

“GREAT VARIETY OF RELEVANT CONDITIONS, POLITICAL, SOCIAL AND ECONOMIC”¹: THE CONSTITUTIONALITY OF CONGRESSIONAL DEADLINES ON AMENDMENT PROPOSALS UNDER ARTICLE V

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ABSTRACT

Within a year or two, the thirty-eighth state is likely to ratify the Equal Rights Amendment (ERA), setting up an unprecedented constitutional challenge.² The ERA was proposed with a seven-year deadline in the resolving clause, establishing the mode of ratification.³ That was a shift from earlier precedents in which a deadline had been placed in the text of the amendment proposal itself.⁴ Article V is annoyingly silent on the issue of congressional deadlines in amendment proposals, and the Supreme Court has never addressed the issue of a deadline that could void an otherwise properly ratified amendment.⁵ The practice of placing deadlines on amendment proposals began in 1917 with the Eighteenth Amendment, but has not been consistent since.⁶ Deadlines appear to have originated as an effort to torpedo amendments by opponents, but have since become almost pro forma.⁷ Some argue

¹ *Coleman v. Miller*, 307 U.S. 433, 453 (1939).

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² See Rick Pearson & Bill Lukitsch, *Illinois Approves Equal Rights Amendment, 36 Years After Deadline*, CHI. TRIB. (May 31, 2018, 8:45 AM), <https://www.chicagotribune.com/news/local/politics/ct-met-equal-rights-amendment-illinois-20180530-story.html> [<https://perma.cc/H6PL-NZSS>].

³ Located in “the preamble to the joint resolution authorizing the amendment.” THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 1 (2013), <https://digital.library.unt.edu/ark:/67531/metadc462590/> [<https://perma.cc/JC6T-E3AC>]

⁴ *See id.*

⁵ *See id.* at 22; cf. *Dillon v. Gloss*, 256 U.S. 368, 373 (1921) (holding that a seven-year ratification deadline did not void the Eighteenth Amendment).

⁶ NEALE, *supra* note 3, at 22.

⁷ *See id.*

deadlines ensure finality and closure;⁸ others argue they infringe on the power of states to control the ratification process free of unconstitutional limitations imposed by the national legislature.⁹

With the 1992 ratification of the Twenty-Seventh Amendment after 203 years,¹⁰ and state ratifications of the ERA after 35 years,¹¹ the issue of congressional deadlines is both front and center and of potentially enormous consequence. This Article examines the history, theory, and policy of amendment deadlines and argues that they are unconstitutional limitations on state power, inconsistent with the federalism guarantees of the founding. This issue will almost certainly require resolution by the Supreme Court, which needs to give the issue of congressional deadlines its most thoughtful attention.

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INTRODUCTION

⁸ See *id.* at 27.

⁹ See 55 CONG. REC. 5636, 5636 (1917) (statement of Sen. Penrose).

¹⁰ NEALE, *supra* note 3, Summary.

¹¹ See Pearson & Lukitsch, *supra* note 2. Nevada ratified the ERA thirty-five years after the deadline. See *Nevada Ratifies Equal Rights Amendment Decades Past Deadline*, LAS VEGAS NOW (Mar. 22, 2017, 3:18 PM), <https://www.lasvegasnow.com/news/nevada-ratifies-equal-rights-amendment-decades-past-deadline/678419418> [<https://perma.cc/MX5J-E8HE>].

On March 22, 2017, and May 30, 2018, Nevada and Illinois respectively became the thirty-sixth and thirty-seventh states¹² to ratify the Equal Rights Amendment (ERA).¹³ Upon ratification by one more state, the requisite thirty-eight states will have ratified the proposed amendment and, like the opening of Pandora's box, a whole host of legal issues will be unleashed.¹⁴ For those of you

¹² *Ratification Info State by State*, ERA, <https://www.equalrightsamendment.org/era-ratification-map> [<https://perma.cc/C86Z-FW26>] (last visited Sept. 7, 2019).

¹³ Nevada ratified its Senate Joint Resolution 2 on March 22, 2017 with the following whereas clauses, indicating concern with the deadline issue and the State's belief that the deadline may be disregarded:

WHEREAS, The 95th Congress of the United States amended the resolution of the 92nd Congress to extend the time for ratification to June 30, 1982, thereby indicating its continued support of the amendment; and

WHEREAS, The Congress of the United States adopted the 27th Amendment to the Constitution of the United States, which was proposed in 1789 by our First Congress but not ratified by three-fourths of the States until May 7, 1992, and, on May 18, 1992, certified as the 27th Amendment; and

WHEREAS, The restricting time limit for ratification of the Equal Rights Amendment is in the resolving clause and is not part of the amendment which was proposed by Congress and which has already been ratified by 35 states; and

WHEREAS, Having passed a time extension for the Equal Rights Amendment on October 20, 1978, Congress demonstrated that a time limit in a resolving clause may be disregarded if it is not part of the proposed amendment; and

WHEREAS, The United States Supreme Court in *Coleman v. Miller*, 307 U.S. 433 (1939), recognized that Congress is in a unique position to judge the tenor of the nation, to be aware of the political, social and economic factors affecting the nation and to be aware of the importance to the nation of the proposed amendment; and

WHEREAS, If an amendment to the Constitution of the United States has been proposed by two-thirds of both houses of Congress and ratified by three-fourths of the state legislatures, it is for Congress, under the principles of *Coleman v. Miller*, to determine the validity of the state ratifications occurring after a time limit in the resolving clause, but not in the amendment itself; and

WHEREAS, The Legislature of the State of Nevada finds that the proposed amendment is meaningful and needed as part of the Constitution of the United States and that the present political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue in the United States.

S.J. Res. 2, 79th Sess., at 2–3 (Nev. 2017), <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/4912/Text> [<https://perma.cc/XJ4L-HN8K>]; *see also Overview*, NELIS, <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/4912/Overview> [<https://perma.cc/LJV7-Z5DB>] (last visited Sept. 7, 2019) (noting bill became effective March 22, 2017). It also passed in Illinois on May 30, 2018. *See Bill Status of SJRCA0004*, ILL. GEN. ASSEMB., <http://www.ilga.gov/legislation/billstatus.asp?Doc.Nvm=4&GAID=14&GA=100&DocTypeID=SJRCA&LegID=99262&SessionID=91> [<https://perma.cc/5ARF-HMF2>] (last visited Sept. 7, 2019).

¹⁴ *See Nevada Ratifies Equal Rights Amendment Decades Past Deadline*, *supra* note 11

who thought the amendment was dead, news of the recent ratifications may seem surprising, but not for the hundreds of women in state legislatures around the country who have introduced the amendment for ratification every year since its supposed demise in the 1980s.¹⁵ The #MeToo movement, the political divisiveness of the Trump era, and the unprecedented rise in women's economic status while they continue to receive only \$0.49 to every dollar earned by a man,¹⁶ helped unblock hitherto unresponsive state legislatures.¹⁷

When the thirty-eighth state ratifies, the courts are likely to be the first stop for advocates and opponents alike. And the two most contentious issues will be the validity of the seven-year deadline Congress imposed for ratification of the ERA,¹⁸ including the extension adding an additional thirty-nine months,¹⁹ and the legal effectiveness of the rescissions by five states that had previously ratified.²⁰ If the rescissions are ignored and the deadline is declared unconstitutional, proponents of equality will rejoice and the ERA will become the Twenty-Eighth Amendment.²¹ If the rescissions are deemed to be valid, or the deadline is found to be constitutional, proponents will have a more difficult battle to win final approval of the ERA.²² Whether there will be strong opposition is also a looming question.²³ Although the ERA proposal is one of only thirty-three total congressional proposals offered in over 230 years,²⁴ the stakes are high and the issues raised are unprecedented.²⁵

(“The amendment required approval from 38 states to take effect.”); Pearson & Lukitsch, *supra* note 2 (noting only one more state is needed, but that the deadline in the amendment has passed).

¹⁵ See H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) (providing that the ERA would only pass if ratified within seven years).

¹⁶ Stephen J. Rose & Heidi I. Hartmann, *Still a Man’s Labor Market: The Slowly Narrowing Gender Wage Gap*, 2018 INST. FOR WOMEN’S POL’Y RES. 15.

¹⁷ See *Nevada Ratifies Equal Rights Amendment Decades Past Deadline*, *supra* note 11; Pearson & Lukitsch, *supra* note 2 (citing #MeToo as partially responsible for the resurgence of interest in the ERA).

¹⁸ See NEALE, *supra* note 3, at 22–23.

¹⁹ A 1978 joint resolution extended the ratification deadline from March 1979 to June 1982. Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 919 (1974).

²⁰ Idaho, Nebraska, Tennessee, Kentucky, and South Dakota rescinded their ratifications. NEALE, *supra* note 3, at 9 n.46.

²¹ See *id.* at 22–23 (discussing ratification issues of rescission and the 1982 deadline).

²² See *id.*

²³ See Pearson & Lukitsch, *supra* note 2; see also NEALE, *supra* note 3, at 26–27.

²⁴ Ethan Trex, 6 Constitutional Amendments that Just Missed the Cut, WEEK (Aug. 28, 2014), <https://theweek.com/articles/446233/6-constitutional-amendments-that-just-missed-cut> [https://perma.cc/2KRT-JPR3].

²⁵ NEALE, *supra* note 3, at 1.

Many scholars wonder why all the fuss and bother over a stale amendment, especially since the Supreme Court has already recognized sex as a quasi-suspect classification under the Equal Protection Clause worthy of intermediate scrutiny.²⁶ For many, Justice Ruth Bader Ginsburg's tenure on the Court is a testament to the success of the women's movement, as she had been a key figure in the movement to ratify the ERA and, after its apparent defeat, spent decades providing an alternative jurisprudential basis for heightened scrutiny of sex-based classifications to take its place.²⁷ Unquestionably, however, the passage of the ERA would bring about significant change, besides elevating sex-based classifications to suspect-class status.²⁸ It would likely render many of the protections against sex discrimination under federal and state law, like Title VII and Title IX, more enduring and impervious to dilution—or perhaps even repeal.²⁹ And it would send an important signal that equality continues to be a valued commitment of our legal system.³⁰

²⁶ See *United States v. Virginia*, 518 U.S. 515, 531 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

²⁷ Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project*, 11 TEX. J. WOMEN & L. 157, 164–65 (2002); Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. ONLINE 227, 230 (2013).

²⁸ MARY A. DELSMAN, *EVERYTHING YOU NEED TO KNOW ABOUT *ERA (*THE EQUAL RIGHTS AMENDMENT)* 144 (1975). Of course the Court would not have to recognize sex as a protected category deserving of the strictest scrutiny as it has done for race, but its failure to do so would be problematic not just because there is a separate equality amendment for sex as there is for race, but also because the higher level of scrutiny is seen by many of the ERA's supporters in the states as the prime motivation for passage. Other quasi-suspect categories like illegitimacy would likely remain subject only to intermediate level review because their protections are not enshrined in the Constitution itself.

²⁹ See *id.* at 212. Delsman notes that the ERA would equalize the age of majority, the age of marriage, child labor laws, cutoff date for parental support, juvenile court laws and procedures, age of buying alcohol, criminal laws, disparate prison sentence laws, legal retirement ages, obligation for jury duty, sentencing procedures, prison conditions, and state laws restricting women's ability to carry out legal transactions. *Id.* at 156–58. Notably, virtually every one of these changes have already occurred except some dealing with criminal law and prison conditions. Certain other laws, like a preference for mothers in infant custody disputes, may need to be revised, although most states now use individual determinations in cases of divorce, child custody, alimony, and child support so that there are no default sex-based differences. ERA opponents were quite concerned about the possible voiding of protectionist legislation for women in the workplace. *Id.* at 203–10.

³⁰ For instance, the Missouri ERA Coalition claimed the ERA would signify a national commitment to eliminate sex discrimination, would, for the time, give all citizens equal protection of the laws, would recognize legally that women are persons under our Constitution, would place woman power and man power on an equal basis of importance, would emphasize individual dignity and worth regardless of sex, and

The initial battle on the legality of the ERA is likely to be over the validity of Congress's deadline for ratification.³¹ In light of changed circumstances, the constitutionality of any ratification deadline deserves a fresh, new analysis. Although much ink was spilled in the 1970s and 1980s over the subject, the passage in 1992 of the Twenty-Seventh Amendment after 203 years sheds further light on the relatively recent practice of adding deadlines to proposals before sending them to the states.³² The first proposal to be saddled with a deadline was the Eighteenth, a proposal that responded to the profound social and political upheaval of the prohibition movement and food shortages during World War I.³³ The legislative history of the proposed Eighteenth Amendment shows great disagreement in Congress as to the constitutionality of imposing a time limit.³⁴ Furthermore, despite the Supreme Court's acceptance of the limit,³⁵ there continues to be significant doubt as to the constitutionality of the practice.³⁶

This Article explores the history of the amendment process, the imposition of deadlines for ratification, and the policy implications of the practice. Many constitutional amendments were controversial in their day, and the fact that the ERA, as of now, is the only one that has timed out means that it is the only one in which a procedural technicality may thwart what has become an expression of popular will.³⁷ A CBS News Poll in 1999 "reported that 89% of respondents

would guarantee to each United States citizen his or her fair share of our nation's cultural heritage of legal rights.

