legislature is bound to that two-thirds requirement by the rules the Legislature itself has adopted, not by Article 2, § 13 of the Kansas Constitution.

Application for Congress to Call Constitutional Conventions

The United States Supreme Court has recognized a federal constitutional limit on the ability of a state, through state constitutional amendment, to direct members of its congressional delegation to propose an amendment to the federal constitution pursuant to Article V. In *Cook v. Gralike*,[38] citizens of Missouri adopted an amendment to their state's constitution providing that each member of that state's congressional delegation must "use all of his or her delegated powers to pass" a federal constitutional amendment limiting service in the U.S. House of Representatives to three terms and in the Senate to two terms.[39] Any Senator or Representative from Missouri who failed to take certain specified federal actions in support of proposing such an amendment would have printed on future primary and general election ballots adjacent to his or her name the phrase "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS." Similarly, any nonincumbent congressional candidate who failed to pledge similar support would have printed on the ballot "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."[40] After the federal district court found this scheme to be "an indirect and unconstitutional attempt by the people of Missouri to interject themselves into the amending process authorized by Article V of the Federal Constitution"[41] and the federal court of appeals found this Missouri scheme a "violation of Article V,"[42] supporters of the state constitutional amendment

amendments to the Constitution, so too Article V grants a state Legislature "the final determination" how to exercise its federal constitutional power to apply to Congress for a convention to be called – including the power, by legislative rule, to determine what constitutes a sufficient majority for exercise of that power.

[37] Rule 2707(b), Permanent Journal of the House, January 23, 2019 at lxxix; Rule 35, Permanent Journal of the Senate, January 17, 2019 at xliv.

[38] *Cook v. Gralike*, 531 U.S. 510 (2001).

[39] *Id.* at 514.

[40] *Id.* at 514-515.

[41] *Id.* at 516.

[42] *Id.* at 517, citing *Gralike v. Cook*, 191 F.3d 911, 918, 924, 925 (8th Cir. 1999).

appealed to the United States Supreme Court and presented alternate theories of why they thought the scheme was authorized by the United States Constitution. The U.S. Supreme Court rejected those claims of authority and invalidated the state constitutional amendment as an impermissible intrusion on the amendment process established by the U.S. Constitution, concluding the state constitutional amendment exceeded the Election Clause's grant of authority to regulate the procedural mechanisms of federal elections.[43] In a concurring opinion, Justice Kennedy explained that the U.S. Constitution allows states and citizens to request and urge their preferred actions by federal officials but not to bind them to action and penalize a failure to act.[44]

Thus, the U.S. Supreme Court has invalidated efforts to use state constitutional amendments to govern the ratification of federal constitutional amendments pursuant to Article V (*Hawke*) and to direct the proposal of federal constitutional amendments by a state's congressional delegation pursuant to Article V (*Gralike*). Turning to the specific question before us, we see no logical reason a state constitutional amendment attempting to govern a state legislature acting under authority of Article V to apply for Congress to call a federal constitutional convention would meet with a different outcome.

No federal constitutional convention has been convened since the 1787 convention that resolved to create a new system of government and replace the Articles of Confederation with the text of the United States Constitution. Accordingly, there are no published cases that squarely address whether a state constitution can impose voting requirements on a state legislature's decision to apply for Congress to call a federal constitutional convention to propose amendments to the United States Constitution. However, because the power to apply for Congress to call a constitutional convention under Article V, like the power to ratify constitutional amendments proposed by Congress, also lies with the legislatures of the several states, we find the same analysis applies. We therefore reach the same conclusion: the supermajority vote requirement to apply for Congress to call a federal constitutional convention in Article 2, § 13 of the Kansas Constitution is precatory language. We likewise conclude the Legislature may adopt rules requiring a two-thirds vote to apply for Congress to call a federal constitutional convention.[45]

In conclusion, the power to ratify amendments to the United States Constitution or apply for Congress to call a constitutional convention to consider amendments to the United States Constitution is a federal power granted to the Kansas Legislature by the federal constitution which cannot be constrained by the people of Kansas through the text of their state constitution. Consistent with Article V of the United States Constitution, and notwithstanding Article 2, § 13 of the Kansas Constitution, the Kansas Legislature may determine for itself the number of affirmative votes required to exercise the federally

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[43] *Gralike*, 531 U.S. at 518-527 (analyzing and rejecting Election Clause and Tenth Amendment arguments).
[44] *Id.* at 527-530 (Kennedy, J, concurring).
[45] See Rule 2707(b), Permanent Journal of the House, January 23, 2019 at lxxix. We note Senate Rule 35 omits explicit reference to a concurrent resolution to call a convention for proposing amendments to the United States Constitution. See Permanent Journal of the Senate, January 17, 2019 at xliv.

delegated power to ratify a proposed amendment to the United States Constitution or apply for Congress to call a federal constitutional convention.

Sincerely,

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