Id. at 146. Many states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments after they had been adopted as a symbolic gesture of their commitment to the doctrine of equality. See Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 34 (2008).

³¹ See NEALE, *supra* note 3, at 22.

³² See *id.* at 16–18.

³³ See *id.* at 22.

³⁴ See Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, 4 WOMEN'S RTS. L.R. 209, 212 (1978).

³⁵ Dillon v. Gloss, 256 U.S. 368, 375 (1921).

³⁶ See, e.g., Ginsburg, *supra* note 19, at 925–27; Allison L. Held et. al, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 113–15 (1997) (arguing that the states control the ratification process); Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 437–38 (1999) (arguing the unconstitutionality of time limits); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 687 (1993); Witter, *supra* note 34, at 217–21.

³⁷ In 1970, 56% of the American public supported the ERA. In 1975, it was 58%. It also passed the Senate by an 84–8 majority and the House by a 354–24 majority. NEALE, *supra* note 3, at 5 & n.21, 7. The D.C. Representation Amendment has also timed out, but currently

supported the proposed ERA.”³⁸ Although some continue to be concerned with how sex equality will play out in the context of the military, public bathrooms, single-sex sports or schools, or other bona fide occupational criteria,³⁹ the modern LGBTQ movement has shown that these issues are more often distractions than real obstacles to legal reform on the basis of equality.⁴⁰ Equal rights have not proven to be as destructive of cultural and social norms as many opponents predicted.⁴¹ After discussing the history of the amendment process and the imposition of time restrictions, this Article explores the arguments on both sides of the issue, both legal and policy, and then explores the implications of a finding that the time limits are, as this Article contends, unconstitutional.

I. A BRIEF HISTORY OF THE AMENDMENT PROCESS AND THE ORIGIN OF TIME LIMITS

Article V of the United States Constitution 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 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.⁴²

is not close to ratification. Proposed in 1978 to give the District of Columbia congressional representation, only sixteen states have ratified it. *See id.* at 26. Thus, it is not in the same posture as the ERA which, presumably, will reach its requisite number of states for ratification. Of course, if the ERA is validated and the deadline deemed unconstitutional, the D.C. Representation Amendment may regain political salience.

³⁸ *Id.* at 5 n.21.

³⁹ *See Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting); Pearson & Lukitsch, *supra* note 2.

⁴⁰ Justice Scalia’s screed, arguing against recognition of sexual orientation protections in *Lawrence*, has simply not led to the breakdown of modern civilization as he predicted. 539 U.S. at 589–91, 599, 602 (Scalia, J., dissenting). And it is clear that marriage equality has not led to the destruction or devaluation of heterosexual marriage.

⁴¹ *Id.*

⁴² U.S. CONST. art. V. There is also a lengthy debate over whether Article V is the exclusive means for amending the Constitution. *See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (claiming that the people could call another convention like the Philadelphia one, and propose and vote on additional amendments). *Contra* Henry Paul Monaghan, *We the*

The text of Article V is silent as to the question of time limits being imposed on the states for ratification,⁴³ but the text does clearly identify two roles for Congress.⁴⁴ First, it can “*propose Amendments*”⁴⁵ and, second, it can prescribe the “*Mode of Ratification*. ”⁴⁶ In proposing amendments, Congress clearly has the authority to elucidate and prescribe the substance of the amendment, e.g., the “right of citizens . . . who are eighteen . . . or older, to vote shall not be denied,”⁴⁷ or “[n]o person shall be elected to the office of President more than twice.”⁴⁸ Congress also has the authority to select the mode of ratification as between the four given options: (1) congressional proposal and state legislative ratification; (2) congressional proposal and state convention ratification; (3) proposal generated by a convention called for by the states and state legislative ratification; and (4) proposal generated by a convention called for by the states and state convention ratification.⁴⁹ All of the current twenty-seven amendments have gone through the congressional proposal, and twenty-six have gone through state legislative ratification.⁵⁰ Only the Twenty-First Amendment went through the state convention stage of ratification.⁵¹ However, in the past 200 years there have been hundreds of calls from the states for conventions, yet Congress has never once acceded to the call.⁵²

These four modes of ratification respond to the Founders’ concerns that the amendment power lie primarily with the states, but that amendments can be initiated by both the national legislature and the states whenever either identifies a need.⁵³ The fear that the national legislature would not be responsive to demands of the states if the public sentiment was to limit federal power was solved by giving the states the power to demand a constitutional convention.⁵⁴ It is notable, therefore, that in all four modes of ratification, the states play the

People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121 (1996) (arguing that Article V is exclusive without abolishing the Constitution entirely and starting anew).

⁴³ See U.S. CONST. art. V.

⁴⁴ See *id.*

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.* amend. XXVI, § 1.

⁴⁸ *Id.* amend. XXII, § 1.

⁴⁹ See *Id.* art. V.

⁵⁰ Witter, *supra* note 34, at 218 n.112.

⁵¹ *Id.*

⁵² See Paulsen, *supra* note 36, at 736.

⁵³ See discussion *infra* Section I.A (discussing the Founders’ original intent).

⁵⁴ The Virginia Plan explicitly provided for amendments initiated by the states with no assent of the national legislature necessary. See discussion *infra* Section II.B.1.

operative role through ratification.⁵⁵ And in the convention mode, Congress need not be in agreement and, in fact, is powerless to prevent amendments because it has no substantive role other than to call the convention when petitioned to do so by the states.⁵⁶

Article V makes no mention of time limits, deadlines, or other procedures that might be imposed.⁵⁷ In fact, the Constitution is entirely silent on how state legislatures should ratify, e.g., by simple majority, supermajority, with or without gubernatorial approval, etc.⁵⁸ And although much leeway remains with the states to set their own ratification process, the Supreme Court has held nonlegislative hurdles, like public referenda within the state, cannot be required.⁵⁹ One could imagine that if Congress made a proposal for an amendment, and then required that the amendment be ratified by popular vote in three-fourths of the states, Congress would have exceeded its Article V power, which limits the mode of ratification to the four methods mentioned above.⁶⁰ However, Congress could presumably propose an amendment to change Article V to require a popular vote on all future amendments, but the popular vote amendment would still have to proceed through one of the four prescribed methods.⁶¹

In light of the silence on the part of the text, and the Founders' concerns that amendment be open from both directions, national and state, the deadline issue is quite perplexing.⁶² There is a sound argument, which this Article explores below, that the act making the amendment legally effective is ratification by the states, and that therefore Congress cannot place a condition or limitation on the states' power to ratify whenever they feel it is important to do so.⁶³ The passage of the Twenty-Seventh Amendment after 203 years is a testament to the Founders' understanding that amendments may occur in the future when public sentiment and experience require changes to the structure of government or the rights of the people to be protected.⁶⁴ After all, Article V states that the amendment becomes

⁵⁵ See U.S. CONST. art. V.

⁵⁶ See The FEDERALIST No. 85, at 593 (Alexander Hamilton) (J.E. Cooke ed., 1961).

⁵⁷ See generally U.S. CONST.

⁵⁸ See *id.*

⁵⁹ See *Hawke v. Smith*, 253 U.S. 221, 228–29, 231 (1920).

⁶⁰ In fact, such an amendment was offered to the proposal for the Nineteenth Amendment with what appears to have been a clear desire to kill the proposal. See 58 CONG. REC. 77, 93 (1919); see also *supra* notes 57–60 and accompanying text.

⁶¹ Some commentators think Congress should propose an amendment to require a deadline in all future amendments. See Michael C. Hanlon, Note, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J.L. & POL. 663, 678 (2000).

⁶² See discussion *infra* Part III.

⁶³ See discussion *infra* Part III; see also Robert Hajdu & Bruce E. Rosenblum, Note, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 111–12 (1979).

⁶⁴ Joseph Story noted that sometimes amendments may need time to be carefully

effective “when ratified” by the states.⁶⁵ Senator Brandegee argued that “when ratified” means “whenever ratified” and that Congress is without power to impose any deadlines on the states.⁶⁶

Others, however, have suggested that implicit in Congress’s power to choose the mode of ratification is the power to impose conditions related to the manner, if not the substance, of the ratification process.⁶⁷ They generally base this argument on the belief that it was not in the Founders’ minds to allow proposals to linger for years, decades, or even centuries and that some implicit or explicit time limit is reasonable.⁶⁸ Whether seven years meets that requirement is another matter.⁶⁹ But the power of Congress to impose limits can be seen as an example of the general power including the lesser power.⁷⁰ Thus, if Congress can make an

considered and should not be hastily ratified or rejected. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1824 (Bos: Hilliard, Gray, & Co., Cambridge: Brown, Shattuck & Co. 1833).

⁶⁵ U.S. CONST. art. V. Professor Lester Orfield agrees that the “constitutionality of Congressional regulation would seem exceedingly doubtful. The states cannot be coerced into adopting an amendment. . . . Congress has done its work when it proposes [an amendment], and the matter of adoption is for the states.” LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 64–65 (1942).

⁶⁶ 55 CONG. REC. 5650 (1917) (statement of Sen. Brandegee) (“The Constitution itself, therefore, provides that an amendment shall be ratified when approved by the legislatures of three-fourths of the States; and I think there is no question that that word ‘when’ always has been interpreted, and is correctly interpreted, as though it were ‘whenever.’ That has been the practice of the States in connection with all constitutional amendments which have been adopted.”). He goes on to illustrate precisely the issue of the ERA. *Id.* (“Suppose the amendment of the Senator from Ohio is added to the joint resolution. I can readily see that when the matter is taken to the Supreme Court the Supreme Court may hold that Congress, by attempting to prescribe an unconstitutional condition to the machinery by which the amendment must be approved by the legislatures of the States, has exceeded its authority, and the whole amendment may fail, although ratified by the States in eight years. For instance, suppose six years go by and three-fourths of the States have not acted favorably upon this proposed constitutional amendment, but that at the end of eight years three-quarters of the States have acted favorably upon it; the friends of this amendment, of course, I suppose, would then, in order to secure the amendment, have to turn around and claim that Congress had no authority to attach a time limit to it, and that it had become a part of the Constitution.”).

⁶⁷ For instance, Senator Pomerene asserted that, “I know of nothing in the Constitution which says that the Congress can not [sic] attach any condition or qualification to a proposition which it submits in the form of a proposed amendment to the Constitution.” 55 CONG. REC. 5650 (1917) (statement of Sen. Pomerene).

⁶⁸ *Id.*

⁶⁹ *See discussion infra* Section II.B.3.

⁷⁰ Senator Shields argued by analogy from the pardoning power:

The pardoning power is given the Executive by the Constitution of the United States. It is an absolute grant of that power; but under that grant the courts have always held that the lesser being embraced in the

unlimited proposal, it must include the power to make a limited proposal.⁷¹ In that sense, proponents of the deadline power treat it like a contract offer.⁷² If Congress can make an offer to the states for their acceptance, it can also limit that offer to being accepted within a prescribed time limit.⁷³

Both of these positions, however, treat the deadline as part of Congress's power to dictate the mode of ratification and not as part of its proposal power, although the first few deadlines were included in the text of the amendment and not in the preamble identifying the mode of ratification.⁷⁴ Would there be any constitutional objection to Congress proposing an amendment that states, for example, "discrimination on the basis of sex shall be prohibited if this amendment is ratified by the states within seven years"? If the deadline is part of the proposal itself, then there would seem to be no constitutional objection to Congress's proposal.⁷⁵ The Constitution does limit Congress's proposal power in two respects: it may not propose any amendments before 1808 that would abolish slavery, and it may not propose any amendment that would deprive a state of equal suffrage in the Senate without that state's consent.⁷⁶ But there is nothing in the text or its history to suggest that a deadline could not be woven into the fabric of the proposed amendment itself.⁷⁷

However, making the deadline part of the proposal is logically incoherent and problematic for a number of reasons. First, until the proposal is ratified, the deadline has no legal efficacy.⁷⁸ Once it is ratified, it is arguably irrelevant. This

greater, the Executive may commute a sentence; he may grant a conditional pardon. Now, is not this an absolute power for the Congress to submit to the States the proposed amendment to be ratified? Can it not be coupled with a condition or a limitation, and come within the principle that the greater involves the lesser?

⁵⁵ CONG. REC. 5653 (1917) (statement of Sen. Shields).

⁷¹ See *id.*

⁷² See Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 523–26 (1994).

⁷³ *Id* at 523. Senator Pomerene argued, "I know of nothing in the Constitution which says that the Congress can not [sic] attach any condition or qualification to a proposition which it submits in the form of a proposed amendment to the Constitution." 55 CONG. REC. 5650 (1917) (statement of Sen. Pomerene).

⁷⁴ Scott Bomboy, *Can a Dormant Proposed Constitutional Amendment Come Back to Life*, CONST. DAILY (May 31, 2018), <https://constitutioncenter.org/blog/can-a-dormant-proposed-constitutional-amendment-come-back-to-life> [<https://perma.cc/S54A-8EPF>].

⁷⁵ Daniel Hemel, *Some Thoughts on the 28th Amendment*, MEDIUM (June 5, 2018), <https://medium.com/whatever-source-derived/some-thoughts-on-the-28th-amendment-fc4d8372ab14> [<https://perma.cc/AX2K-T8LY>].

⁷⁶ U.S. CONST. art. V.

⁷⁷ See *id.*

⁷⁸ Senator Brandegee argued that the deadline is inconsistent with the proposing power as currently stated:

was how the issue was framed in the congressional debates surrounding the Eighteenth Amendment in which the first deadline was included as part of the proposed amendment.⁷⁹ Every amendment in which the deadline resides in the text of the proposed amendment has passed within the relevant time limitation.⁸⁰ Only if the amendment were to be ratified by the thirty-eighth state after the time limit in the proposal would there be an issue, but that situation has never arisen.⁸¹ But one could imagine that putting an expiration date within the proposal itself is not inherently unconstitutional, and ratification after the date within the proposal would simply be ineffective because the proposal would have expired on its own terms.⁸²

But philosophically speaking, it would seem counter to the finely wrought mechanism established in the Constitution for Congress to be able to impose a time limit on the states within the proposal, when state ratification is the act that gives legal efficacy to the proposed amendment.⁸³ This would be akin to offering a proposal to the states that includes a successive Congressional veto power after ratification.⁸⁴ If they ratify they presumably accept the condition; if they do not ratify then it is ineffective. In a sense, either would be no harm, no foul.

Including the limitation within the proposal itself, however, seems inherently contradictory. If we consider recent Tenth Amendment cases in which the Court has held that Congress may offer incentives, and regulate on its own through pre-emption, but may not condition federal benefits on states doing the bidding of the federal government,⁸⁵ the deadline appears highly suspect. Because approving the

[I]t is utterly beyond my mental apparatus to comprehend the claim that, with the Constitution as at present written, with its existing machinery for its own amendment, a proposed amendment which it is sought to make a part of the Constitution can include a provision which will so change the Constitution as to make it applicable to the very amendment which itself can not [sic] take effect until it has been ratified by three-quarters of the States. It is an attempt to hoist yourself by your own boot straps, if I may use a homely phrase.

55 CONG. REC. 5651 (1917) (statement of Sen. Brandegee).

⁷⁹ See discussion *infra* Section I.B.

⁸⁰ Bomboy, *supra* note 74.

⁸¹ Just as the ERA raises a case of first impression, the amendment proposing D.C. representation could raise the issue of a proposal timing out when the deadline is in the text of the amendment itself. See H.R.J. Res. 554, 95th Cong. (1978) (including the seven-year deadline in both the amendment and the resolving clause).

⁸² Dalzell & Beste, *supra* note 72, at 523.

⁸³ Kalfus, *supra* note 36, at 453–56.

⁸⁴ See *id.* at 456, 461–62.

⁸⁵ See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 168–69 (1993). In *New York v. United States*, Justice O’Connor explained that the history of the finely wrought federalism relationship depended on political accountability by the legislature that is mandating certain acts. She explained:

amendment proposal with the deadline is like agreeing to have one's absolute power limited in order to obtain the benefits of the proposal, the deadline is like a gun to the head. If Congress provided two proposals, one with and one without a deadline, and gave the states their choice, it would be hard to dispute the validity if the states chose the one with the deadline. And they might very well do so if they want to achieve closure on a proposal quickly, as they did with the prohibition amendment.⁸⁶ But only giving them that option is highly problematic, for what state will refuse to ratify because it thinks Congress has overstepped if the state wants the substantive amendment to become operative? The deadline puts the states in a catch-22 that seems highly improper in light of the states'

By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id.; see also Di Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 639–65 (1985) (stating the same problem of lack of political accountability); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 61–62 (1988).

⁸⁶ Kalfus, *supra* note 36, at 465–66.

undisputed power over ratification.⁸⁷ As Senator Brandegee so eloquently put it, “It is an attempt to hoist yourself by your own bootstraps.”⁸⁸

There are deeper philosophical issues with the deadline when we further parse the distinctions between Congress’s proposal power and its mode of ratification power. Until the Eighteenth Amendment, Congress never imposed a deadline of any sort on its proposed amendments, but it always used a resolving clause, like a preamble, to indicate the mode of ratification it was adopting.⁸⁹ Thus, the ERA’s resolving clause reads:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress.*⁹⁰

Because the resolving clause is not part of the proposed amendment itself, it is considered a normal act of legislation, albeit one that does not require presentment to the President nor, arguably, a supermajority.⁹¹ States ratify the

⁸⁷ In correspondence between James Madison and Alexander Hamilton about the amending power, Madison noted that conditional ratifications were not acceptable. States could not impose conditions on their ratifications, like “we ratify but only if x others ratify within the next two years.” Similarly, Congress should be unable to condition its proposal on ratification within a certain period. Madison wrote: “The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any *condition* whatever must vitiate the ratification.” See Letter from James Madison to Alexander Hamilton (July 20, 1788), in 2 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 1317 (1910).

⁸⁸ 55 CONG. REC. 5651 (1917) (statement of Sen. Brandegee).

⁸⁹ Kalfus, *supra* note 36, at 438–39.

⁹⁰ H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972). The Seventeenth Amendment was offered without a deadline and its preamble reads:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following be proposed as a substitute for section one of Article II of the Constitution of the United States, which will be valid to all intents and purposes as part of the Constitution when ratified by the legislature of three-fourths of the States.

62 H.R.J. Res. 313 (1912).

⁹¹ Ginsburg, *supra* note 19, at 928–30.

proposal and not the preamble.⁹² The Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments all included deadlines in the resolving clause, while the Eighteenth, Twentieth, Twenty-First, and Twenty-Second included the deadline in the text of the proposed amendment itself.⁹³ The First through Seventeenth, the Nineteenth, and the Twenty-Seventh had no deadline.⁹⁴ And oddly, the 1978 proposed amendment for D.C. Representation had a deadline in both the proposed amendment and in the resolving clause.⁹⁵

Despite lack of any clear legal history on the reasons for the dual deadline, it would seem that different Congresses took different perspectives on the constitutionality of the deadline, whether within the amendment or within the resolving clause.⁹⁶ Although there is no judicial precedent on the subject, at the very least it would seem that including the deadline within the proposed amendment would require a two-thirds majority, and that once included it could not be extended or removed by a subsequent Congress unless the deadline was deemed invalid or a new proposal was adopted and sent to the states.⁹⁷ The deadline in the resolving clause is a different matter, as it is simply a form of legislation that can be changed by a subsequent Congress, does not require a supermajority, and, if valid, presumably could be extended or waived by a later Congress.⁹⁸

As with most constitutional questions, the document itself is silent as to the particular details at issue,⁹⁹ leaving us to reason from history, precedent, practice, policy, and logic. Undoubtedly, as Senator Borah argued in 1917, a properly ratified amendment limiting the ratification period for all future amendments would be constitutional.¹⁰⁰ And one was proposed in the Senate during the

⁹² See *id.* at 929–30.

⁹³ Bomboy, *supra* note 74.

⁹⁴ See *id.*

⁹⁵ See H.R.J. Res. 554, 95th Cong. (1978).

⁹⁶ It seems the deadline was put into the text to avoid the possibility of later Congresses modifying or removing the deadline. See discussion *infra* Section I.B.

⁹⁷ Ginsburg, *supra* note 19, at 928–30.

⁹⁸ This was the issue with the extension to the deadline for the ERA. However, most scholars and Congressmen viewed the deadline in the resolving clause as merely a joint resolution that does not require a supermajority. See *id.*

⁹⁹ U.S. Const. art. V; see also Dalzell & Beste, *supra* note 72, at 503.

¹⁰⁰ 55 CONG. REC. 5649 (1917) (statement of Sen. Borah) (“I would vote for an amendment to change the Constitution of the United States in regard to the machinery provided for the ratification of proposed amendments, because I think there is much merit in the proposition that there ought to be a time within which constitutional amendments should be ratified; but we can not [sic] change the Constitution of the United States as to the machinery by which ratification takes place by the manner in which we submit a particular constitutional amendment. In other words, we can not [sic] provide in the submission a rule for ratification of that particular proposal when there is another existing rule in the

debates on the Eighteenth Amendment.¹⁰¹ But interposing a time limit either in the text of the proposal itself, under Congress's proposing power, or in the resolution, under Congress's mode-of-ratification power, are both of questionable constitutional validity.¹⁰² There are good arguments on both sides, regarding deadlines either within the proposal itself or within the resolving clause, which need further clarification and analysis as we approach the time when a court will most likely have to make a decision on the subject.¹⁰³ One of the first places to begin will be founding documents, practices, and policies.

A. Original Intent

There are very few textual references to the amendment process in founding documents.¹⁰⁴ James Madison explained the importance of the amendment process, for experience and time may show the need for adjustments to the structure of the national government:

That useful alterations will be suggested by experience, could not but be foreseen. It was requisite therefore that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other.¹⁰⁵

As David Watson notes, many constitutions of earlier times did not include an amending power, but drafters of a handful of state constitutions and the federal constitution apparently recognized that, without a power of amendment, public dissatisfaction would lead either to revolution or continuation of an unsatisfactory regime.¹⁰⁶ The amendment power was also relied on to garner the support of those who felt that there were flaws in the federal system being

Constitution.”).

¹⁰¹ See 55 CONG. REC. 5652 (1917).

¹⁰² See Hemel, *supra* note 75.

¹⁰³ See *id.*

¹⁰⁴ Kalfus, *supra* note 36, at 438–40.

¹⁰⁵ THE FEDERALIST No. 43, at 297 (James Madison) (J.E. Cooke ed., 1961).

¹⁰⁶ WATSON, *supra* note 87, at 1301–05.

proposed and who threatened to block its ratification if those flaws were not immediately addressed.¹⁰⁷

The Virginia Plan had provided that amendments would only originate with the states and would not require Congressional approval at all.¹⁰⁸ And the Report from the Committee of Detail passed on that recommendation, proving only one avenue to amendment—state legislatures call for a convention.¹⁰⁹ But Alexander Hamilton was concerned that states would only tend to their own interests, and not the interests of the national government, and thus he proposed granting Congress the power to call for amendments as well.¹¹⁰

The *Federalist No. 85* provides the most comprehensive discussion of the amendment process.¹¹¹ Its focus is on the power of the states to call for amendments and the inability of the national legislature to thwart the will of the people.¹¹² As Alexander Hamilton explained:

In opposition to the probability of subsequent amendments it has been urged, that the persons delegated to the administration of the national government, will always be disinclined to yield up any portion of the authority of which they were once possessed. . . . I think there is no weight in the observation just stated. . . . But there is yet a further consideration . . . It is this, that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan; the congress will be *obliged* . . . to call a convention for proposing amendments . . . The words of this article are peremptory. The Congress “*shall* call a convention.” Nothing in this particular is left to the discretion of that body. . . . We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.¹¹³

James Madison also noted in *Federalist No. 39* that the amendment power is neither “wholly *national*, nor wholly *federal*.¹¹⁴ It is federal because the

¹⁰⁷ *Id.*; see also Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 209 (1994).

¹⁰⁸ MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 539 (2016).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ THE FEDERALIST NO. 85 (Alexander Hamilton).

¹¹² *Id.*

¹¹³ THE FEDERALIST NO. 85, *supra* note 56, at 592–93.

¹¹⁴ THE FEDERALIST NO. 39, at 257 (James Madison (J.E. Cooke ed., 1961)).

participation of the states is required for amendments, but it “partakes of the *national character*” when it binds all on the concurrence of less than the whole number of states.¹¹⁵ Unquestionably, the primary focus was on the ability of the people, or the states, to rein in a national legislature through the amendment process when the national legislature might object.¹¹⁶

There is nothing in the Federalist or Anti-Federalist Papers about a deadline, or any implied powers in Congress to condition or limit the terms of proposed constitutional amendments.¹¹⁷ And the overall philosophy of a limited federal government means Congress does not have the power to limit the states without an express grant.¹¹⁸ Moreover, the primary concern of Anti-Federalists was that the amendment power was too cumbersome, allowing a small minority in a small number of state legislatures to thwart needed change.¹¹⁹ Allowing Congress to impose additional barriers to state control over ratification would be another sign of national power that would have upset Anti-Federalists.¹²⁰ On the other side, there was a desire to make it difficult enough that the Constitution would not be amended to reflect every shift in political winds—although arguably the supermajorities accomplished this goal satisfactorily without adding a debilitating barrier like a deadline.¹²¹ The total silence on the issue of deadlines should be read in light of the ubiquitous concern on the part of the Federalists and Anti-Federalists alike to protect the power of the states to control amendments even when the national government might resist.¹²²

¹¹⁵ *Id.*

¹¹⁶ *See id.*

¹¹⁷ WATSON, *supra* note 87, at 1311. Madison also indicated that conditional ratifications were not permissible, which tends to suggest that conditional proposals are equally impermissible. *See supra* note 87 and accompanying text.

¹¹⁸ Although some senators who favored the power to impose a deadline argued it lay within the Necessary and Proper Clause, one can argue in response that the Necessary and Proper Clause applies only to Article I powers and not to Article V powers. *See* Hemel, *supra* note 75.

¹¹⁹ Patrick Henry, Speech before the Virginia Ratifying Convention (June 7, 1788), reprinted in THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 213–14 (Ralph Ketcham ed., 2003).

¹²⁰ *See id.*

¹²¹ The amendment process “guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults.” THE FEDERALIST NO. 43, *supra* note 105, at 296.

¹²² *See id.*; *see also* Henry, *supra* note 119, at 213–14. “Madison believed that amendments, ‘if pursued with a proper moderation and in a proper mode, will be not only safe, but may serve the double purpose of satisfying the minds of well meaning opponents and of providing additional guards in favor of liberty.’” KLARMAN, *supra* note 108, at 565. Klarman further states that:

[i]n terms of how amendments should be pursued, Madison argued that it would be more “expeditious” and “certain” for Congress to propose

Thus, as a matter of original intent, the silence should be read as indicating Congress does not have the power to impose a deadline on a process that lies primarily with the states. However, original intent often has to give way in light of precedent and practical necessity. In this case, prior practice also fails to provide a rationale for validating the deadline.

B. Prior Practice

As previously noted, Congress proposed all amendments before 1917 with no time limitations.¹²³ Of the original twelve proposed in 1789, ten passed in under three years' time (811 days).¹²⁴ The Congressional Pay Act amendment, which was one of the two initially rejected, was eventually ratified as the Twenty-Seventh Amendment in 1992 after 203 years.¹²⁵ The ratification of the Twenty-Seventh Amendment after so much time generated a significant amount of scholarship on whether the amendment had exceeded its shelf life, whether the long shadow of the amendment affirmed fears of some that proposals once unleashed could never be reined in, but also supported the general philosophy that the states could amend the Constitution whenever the public and political will dictated.¹²⁶ It also brought out calls to amend the Constitution to mandate deadlines.¹²⁷ The Eleventh Amendment was ratified in under a year (340 days) and was the last of the eighteenth century amendments.¹²⁸

The pace of amendments declined precipitously as only four amendments—the Twelfth, Thirteenth, Fourteenth, and Fifteenth—were ratified during the nineteenth century, and all were ratified within three years.¹²⁹ The Fourteenth Amendment took the longest, at 757 days, and the Twelfth took the least time, at 189 days.¹³⁰ None included a deadline, although the latter three were

them than for the states to call a second convention to recommend them
(though he conceded that, under Article V of the Constitution,
Congress had no discretion to refuse to call a convention if two-thirds
of the states petitioned for one).

Id.

¹²³ See NEALE *supra* note 3, at 22.

¹²⁴ *Notes on the Amendments*, U.S. CONST., <https://www.usconstitution.net/constamnotes.html/const.html> [<https://perma.cc/32L2-ZTPP>] (last visited Sept. 8, 2019).

¹²⁵ *Id.*

¹²⁶ See Paulsen, *supra* note 36, at 678–81; see also Amar, *supra* note 42, at 1429–30, 1440–41, 1465–66.

¹²⁷ See Hanlon, *supra* note 61, at 665–67.

¹²⁸ The Eleventh Amendment concerns sovereign immunity of states and was ratified by the thirteenth state, North Carolina, on February 7, 1795. *Notes on the Amendments*, *supra* note 124.

¹²⁹ *Id.*

¹³⁰ The Twelfth Amendment changed the procedure for electing the president and vice

certainly not uncontroversial.¹³¹ Moreover, post-adoption ratifications of the equality amendments (the Thirteenth, Fourteenth, and Fifteenth), even a century later, as well as the final stragglers of the Bill of Rights, have made all of these substantive rights-based amendments unanimously approved by all states.¹³² The unanimous ratification of all prior equality and individual rights based amendments is a sign of the commitment our state representatives have toward this type of constitutional guarantee.¹³³

In the twentieth century, the Sixteenth Amendment on the income tax was proposed without a deadline, and it passed in a little over three and half years (1,302 days) in 1913.¹³⁴ The Seventeenth Amendment on the popular election of senators was ratified a few months later after less than a year of consideration (330 days).¹³⁵ But beginning with the prohibition movement, for the first time a deadline of six years was added by an amendment in the Senate, lengthened to seven years by the House,¹³⁶ and ultimately became the new norm.¹³⁷

Debates in the Senate on the imposition of the deadline to the Eighteenth Amendment illustrate both the concern that the Senate was wading into unconstitutional territory and a recognition that the prohibition amendment was unique in interposing into the Constitution a substantive rule that was more appropriately the subject of legislation through the police power or the Commerce Clause.¹³⁸ Senator Warren G. Harding, of future presidential fame, who introduced the deadline, admitted that the prohibition amendment was a question relating to personal liberty, and he bemoaned the fact that the only way to submit the issue to the people was through the amendment process.¹³⁹ His primary motivation, however, was to get the issue settled, once and for all, so that

president and was ratified by the thirteenth state, New Hampshire, on June 15, 1804. *Id.* The Thirteenth Amendment outlawed slavery and was ratified by the twenty-seventh state, Georgia, on December 6, 1865. *Id.* The Fourteenth Amendment providing individual rights protections for former slaves, and other matters, was ratified by the twenty-eighth state, South Carolina, on July 9, 1868. *Id.* The Fifteenth Amendment, providing voting rights protections, was ratified by the twenty-eighth state, Iowa, on February 3, 1870. *Id.*

¹³¹ See *id.*

¹³² Chin & Abraham, *supra* note 30, at 31–34.

¹³³ *Id.* at 31, 37–38.

¹³⁴ The Sixteenth Amendment was ratified by the thirty-sixth state, Delaware, on February 3, 1913. *Notes on the Amendments*, *supra* note 124; see also Andrew Glass, *States Ratify 16th Amendment, Feb. 3, 1913*, POLITICO (Feb. 3, 2012, 4:30 AM), <https://politico.com/story/2012/02/this-day-in-politics-072387> [https://perma.cc/GF7K-UEZ6].

¹³⁵ The Seventeenth Amendment was ratified by the thirty-sixth state, Connecticut, on April 8, 1913. *Notes on the Amendments*, *supra* note 124.

¹³⁶ 56 CONG. REC. 421 (1917).

¹³⁷ Kalfus, *supra* note 36, at 434 n.12.

¹³⁸ See, e.g., 55 CONG. REC. 5637 (1917) (statement of Sen. Penrose).

¹³⁹ See *id.* at 5648, 5651 (statements of Sen. Harding and Sen. Johnson).

Congress could get back to the war effort, and politicians were not “measured by the wet and dry yardstick.”¹⁴⁰ Senator Harding admitted that he was not in favor of the prohibition amendment and felt the issue was better left to the states.¹⁴¹ But in the midst of the war and the extremely strong public sentiment on both sides, he simply wanted the decision over with, and he felt a deadline was an appropriate way to assure finality.¹⁴²

One can speculate about Senator Harding’s motives. Some of his fellow senators accused him of adding the deadline in order to guarantee the amendment’s ultimate failure as, even if it was ratified, many suspected the unconstitutional limitation would doom the entire amendment.¹⁴³ At the time, in early fall of 1917, only four proposed constitutional amendments were outstanding.¹⁴⁴ Three of them, including the unratified two from the original twelve and an 1810 proposal revoking citizenship of people who accept titles of nobility, were over a century old and there was unlikely any prospect that they would rise like a phoenix to muddy constitutional norms and procedures.¹⁴⁵ The fourth, the Corwin Amendment, was proposed in 1861 to prohibit constitutional amendments abolishing or interfering with slavery.¹⁴⁶ That amendment was

¹⁴⁰ *Id.* at 5648 (statement of Sen. Harding) (“I have watched the progress of this question from the conflict in the hamlet to the municipality, to the county, the State, and the Nation, and while I stand here and freely express my doubts about its practicability, at the same time I recognize that it is growing and insistent and persistent and it must be settled. Ever since I have been in public life in a small way I have seen men continually measured by the wet and dry yardstick, and the submission of this amendment is going to measure every candidate for public office by the wet and dry yardstick until the final settlement. When I say that, I have expressed my strongest reason for putting a limitation upon the pendency of the amendment. I want to see this question settled. I want to take it out of the Halls of Congress and refer it to the people who must make the ultimate decision. I want to meet the demand for submission, and witness a decision.”).

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *Id.* at 5650 (statement of Sen. Brandegee) (“[I]n my opinion the attachment of this time-limit amendment to the proposed prohibition constitutional amendment is extremely liable to result in the loss of the amendment, and if I wanted by more or less of a trick to secure the defeat of the amendment I would want no better opportunity to embarrass this proposed constitutional amendment than to vote for the amendment of the Senator from Ohio.”). This view was also expressed by Harding’s biographers. FRANCIS RUSSELL, THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING IN HIS TIMES 299 (1968) (“Privately he hoped, with the wets, that after half-a-dozen years a third of the states would still be holding out.”); *see also* ANDREW SINCLAIR, THE AVAILABLE MAN: THE LIFE BEHIND THE MASKS OF WARREN GAMALIEL HARDING 63–65 (1969).

¹⁴⁴ *See infra* notes 145–46 and accompanying text.

¹⁴⁵ *See* Jol A. Silversmith, *The “Missing Thirteenth Amendment”: Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDIS. L.J. 577, 582–83, 588 (1999).

¹⁴⁶ 12 Stat. 251.

ratified by only two states, and was effectively superseded by the adoption of the Thirteenth Amendment.¹⁴⁷ So, it is unlikely that Harding was particularly concerned about stale proposals rearing their heads, nor was it likely that he was concerned that states would take too long to ratify the proposed Eighteenth Amendment.¹⁴⁸ No amendment to that date had taken longer than three-and-a-half years, and many had passed in far less time.¹⁴⁹

More likely, Harding was hedging his bets, playing both sides, and doing what he did very well which was trying not to antagonize important political figures. As a journalist with no legal training, Harding does not seem to have worried much about the constitutionality of his proposed amendment. As a procedural matter, it would seem unlikely that Harding was concerned about the amendment process generally or the prospect of stale amendments suddenly being revived.¹⁵⁰ More likely, this was about the unique controversies swirling around prohibition and, perhaps, was a subtle, or not-so-subtle, effort to torpedo the amendment.¹⁵¹ Ultimately, Harding voted for the amendment, which suggests that he was probably most concerned with finality.¹⁵² However, the uncertainty kept the amendment unstable and worked against his purported aim of settling the matter once and for all.¹⁵³ Ultimately, Senator Harding's amendment passed by a vote of 56–23, with 17 abstentions, hardly a two-thirds majority.¹⁵⁴ After similar debates in the House, and after lengthening the time from six to seven years, the amendment proposal passed with the deadline in the text of the proposal itself with the appropriate supermajority votes.¹⁵⁵ The prohibition amendment was ratified in slightly over a year (394 days) so the deadline played no operative role.¹⁵⁶

¹⁴⁷ See A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 HARV. J.L. & PUB. POL’Y 501, 512–13, 515 (2003).

¹⁴⁸ See 55 CONG. REC. 5648 (1917).

¹⁴⁹ See Gregory A. Caldeira, *Constitutional Change in America: Dynamics of Ratification Under Article V*, 15 PUBLIUS: J. FEDERALISM 29, 35 (1985).

¹⁵⁰ See 55 CONG. REC. 5648 (1917).

¹⁵¹ See *id.* at 5648, 5650.

¹⁵² See *id.* at 5666.

¹⁵³ See *id.* at 5661.

¹⁵⁴ See *id.*

¹⁵⁵ It passed the Senate on a vote of 65–20, and the House on a vote of 282–128. Scott Schaeffer, *The Legislative Rise and Populist Fall of the Eighteenth Amendment: Chicago and the Failure of Prohibition*, 26 J.L. & POL. 385, 394, 396 (2001). Because the House changed the length of the deadline, the resolution had to go back to the Senate, which passed it on a vote of 47–8. *Id.* at 396.

¹⁵⁶ The thirty-sixth state, Nebraska, ratified it on January 16, 1919. Ten more states quickly followed suit, resulting in a total of forty-six states to ratify the amendment out of forty-eight. *Id.* at 397.

A year-and-a-half later, the Nineteenth Amendment on women's suffrage was proposed with no deadline and was ratified a year and a half later, after 441 days.¹⁵⁷ There was no congressional debate on whether the amendment should be time limited although an amendment to limit the time for ratification was proposed.¹⁵⁸ Representative Clark of Florida proposed a seven-year deadline, but it was voted down with no debate.¹⁵⁹ Representative Saunders of Virginia then proposed an amendment requiring a popular vote in three-fourths of the states.¹⁶⁰ It too was voted down with no discussion.¹⁶¹ Notably both Clark and Saunders voted against the Nineteenth Amendment, suggesting that they added their amendments with the intent of defeating the substantive proposal by interposing unconstitutional limitations on the states' ratification powers.¹⁶² Clearly Congressman Saunders's amendment raised constitutional questions, as Article V requires legislative approval, not popular approval.¹⁶³ And Congressman Clark's deadline amendment tracks closely with the anti-amendment tactics of Senator Harding regarding the Eighteenth Amendment.¹⁶⁴ These initial efforts involving the deadline suggest that a time limit was imposed with an understanding that it was an unconstitutional limitation and could result in either voiding the amendment altogether if it did receive the requisite ratifications, or causing it to be timed out if it failed within the requisite time.¹⁶⁵ Either way it was a win-win for the amendment opponents.

In 1921, however, the Supreme Court upheld the Eighteenth Amendment as valid in *Dillon v. Gloss*, despite the existence of the ultimately inoperative deadline.¹⁶⁶ As I discuss below, the case was unusual and does not provide particularly helpful precedent as the petitioners sought to have the entire amendment voided as a result of the purportedly unconstitutional deadline.¹⁶⁷ When the Court upheld the amendment despite the deadline, the stakes ultimately

¹⁵⁷ Lynda G. Dodd, *Parades, Pickets, and Prison: Alice Paul and the Virtues of Unruly Constitutional Citizenship*, 24 J.L. & POL. 339, 424 (2008).

¹⁵⁸ Although a proposed amendment was offered to add a deadline, the amendment to the proposal was voted down with no discussion. See 58 CONG. REC. 93 (1919).

¹⁵⁹ Only 37 Congressmen voted to add the deadline, and 259 opposed it, while 52 voted to add the public vote requirement and 244 opposed it. See *id.* at 81, 93.

¹⁶⁰ *Id.* at 87.

¹⁶¹ See *id.* at 93.

¹⁶² See *id.* at 93–94.

¹⁶³ *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that states could not require popular approval in addition to legislative approval under Article V).

¹⁶⁴ See *supra* note 139 and accompanying text. It would be two years before the Supreme Court would clarify, in *Dillon v. Gloss*, that the textual deadline does not render the amendment unconstitutional. See 256 U.S. 368, 374 (1921).

¹⁶⁵ See *supra* note 151 and accompanying text.

¹⁶⁶ 256 U.S. 368, 374 (1921).

¹⁶⁷ See *id.* at 370–71.

shifted as amendment opponents could not use the mere presence of a deadline to torpedo proposals.¹⁶⁸ After 1921, therefore, discussion over the deadline shifted to proponents of the amendment adding it purportedly to achieve finality and closure as legislators were concerned that proposals, once unleashed, could not be reclaimed.¹⁶⁹

A few years later, in 1924, a child labor amendment was proposed, again with no deadline, although the proposal ultimately was not ratified.¹⁷⁰ The need for the amendment became moot, however, with the Supreme Court's decision in *United States v. Darby* in 1941, affirming the child labor prohibitions of the Fair Labor Standards Act of 1938.¹⁷¹

A decade later, the Twentieth Amendment, changing the commencement of terms for Congress and the President, was ratified in under a year (327 days) with a deadline in the text of the amendment proposal itself.¹⁷² The Twentieth Amendment proposal was the first successful amendment in which Congress had the benefit of the Supreme Court's decision in *Dillon v. Gloss*.¹⁷³ Discussion on the deadline in the Twentieth Amendment noted the precedent of *Dillon*, and also claimed the need for finality.¹⁷⁴ Senators and Representatives were concerned that proposals might hang out for decades or even centuries, only to be ratified on the sly by states at their convenience.¹⁷⁵ Since the Twentieth Amendment, the deadline has essentially become pro forma with no further judicial pronouncements on the matter.¹⁷⁶

¹⁶⁸ See *id.* at 375–76.

¹⁶⁹ See *id.*

¹⁷⁰ Thirty-six states needed to ratify the Child Labor Amendment, but only twenty-eight states did. Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 91 (2010). Ironically, this unratified amendment may be the impetus for the imposition of future deadlines, as only five states had ratified within three years of its being proposed. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking The Amendment Process*, 97 HARV. L. REV. 386, 426 (1983). The majority of states (fourteen) ratified in 1933, nine years after it was proposed, and another eight states ratified in 1935 or 1937, the latest being thirteen years after it was proposed by Congress. See *id.* It is not coincidental that ratifications ceased in 1937 when the Supreme Court began its retreat from the strong economic substantive due process jurisprudence that had characterized the *Lochner* era. See Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENVER U.L. REV. 453, 457 (1998).

¹⁷¹ 312 U.S. 100, 100–01 (1941).

¹⁷² The Twentieth Amendment was ratified by the thirty-sixth state, Missouri, on January 23, 1933. John Copeland Nagle, *Lame Duck Logic*, 45 U.C. DAVIS L. REV. 1177, 181 & n.12 (2012).

¹⁷³ 256 U.S. 368 (1921).

¹⁷⁴ 75 CONG. REC. 3822 (1932).

¹⁷⁵ See, e.g., *id.*

¹⁷⁶ NEALE, *supra* note 3, at 22.

The Twenty-First and Twenty-Second Amendments were subsequently ratified in 1933 and 1951 respectively, both containing deadlines in the text of the proposals themselves.¹⁷⁷ The Twenty-Second Amendment, limiting presidential terms to two, took three weeks shy of four years for ratification (1,439 days) and was the longest of any twentieth century amendment to be ratified.¹⁷⁸

The Twenty-Third Amendment marked another change, however, when Congress began to include the deadline in the resolving clause rather than in the text of the amendment itself.¹⁷⁹ The practice had actually begun five years earlier when Professor Noel Dowling of Columbia Law School testified to the Senate Subcommittee on Constitutional Rights that Congress should not clutter up amendments by including the deadline in the text.¹⁸⁰ Instead, they should move it to the resolving clause.¹⁸¹ The subcommittee was considering an amendment on the procedure for governors to fill vacancies in the Congress caused by disasters.¹⁸² The subcommittee changed the location of the deadline and explained its reasons during the Senate debate.¹⁸³ And although that proposal never received the requisite votes to be sent to the states,¹⁸⁴ the shift from the text to the resolving clause became standard after that.¹⁸⁵ The Twenty-Third, Twenty-fourth, Twenty-Fifth, and Twenty-Sixth Amendments all included deadlines in the resolving clause, though none took more than two years for ratification.¹⁸⁶ All

¹⁷⁷ The Twenty-First Amendment repealed the Eighteenth Amendment and was ratified by the thirty-sixth state, Utah, on December 5, 1933. Jonathan M. Rotter & Joshua S. Stambugh, *What's Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 601, 624 (2008). The Twenty-Second Amendment limited the president to two terms and was ratified by the thirty-sixth state, Minnesota, on February 27, 1951. Julia C. Wommack, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 ST. MARY'S L.J. 1361, 1379–80 (1993).

¹⁷⁸ Excepting, of course, the Twenty-Seventh Amendment, that was ratified in 1992 after 203 years. See Paulsen, *supra* note 36, at 679.

¹⁷⁹ See Witter, *supra* note 34, at 211.

¹⁸⁰ See *id.* at 214.

¹⁸¹ See *id.*

¹⁸² *Appointment of Representatives: Hearing on S.J. Res. 8 Before the Subcomm. of the Comm. on the Judiciary*, 84th Cong. 1, 34 (1955).

¹⁸³ See 101 CONG. REC. 6628 (1955).

¹⁸⁴ 84 S.J. Res. 8 (1955–1956), PROQUEST CONG., https://congressional-proquest.com.proxy.wm.edu/Congressional/docview/+03.204.84_sjres_8?accountid=15053 [https://perma.cc/K3VL-K8P9] (last visited Sept. 8, 2019).

¹⁸⁵ See *supra* note 137 and accompanying text.

¹⁸⁶ The Twenty-Third Amendment, granting the District of Columbia the right to vote for president, was ratified by the thirty-eighth state, Ohio, on March 29, 1961. Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & POL. 665, 681 (1996). The Twenty-Fourth Amendment, abolishing poll taxes, was ratified by the thirty-eighth state, South Dakota, on January 23, 1964. Jason P.W. Halperin, Note, *A Winner at the*

four were proposed prior to the ERA (in 1960, 1962, 1965, and 1971, respectively) with no discussion of the deadline.¹⁸⁷ The ERA, following the relatively recent fifteen-year trend, included the deadline in the resolving clause and was ultimately the first proposal to be timed out as a result of the deadline.¹⁸⁸ As discussed below, however, the addition of the deadline was not without controversy.¹⁸⁹

Six years later, however, the proposal for D.C. representation included a deadline in both the text of the amendment and the resolving clause and it too has timed out if either type of deadline is deemed constitutional.¹⁹⁰ Debate around the D.C. Representation Amendment suggests that there was concern about the effectiveness of the deadline in the resolving clause.¹⁹¹ The proposal originally included the deadline in the resolving clause, as the prior five proposals had done.¹⁹² In committee, however, an amendment was offered to include a deadline in the text of the amendment proposal itself on the grounds that the textual deadline would not be subject to revision, waiver, or extension by a subsequent Congress.¹⁹³ This concern arose because of the debate swirling around the ERA, as it was getting close to ratification but running short of time and there was talk of an extension.¹⁹⁴ Members of the Judiciary Committee of the House apparently believed that a deadline in the resolving clause was malleable, where a deadline in the text itself was not.¹⁹⁵

As things currently stand, six proposals for constitutional amendments have failed of ratification.¹⁹⁶ The apportionment and titles of nobility proposals of 1789 and 1810 contain no deadlines but have lost their salience for all practical

Polls: *A Proposal for Mandatory Voter Registration*, 3 N.Y.U.J. LEGIS. & PUB. POL'Y 69, 87 n.121 (1999). The Twenty-Fifth Amendment, dealing with the presidential succession, was ratified by the thirty-eighth state, Nevada, on February 10, 1967. John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 481 (1995). The Twenty-Sixth Amendment, granting eighteen-year-olds the right to vote, was ratified by the thirty-eighth state, North Carolina, on July 1, 1971. Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 672 (2017).

¹⁸⁷ Witter, *supra* note 34, at 214.

¹⁸⁸ See *id.* at 210.

¹⁸⁹ See discussion *infra* Part II.

¹⁹⁰ See H.R.J. Res. 554, 95th Cong. (1978).

¹⁹¹ See 124 CONG. REC. 5263–65 (1978).

¹⁹² See *id.* at 5263–64.

¹⁹³ *Id.* at 5269.

¹⁹⁴ See *id.* at 5268.

¹⁹⁵ See *id.* at 5264.

¹⁹⁶ Jonathan L. Marshfield, *Decentralizing the Amendment Power*, 19 LEWIS & CLARK L. REV. 963, 1008 (2015).

purposes.¹⁹⁷ The Corwin Amendment of 1861, prohibiting amendments to outlaw slavery, has been essentially foreclosed by the Thirteenth Amendment.¹⁹⁸ And the Child Labor Amendment of 1924 has been mooted.¹⁹⁹ Although it is certainly possible that any of these four amendments could be revived, just as the Congressional Pay Amendment was,²⁰⁰ and any of them could be passed decades or even centuries later.²⁰¹ The ERA and the D.C. Representation Amendments have both timed out and are therefore susceptible to being revived if the deadlines are deemed to be ineffective.²⁰² The fact that the D.C. Representation Amendment includes a deadline in the text while the ERA includes it only in the resolving clause may be relevant in a constitutional challenge.²⁰³ If deadlines generally are unconstitutional, it would not matter. If, however, deadlines in the text are deemed constitutional and unalterable, the D.C. Representation proposal may be dead,²⁰⁴ but not the ERA as its deadline in the resolving clause could be subject to extension or waiver by a subsequent Congress.²⁰⁵

Prior practice tells us very little, except that Congress has not been consistent in the practice of adding deadlines, and that there has been substantial debate over the constitutionality of any deadline.²⁰⁶ There is also uncertainty as to the constitutionality of the deadline in the amendment itself as opposed to in the resolving clause, an issue on which the Supreme Court has made its one and only contribution to settling the question.²⁰⁷

C. Judicial Precedent

As predicted by Senators Borah and Cummins in 1917, the Eighteenth Amendment was challenged on the basis of the deadline inserted in the amendment itself.²⁰⁸ *Dillon v. Gloss* challenged the National Prohibition Act

¹⁹⁷ See *supra* note 146 and accompanying text.

¹⁹⁸ See *supra* note 147 and accompanying text.

¹⁹⁹ See *supra* note 171 and accompanying text.

²⁰⁰ See *supra* note 125 and accompanying text.

²⁰¹ See *supra* note 127 and accompanying text.

²⁰² See *supra* notes 188, 190 and accompanying text.

²⁰³ See *supra* note 190 and accompanying text.

²⁰⁴ See *supra* note 193 and accompanying text.

²⁰⁵ See *supra* note 188 and accompanying text.

²⁰⁶ See discussion *supra* Section I.B.

²⁰⁷ See discussion *infra* Part II.

²⁰⁸ 55 CONG. REC. 5652 (1917) (statement of Sen. Cummins) (“I have no doubt whatever that if ratifications were to occur after the period of six years named in the amendment of the Senator from Ohio the courts would either recognize those ratifications or set aside the entire amendment, and the possible outcome of adopting the amendment of the Senator from Ohio will be to plunge the whole subject into litigation that may continue for years to come.”).

promulgated under authority of the Eighteenth Amendment on ground that it was invalid simply because it contained the seven-year deadline, even though it was fully ratified within the requisite seven years.²⁰⁹ In upholding Congress's power to impose the deadline in the text of the amendment, Justice VanDevanter noted that:

[t]he plain meaning of . . . [Article V] is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.²¹⁰

The Eighteenth Amendment was properly ratified by the states, so seeking voidance of the amendment on the technicality that a deadline was included that never became operative was an audacious argument.²¹¹

Because the argument was that the amendment was void simply because of the existence of a deadline, the justices had to address the deadline issue itself even though the deadline had not played any operative role.²¹² Noting that the finely wrought procedure had been successfully completed, Justice VanDevanter explained that Congressional proposal and state ratification are succeeding steps in a single process in which, he asserted, “the natural inference being that they are not to be widely separated in time.”²¹³ Finding the deadline to be a “subsidiary matter[] of detail” that “Congress may determine as an incident of its power to designate the mode of ratification,” the Court upheld the irrelevant seven-year deadline as reasonable.²¹⁴ The Court did not expressly acknowledge the inconsistency inherent in its decision.²¹⁵ Justice VanDevanter opined that the deadline was a matter of detail that was within Congress’s mode of ratification power, yet the deadline at issue was located within the proposal itself and not in the resolving clause that actually stated the mode of ratification.²¹⁶

The arguments in the *Dillon* briefs underscore the ambiguity of the complex issues: that the deadline was imposed to torpedo the amendment, that it is likely unconstitutional, and also that it was irrelevant. The appellant argued primarily

²⁰⁹ 256 U.S. 368, 370–71 (1921).

²¹⁰ *Id.* at 374.

²¹¹ *Id.* at 376–77.

²¹² *Id.* at 373.

²¹³ *Id.* at 375.

²¹⁴ *Id.* at 376.

²¹⁵ *Id.* at 375–76.

²¹⁶ *Id.* at 371–74.

that the entire Eighteenth Amendment should be tossed out because there was sufficient legislative history to suggest that the requisite two-third vote by both houses was acquired only because of the presence of the deadline.²¹⁷ That was the main argument of appellant and immediately exposes the weakness of the case. Although numerous senators and representatives may have indicated that they were voting in favor of the amendment solely because of the deadline, there was no way to know that the proposal would have failed had the deadline not been included. The appellant argued that the deadline was a condition of approval and that without the deadline the two-thirds majority would not have been reached.²¹⁸ And even if it might have been reached, the existence of the unconstitutional limitation rendered the vote suspect. Both of these were easy targets for the respondent, who simply answered that it was unimportant whether the deadline was constitutional or not since the amendment passed and, if it wasn't constitutional, it could be excised without destroying sections one and two of the amendment.²¹⁹

Arguably asking the Court to void the entire Eighteenth Amendment because of the unconstitutional deadline was a long shot but the appellant had no lesser argument to fall back on and would only prevail if the entire amendment were thrown out. Voiding only section three would leave intact the substance of the amendment under which he was convicted. This meant the appellant had to argue the entire amendment was infected, which was difficult to do given that it received its requisite two-thirds votes in both houses and was ratified by the states within thirteen months. The appellant did make the somewhat persuasive argument that the speed of ratification is evidence that the states felt under the gun and that they were unable to engage in proper deliberation.²²⁰ The fact that they could have taken another nearly six years to deliberate undermined the strength of that argument.

Dillon, however, essentially answered only one of a multitude of questions posed by the deadline issue.²²¹ In the congressional debates on the Eighteenth Amendment, there were three possible scenarios raised.²²² First, the deadline might be deemed an unconstitutional limitation on the states and thus the entire amendment would be held void because it contained this unconstitutional condition, even if it otherwise was ratified successfully within the time allotted.²²³ Second, the deadline could be deemed unconstitutional or ineffective,

²¹⁷ Brief for Appellant at 5–8, *Dillon v. Gloss* 256 U.S. 368 (1921) (No. 251).

²¹⁸ *Id.* at 9–10.

²¹⁹ Brief for Appellee at 6–7, *Dillon v. Gloss* 256 U.S. 368 (1921) (No. 251).

²²⁰ Brief for Appellant, *supra* note 217, at 11.

²²¹ *Id.* at 371.

²²² 55 CONG. REC. 5648–53 (1917).

²²³ *Id.* at 5649.

but the substance of the properly ratified amendment could continue to stand as the section containing the deadline would be severed.²²⁴ That was the appellant's position.²²⁵ Third, the deadline could be affirmed as a permissible exercise of Congress's power.²²⁶ If deemed permissible, however, there are at least two different theories of its legality.²²⁷ A narrow reading of Congress's actions would allow the deadline to stand in this particular amendment because it was irrelevant—the proposal was ratified within the time limit.²²⁸ A broader reading of Congress's actions would hold that Congress may impose any deadline that could be effective to time out a proposal because imposing a deadline is fully within Congress's proposal power or mode of ratification power.²²⁹

Dillon ultimately only involved the first scenario by holding that the deadline within the text did not, *ab initio*, void the proposed amendment altogether, especially in light of ratification within the given time period.²³⁰ What *Dillon* did not answer is whether the deadline is actually legally permissible to disqualify an amendment that was ratified after the deadline had expired.²³¹ Because the Eighteenth Amendment was fully ratified by the requisite number of states within a very short time, the only question for the Court in *Dillon* was whether the presence of the deadline in what was otherwise a fully compliant amendment process was sufficient to void the amendment altogether.²³²

The Court's decision in *Dillon* effectively stifled the complaints of senators like Borah and Cummins,²³³ who had argued against the addition of the deadline on the grounds that it would render the entire amendment unconstitutional.²³⁴ Because the deadline was not violated, there was no real issue raised about the power of Congress to limit the states' period of ratification.²³⁵ The *Dillon* Court expressed in dictum that Congress could impose reasonable time limits, but that dictum is premised on the theory that proposal and ratification are succeeding steps in a single endeavor.²³⁶ The bogeyman of a proposal hanging out for all time, or that ratification in some states may be separated from that in others by

²²⁴ *Id.* at 5652–53.

²²⁵ *Id.*

²²⁶ *Id.* at 5651.

²²⁷ *Id.* at 5650–51.

²²⁸ *Id.* at 5650.

²²⁹ *Id.* at 5651.

²³⁰ *Dillon v. Gloss*, 256 U.S. 368, 376–77 (1921).

²³¹ See *id.* at 371 (noting that Article V is silent as to how long proposed amendments remain valid).

²³² *Id.* at 370–71.

²³³ *Id.* at 375–76.

²³⁴ 55 CONG. REC. 5649–53 (1917).

²³⁵ *Dillon*, 256 U.S. at 376–77.

²³⁶ *Id.* at 373, 376.

many years, has in fact now occurred and has not proven to be so problematic.²³⁷ *Dillon* was decided seventy years before the passage of the Twenty-Seventh Amendment, and that recent development calls into question the *Dillon* Court's reasoning that a *reasonable* time limit is implicit in all proposed amendments.²³⁸

The most one can say of *Dillon* is that the Court refused to void a legally ratified amendment simply because a condition was imposed that never became operative.²³⁹ The ERA poses a completely different question because the deadline could be deemed operative to thwart the wishes of three-fourths of the states that ultimately vote to ratify the proposal.²⁴⁰ Now that the deadline could be a matter of legal relevance, Justice VanDevanter's acknowledgment that amendments must have the sanction of the people, and that legislative ratification is a decisive expression of the people's will, makes problematic Congress's imposition of an artificial roadblock to the expression of that will.²⁴¹ The second difference is that the deadline in the ERA is in the resolving clause and not in the amendment itself.²⁴² To that end, *Dillon* could be seen as completely irrelevant because it affirmed the power of Congress to include the condition within the proposal but says nothing about the power of Congress to include the limitation in the resolving clause, including whether a subsequent Congress may modify the deadline.²⁴³ Moreover, most congressional scholars view *Dillon* as a relatively weak and poorly reasoned precedent.²⁴⁴

Because the Court did not need to address the question of whether a deadline, in either the resolving clause or the text, could operate to void an otherwise properly ratified amendment, the dictum in *Dillon* is not very persuasive.²⁴⁵ It is one thing to hold that an ineffective technicality will not void an otherwise proper law; it is another to hold that technicality to be effective to thwart the will of a supermajority of the people.²⁴⁶

²³⁷ *Id.* at 371, 73 (referencing the debates of the Eighteenth Amendment and noting that Article V does not establish a time limit for proposed amendments).

²³⁸ *Id.* at 375.

²³⁹ See generally *id.*

²⁴⁰ See *supra* note 188 and accompanying text.

²⁴¹ *Dillon*, 256 U.S. at 374.

²⁴² See *supra* note 3 and accompanying text.

²⁴³ See *Dillon*, 256 U.S. at 370–71, 375–77.

²⁴⁴ Memorandum Opinion to C. Boyden Gray, Couns. to the President, 16 Op. O.L.C. 85, 97 (1992) [hereinafter O.L.C. Memorandum] (“In sum, the dictum of *Dillon* and the view of Chief Justice Hughes’s plurality in *Coleman* are not authoritative nor are they persuasive.”); Hanlon, *supra* note 61, at 671–76; Paulsen, *supra* note 36, at 689–96; see also Kalfus, *supra* note 36, at 451–53.

²⁴⁵ See *Dillon*, 256 U.S. at 370–71 (noting that the issue before the Court was whether the time limit, on its own, invalidated the amendment).

²⁴⁶ See *id.* at 370–71, 374 (noting that amendments’ primary purpose are to serve the will of the people).

The Court has never again weighed in on the constitutionality of a Congressional deadline on an amendment proposal. And, if the ERA gets the thirty-eighth state's ratification, the deadline will become an obstacle to the expression of the people's will.²⁴⁷ That means there are four possible outcomes: (1) the Court could hold the deadline to be valid and unwaivable, thus requiring proponents of the ERA to start all over again; (2) the Court could hold the deadline to be valid but waivable by Congress, which could arguably be amended through a simple majoritarian joint resolution to amend the resolving clause;²⁴⁸ (3) the Court could hold that deadlines in the resolving clause are ineffective because they are in the preamble and are not part of the operative language; and (4) the Court could hold that all deadlines, whether in the resolving clause or the amendment itself, are unconstitutional restrictions on the power of the states to ratify amendments when the political, social, and economic conditions so dictate, effectively distinguishing *Dillon* in light of the precedent of the Twenty-Seventh Amendment. Under either the third or fourth outcome, a finding that the deadline is ineffective would presumably have no effect on the substance of the proposed amendment, as the deadline would be merely severed and held to be of no effect.²⁴⁹ And under both there would be no scope for further Congressional action.

In 1939, the Court addressed the issue of whether a state could ratify a proposal after rejecting it in *Coleman v. Miller*.²⁵⁰ In that case, Kansas had initially rejected the proposed Child Labor Amendment, and then later ratified it through a tied legislative vote, broken by the Lieutenant Governor thirteen years after it was initially proposed.²⁵¹ Opponents of the amendment brought suit, claiming that the proposal had lost its vitality because of the passage of so much time, that a state could not ratify after it had rejected a proposal, and that the Court had jurisdiction to hear the case and order mandamus to prevent the transmission of the notice of ratification to the Secretary of State.²⁵² Because there were so many convoluted issues, the justices split along a variety of axes and it issued four different opinions.²⁵³ For our purposes, however, the important

²⁴⁷ See *supra* note 242 and accompanying text.

²⁴⁸ This was the argument of many in 1979 when the original seven-year deadline was reaching an end with only thirty-five states having ratified. The extension of thirty-nine months was deemed by many to be a legitimate act of Congress in modifying the deadline since it was in the resolving clause. Others, however, felt that it was unconstitutional. See Witter, *supra* note 34, at 219–23.

²⁴⁹ This is what happens when a portion of a statute is rendered unconstitutional; the rest remains valid. Such an effect would comply with *Dillon*.

²⁵⁰ 307 U.S. 433, 435–36 (1939).

²⁵¹ *Id.* at 435–37.

²⁵² *Id.* at 436.

²⁵³ *Id.* at 436–56; *id.* at 456–60 (Black, J., concurring); *id.* at 460–70 (opinion of

holding is that constitutional amendments do not contain implicit time limits.²⁵⁴ The Child Labor Amendment did not contain any deadline and the Court refused to impose one, stating that it was up to Congress to determine whether the political, social, or economic conditions of the time had so changed as to render the proposal stale.²⁵⁵

The holding in *Coleman* could be read to grant Congress unfettered discretion to determine a time limit for a proposed amendment, as the determination of whether it is stale or not was held to be a political question.²⁵⁶ It could also be read, in light of precedents around rescissions and post-rejection ratifications of the Fourteenth Amendment, as granting Congress the sole power to determine whether a state has ratified or not.²⁵⁷ The latter interpretation focuses solely on the question of whether states can take a second bite at the apple, so to speak, before an amendment has been fully ratified by the requisite number of states.²⁵⁸ The first suggests that the courts will take a broad, hands-off approach to details around ratification under the Political Question Doctrine.²⁵⁹ But because no opinion in *Coleman* received a majority, to a large extent they are all dicta.²⁶⁰

Frankfurter, J.); *id.* at 470–74 (Butler, J., dissenting).

²⁵⁴ *Id.* at 456 (Black, J., concurring).

²⁵⁵ The Supreme Court states:

When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country, whether these had so far changed since the submission as to make the proposal no longer responsive to the conception which inspired it or whether conditions were such as to intensify the feeling of need and the appropriateness of the proposed remedial action. In short, the 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. . . .

Id. at 453 (majority opinion).

²⁵⁶ See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 548 (1992).

²⁵⁷ This was a controversial issue during ratification of the Fourteenth Amendment. See *id.* at 547–48; Douglas H. Bryant, Commentary, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 575–76 (2002); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1628–31 (2013).

²⁵⁸ See Bernstein, *supra* note 256, at 547–48.

²⁵⁹ *Id.* at 548.

²⁶⁰ *Coleman v. Miller*, 307 U.S. 433 (1939).

Numerous scholars have argued that judicial review of the deadline issue should not be deemed a political question under *Coleman*, and their arguments are persuasive.²⁶¹ The political question in *Coleman* was Congress's power to accept a state's notice of ratification, not whether Congress is exempt from judicial oversight in all matters regarding Article V amendments.²⁶² Because the deadline is a straightforward question of interpretation of powers granted to Congress by Article V, judicial resolution does not raise any of the concerns articulated in *Baker v. Carr*, the Court's most extensive discussion of the Political Question Doctrine, in the way Congress's decision to accept or reject a state's purported ratification does.²⁶³

Moreover, the Political Question Doctrine is one of separation of powers (i.e., whether a judicial determination steps on the toes of either the legislative or executive branch).²⁶⁴ The issue of the constitutionality of a deadline on state ratification, however, is a federalism question (i.e., whether Congress can limit the states in the exercise of their constitutional right to ratify amendments).²⁶⁵ Although it is easy to confuse the two doctrines, the plurality in *Coleman* held that it was Congress's and not the courts' job to determine whether ratification had in fact occurred.²⁶⁶ Subsumed in that was a discussion of whether Congress could choose to reject a ratification if too long a time had elapsed.²⁶⁷ It would seem that the passage of the Twenty-Seventh Amendment puts that issue to rest, leaving us with very little guidance on how to view Congress's power to impose conditions on the states.²⁶⁸

There are a number of technical details left unstated by Article V. Whether states can ratify after rejection or rescind after ratification is one.²⁶⁹ Another is whether Congress may impose any deadlines or other conditions on ratification.²⁷⁰ A third is whether Congress, the President, the federal courts, or the states have the ultimate power to declare that an amendment has been properly ratified.²⁷¹ As it currently stands, *Coleman* suggests that Congress has the power to determine whether a ratification has in fact occurred,²⁷² but prior

²⁶¹ See, e.g., Paulsen, *supra* note 36, at 706–18.

²⁶² *Id.* at 707–12.

²⁶³ *Baker v. Carr*, 369 U.S. 186 (1962).

²⁶⁴ Paulsen, *supra* note 36, at 713.

²⁶⁵ See *id.* at 724–25.

²⁶⁶ See *id.* at 712, 714, 721.

²⁶⁷ *Coleman v. Miller*, 307 U.S. 433, 454 (1939).

²⁶⁸ See O.L.C. Memorandum, *supra* note 244, at 102–05; Paulsen, *supra* note 36, at 680.

²⁶⁹ Bernstein, *supra* note 256, at 542–43.

²⁷⁰ *Id.*

²⁷¹ See *id.* at 539–41.

²⁷² See *id.* at 544.

practice suggests there have been anomalies.²⁷³ The Fourteenth Amendment, for instance, was held to be valid despite two state rescissions, which has led most scholars to argue that ratification is a one-way street.²⁷⁴ And the Fourteenth and the Twenty-Seventh Amendments were both promulgated before any congressional statement of acceptance.²⁷⁵

A congressional deadline has been held not to void a properly ratified amendment, but the courts have not weighed in on the difference between deadlines in the resolving clause or in the text, or whether an effective deadline would be unconstitutional.²⁷⁶ There is a wide gap between the idea that there is an implicit statute of limitations to void stale amendments when none are stated, and whether Congress has the power to impose a statute of limitations on the states that have the exclusive power to ratify amendment proposals.

Although Congress did pass a resolution accepting the Twenty-Seventh Amendment, the general consensus is that acknowledging ratification is a ministerial act.²⁷⁷ And, if there is disagreement as to whether ratification has in fact occurred, the most logical body to determine if the constitutional requirements of Article V have been met would be the courts.²⁷⁸ There is some allure in the claim that Congress gets to determine if a state has ratified, and that the decision is a political question, unreviewable by a court.²⁷⁹ There is very little allure to the claim that the courts have no power to review any questions involving the procedural steps of Article V.²⁸⁰ All of this uncertainty leaves us, as noted above, in the unenviable position of trying to determine who should decide, and within what parameters, whether the ERA has been validly ratified after thirty-eight states submit their ratifications to the National Archivist.

Coleman and *Dillon* represent the Supreme Court's total consideration of time limits in amendment ratification, and neither is on point for the issues raised by the ERA because the time limit is in the resolving clause.²⁸¹ Moreover, the

²⁷³ See O.L.C. Memorandum, *supra* note 244, at 104–05; Paulsen, *supra* note 36, at 680.

²⁷⁴ This is supported by Congressional opinion as well. In discussing the D.C. Representation Amendment, Representative Volkmer opined that after research on the subject he felt that rescissions after ratification should not be allowed. 124 CONG. REC. 5270 (1978).

²⁷⁵ See O.L.C. Memorandum, *supra* note 244, at 104–05; Paulsen, *supra* note 36, at 680.

²⁷⁶ See *Dillon v. Gloss*, 256 U.S. 368, 376 (1921) (finding a Congressional deadline does not void a ratified amendment).

²⁷⁷ See *Bernstein*, *supra* note 256, at 540–41.

²⁷⁸ For a thorough discussion of these three “details,” see Brendon Troy Ishikawa, *Everything You Always Wanted to Know About How Amendments are Made, but Were Afraid to Ask*, 24 HASTINGS CONST. L.Q. 545, 546–49 (1997).

²⁷⁹ See *id.* at 548.

²⁸⁰ See *id.* at 591–95 (arguing that the courts are the best arbiter of Article V procedural questions).

²⁸¹ See *Bernstein*, *supra* note 256, at 543.

Eighteenth Amendment being considered in *Dillon* passed,²⁸² and the Child Labor Amendment considered in *Coleman* never received the requisite ratifications.²⁸³ This means that when the ERA reaches its thirty-eighth ratification, it will squarely pose, for the first time, whether Congress can impose a time limit that in fact might nullify a proposal fully ratified by the states pursuant to the technical requirements of Article V. In that vein, the deadline in the ERA will truly be a case of first impression.

II. ARGUMENTS FOR AND AGAINST CONSTITUTIONALITY OF THE DEADLINE

Because the constitutionality of the deadline will be a case of first impression, the Court may consider the issue anew, since *Dillon* involved a different type of deadline (in the text of the amendment itself and not the resolving clause) and the Eighteenth Amendment was actually ratified within the time period, not afterward.²⁸⁴ At the time the ERA's original seven-year deadline was reaching its end, Congress debated extending the deadline and numerous scholars weighed in on the subject.²⁸⁵ Most of that scholarship accepted the constitutionality of a Congressional deadline in light of *Dillon*,²⁸⁶ although it also noted the issue could be different if the deadline was in the resolving clause.²⁸⁷ As a result, most also accepted the power of Congress to extend the deadline in the resolving clause through a majority resolution.²⁸⁸ But with ratification of the Twenty-Seventh Amendment after 203 years,²⁸⁹ I think the issue is worth a second or even a third look. In particular, the recognition that the political, social, and economic conditions may persist, wane, or re-emerge at any time in the

²⁸² See *Dillon v. Gloss*, 256 U.S. 368, 376 (1921).

²⁸³ See *Witter, supra* note 34, at 210 n.13.

²⁸⁴ Compare H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972) (placing limitation in resolving clause), with U.S. CONST. amend. XVIII, § 3 (placing the limitation within the text of the amendment (repealed in 1933)).

²⁸⁵ Some said Congress had the authority and others have claimed it did not. See *Ginsburg, supra* note 19, at 926 n.40; *Held et al. supra* note 36, at 130–31; Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494, 517 (1978) [hereinafter *The Equal Rights Amendment and Article V*]; *Witter, supra* note 36, at 219–23. But see *Orrin Hatch, The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL'Y 19, 23–25 (1979); *Grover Rees III, Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875, 879 (1980); *Alexander White, Note, Keep 'em Separated: Article I, Article V, and Congress's Limited and Defined Role in the Process of Amending the Constitution*, 113 COLUM. L. REV. 1051, 1076–79 (2013).

²⁸⁶ See *Hatch, supra* note 285, at 22–23; *Witter, supra* note 34, at 212–13.

²⁸⁷ See *Hatch, supra* note 285, at 31; *Witter, supra* note 34, at 213.

²⁸⁸ See, e.g., *Ginsburg, supra* note 19, at 928–29; *NEALE, supra* note 3, at 15.

²⁸⁹ See *Bernstein, supra* note 256, at 498.

future supports the conclusion that Congress may not impose any time limit on an amendment proposal.²⁹⁰ This conclusion stems primarily from the fact that the legally necessary and sufficient element of state ratification by the people cannot be subjected to the whims or conditions of the national legislature. Before turning to the multitude of reasons supporting this conclusion, we must first turn our attention to the unprecedented passage of the Twenty-Seventh Amendment.

A. The Political, Social, and Economic Conditions Called for a Revival of the Congressional Pay Act Amendment

The Congressional Pay Act Amendment reads: “[N]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”²⁹¹

Proposed in 1789 as one of the original twelve amendments, the Pay Act Amendment was not ratified until 1992.²⁹² Its history is not without a colorful flair.²⁹³ In 1982, a University of Texas college student, Gregory Watson, wrote a term paper arguing that the amendment was still alive and should be ratified.²⁹⁴ He purportedly received a “C” on the paper, which allegedly motivated him to start a letter-writing campaign to state legislators to revive the amendment.²⁹⁵ Frustration with Congressional self-dealing in the form of “middle-of-the-night, rush-out-of-town pay raises spurred a wave of state ratifications” during the 1980s.²⁹⁶ Congress’s check-bouncing scandal and the Senate’s midnight pay raise of 1991 provided further impetus and the amendment received its final state ratification in May, 1992.²⁹⁷ Eventually, Watson’s grade was changed to an “A” after his efforts bore fruit.²⁹⁸

The last ratification caught nearly everyone off guard, as the Congressional Research Service, the Office of Legal Counsel, and scores of academics weighed in on the question of whether a proposal could linger for 203 years precisely the fears Justice VanDevanter expressed in *Dillon*.²⁹⁹ At the same time, however, the

²⁹⁰ See *The Equal Rights Amendment and Article V*, *supra* note 285, at 502–03.

²⁹¹ U.S. CONST. amend. XXVII.

²⁹² Bernstein, *supra* note 256, at 498.

²⁹³ See generally *id.* (discussing the ratification of the Twenty-Seventh Amendment over a 200 year period).

²⁹⁴ Paulsen, *supra* note 36, at 678.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Evan Andrews, *The Strange Saga of the 27th Amendment*, HIST. (Aug. 31, 2018), <https://www.history.com/news/the-strange-case-of-the-27th-amendment> [<https://perma.cc/5RW5-65AA>].

²⁹⁹ See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921); O.L.C. Memorandum, *supra* note 244, at 87; Bernstein, *supra* note 256; Dalzell & Beste, *supra* note 72, at 503; Paulsen, *supra* note

Congressional shenanigans with last-minute pay raises gave the amendment more salience and resonance as the states had become fed up with what had become the new normal in Washington.³⁰⁰ In that sense, the Twenty-Seventh Amendment posed precisely the situation presaged by Justice Story in 1833 and Justice Hughes in 1939 that the political, social, and economic conditions may persist or reappear to justify allowing a lengthy ratification period.³⁰¹ In the end, the consensus was that the amendment was legally ratified and it became the Twenty-Seventh Amendment.³⁰² Although the Courts have not weighed in on its validity, which would likely only occur if Congress were to pass a pay raise without an intervening election, it has stood unquestioned now for nearly three decades as a properly ratified amendment.³⁰³

The history of the Twenty-Seventh Amendment poses an interesting question for proponents of the ERA. Despite the deadline, can the states not take matters into their own hands and ratify an extant proposal when they feel the political, social, and economic conditions suggest that it is warranted? Is it Congress or the states that should decide whether the political, social, or economic conditions are ripe for change? The current situation of a misogynist president who has sexually assaulted women and bragged about it,³⁰⁴ the unprecedented power of the #MeToo movement in bringing down scores of powerful men accused of sexual assault,³⁰⁵ and the staggering report that women make only \$0.49 for every dollar made by men³⁰⁶ suggests that the political, social, and economic conditions continue to be ripe for passage of the ERA. And that fact seems precisely to be what has motivated Nevada and Illinois to ratify the ERA a mere thirty-five years after it was proposed.³⁰⁷ Thus, the legal question before the courts will be

³⁶, at 679.

³⁰⁰ Paulsen, *supra* note 36, at 678–79.

³⁰¹ See *id.*; see also *Coleman v. Miller*, 433 U.S. 452–54; STORY, *supra* note 64, § 1824.

³⁰² Paulsen, *supra* note 36, at 680.

³⁰³ See *id.*

³⁰⁴ See David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2015*, WASH. POST (updated Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html [<https://perma.cc/J935-2EZ7>].

³⁰⁵ See Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (May 2, 2019, 3:56 PM), <https://www.chicagotribune.com/lifestyle/ct-me-too-timeline-20171208-htmlstory.html> [<https://perma.cc/YK5R-6YCZ>].

³⁰⁶ Rose & Hartmann, *supra* note 16.

³⁰⁷ See S.J. Res. 2, 79th Sess., at 2–3 (Nev. 2017), <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/4912/Text> (“The Legislature of the State of Nevada finds that the proposed amendment is meaningful and needed as part of the Constitution of the United States and that the present political, social and economic conditions demonstrate that constitutional equality for women and men continues to be a timely issue in the United

whether Congress may impose, in the resolving clause, a deadline that will nullify a constitutional amendment that has received the requisite state ratifications and continues to have political, social, and economic vitality? And although the ERA does not raise the question of the constitutionality of a deadline in the text,³⁰⁸ I would argue that any deadline is an unconstitutional infringement of the states' rights to exercise their Article V power to ratify amendments without barriers being erected by the national legislature.

B. Reasoning by First Principles

There are a number of principles that support the conclusion that any Congressional deadline is unconstitutional. Perhaps the most important is that the Constitution was established by the people and the people, their wishes mediated through the state legislatures, have the necessary and sufficient power to amend the Constitution.³⁰⁹ Any default gleaned from the silence of Article V would tend toward a limitation on Congress's authority as the Founders clearly intended numerous explicit and implicit checks on the national legislature.³¹⁰ Because the legal significance of the amendment process is the state ratification, imposing limits on the states would seem to go counter to the clear philosophy of the Constitution.³¹¹ Further, traditional canons of construction suggest that the preamble, at the very least, is non-binding; only the operative words of the amendment matter because that is only what is ratified by the states.³¹² Even the omitted words canon suggests that the deadline is unconstitutional.³¹³ And certainly, the original intent was to protect the power of the states against a national government that would be jealous of its power and would logically strive for more, thwarting the states by throwing up roadblocks to change.³¹⁴

1. Original Intent

States") [<https://perma.cc/ELK9-88E7>] (last visited Sept. 8, 2019). Illinois State Senator Heather Steans stated that "[b]y ratifying the Equal Rights Amendment we can provide a strong legal protection for women's rights and prevent rollbacks from Congress or presidential administrations," and "[t]his amendment is still relevant and necessary." Brendan O'Brien, *Illinois Passes Equal Rights Amendment More Than Three Decades After Deadline*, REUTERS (May 31, 2018, 2:40 AM), <https://www.reuters.com/article/us-illinois-era/illinois-passes-equal-rights-amendment-more-than-three-decades-after-deadline-idUSKCN1IW0LB> [<https://perma.cc/G8R2-L95U>].

³⁰⁸ See H.R.J. Res. 208, 92d Cong. (1972).

³⁰⁹ See Paulsen, *supra* note 36, at 695–96.

³¹⁰ See *id.* at 38–39.

³¹¹ See *id.*

³¹² See Ginsburg, *supra* note 19, at 923–24.

³¹³ See Paulsen, *supra* note 36, at 694 n.54.

³¹⁴ See *The Equal Rights Amendment and Article V*, *supra* note 285, at 500–01.

As noted above, the two principal concerns of the Founders were to provide a process to amend the Constitution when new experience and new circumstances suggested change was required.³¹⁵ Certainly the ERA fits that bill, as the struggle for sex equality has taken centuries and will likely take many more years to achieve.³¹⁶ Even basic legal and civil rights for women, sexual minorities, and transgender persons have been elusive.³¹⁷ Another concern was to protect the power of the states to initiate amendments and to ensure state control of the ratification process.³¹⁸ The Virginia Plan proposed by Governor Edmund Randolph included a resolution “that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.”³¹⁹ Randolph echoed the fears of many at the convention that the national legislature will be loathe to amend the Constitution when doing so would limit federal power.³²⁰ The idea that the states were the key players in ratification, and could initiate amendments on their own, flowed directly from the convention itself as a meeting of the state representatives who represented the people directly.³²¹

David Watson, in his treatise on the history of the Constitution, explained that

the Constitution does not prescribe the time in which the States may ratify an amendment. Such a provision might have been regarded as an attempt to force the States into a ratification, whereas it was the desire of the Convention that the action of the States should be deliberate and free from influence.³²²

Further on this point, Watson showed his prescience:

³¹⁵ See *id.*

³¹⁶ Efforts to pass the ERA began in 1923. See SUSAN D. BECKER, THE ORIGINS OF THE EQUAL RIGHTS AMENDMENT: AMERICAN FEMINISM BETWEEN THE WARS 15, 19 (1981); DELSMAN, *supra* note 28, at 29–32; see also Witter, *supra* note 34, at 209.

³¹⁷ See generally *LGBT Rights Milestones Fast Facts*, CNN (Apr. 1, 2019, 9:18 AM), <https://www.cnn.com/2015/06/19/US/lgbt-rights-milestones-fast-facts/index.html> [<https://perma.cc/4C9V-RC8T>] (demonstrating the long history of the LGBT community’s fight for civil rights).

³¹⁸ See *The Equal Rights Amendment and Article V*, *supra* note 285, at 501–02.

³¹⁹ Henry, *supra* note 119, at 39.

³²⁰ See Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. R.L. & POL. 1, 8–9 (2016).

³²¹ See *id.* at 7.

³²² WATSON, *supra* note 87, at 1310–11.

[The Sixteenth] [A]mendment is now pending. Thirty-five States must ratify it before it can become a part of the Constitution. Suppose thirty-four States should ratify it within a reasonable time but the thirty-fifth should not do so until the expiration of ten or fifteen years? Would this be a ratification within the meaning of the Constitution? Can the doctrine of reasonable time be applied in such a case? Who but the State can judge of what would be a reasonable time? It is for the State to ratify and cannot the State take its own time to do it? What branch of the government can tell a State when it must ratify an amendment in the absence of any constitutional provision of the subject? The question may some day become of great importance.³²³

As Watson noted, the question of a time limit on ratification was not considered by the Constitutional Convention nor by any of the state conventions called to consider ratification of the Constitution.³²⁴ However, given the efficacious role of the states in ratifying amendments, and the Founders' clear and unwavering intent to limit Congress's ability to thwart amendments sought by the states, the logical interpretation is that Congress cannot put a time limit on the ratification process.³²⁵ If states choose to ratify ten, fifteen, thirty-five, or two hundred and two years later, that prerogative lies solely with the states.³²⁶

None other than the renowned Justice Story noted that constitutional amendments may take time to achieve consensus among the states and therefore should not be rushed.³²⁷ He noted that “[t]ime is thus allowed, and ample time, for deliberation, both in proposing and ratifying amendments. They cannot be carried by surprise, or intrigue, or artifice. Indeed, years may elapse before a deliberate judgment may be passed upon them, unless some pressing emergency calls for instant action.”³²⁸ He also noted that:

Whenever, then, a general power exists, or is granted to a government, which may in its actual exercise or abuse be dangerous to the people, there seems a peculiar propriety in restricting its operations, and in excepting from it some at

³²³ *Id.* at 1311–12.

³²⁴ *Id.* at 1310–11.

³²⁵ See Abbott, *supra* note 320, at 7.

³²⁶ See WATSON, *supra* note 87, at 1310–11.

³²⁷ See STORY, *supra* note 64, § 1824.

³²⁸ *Id.*

least of the most mischievous forms, in which it may be likely to be abused.³²⁹

Story, in explaining and justifying the constitution, recognized that amendments take time and should be thoughtfully proposed and carefully ratified.³³⁰ He also noted that powers in the government should be narrowly construed when implied powers tend to infringe individual rights.³³¹ In the case of the deadline, the Tenth Amendment's protections against federal usurpation of power speaks both to the states' rights to control the amendment process and the individual's rights to express their wishes through their states rather than through the indirect voice of their national legislature.³³²

Studies have also shown that it is Congress and not the states that put up the greatest barriers to the amendment process.³³³ In the 130 years between the founding and 1924, over 3,500 amendments have been proposed but only nineteen adopted.³³⁴ Most constitutional amendment proposals wither and die in Congressional committees year after year, and the ERA is no exception.³³⁵ Having first been proposed in 1923, it took fifty years for it to reach the floor of each house of Congress, and even then the proponents had to use a procedural rule to remove the resolution from committee and bring it to the floor of the House for a vote.³³⁶ And the success rate of most proposals once they reach the states supports the conclusion that it is Congress, and not the states, that imposes the roadblock.³³⁷ Consequently, working from a clean slate with little to guide us, the logical interpretation is that Congress should not throw up any additional roadblocks once the proposal passes the necessary two-thirds votes of both houses.³³⁸ That alone has proven to be a significant barrier.³³⁹

³²⁹ STORY, *supra* note 64, § 1858.

³³⁰ See *id.* § 1824.

³³¹ See *id.* § 1858.

³³² See U.S. CONST. amend. X.

³³³ See Herman V. Ames, *The Amending Provision of the Federal Constitution in Practice*, 63 PROC. AM. PHIL. SOC'Y. 62, 64 (1924).

³³⁴ *Id.* at 63

³³⁵ See *id.*

³³⁶ Proponents of the ERA used the procedure pursuant to Cl. 4 of Rule 27, House Rules, 91st Cong. that allows for the full body to vote a motion to discharge a House committee from further consideration of a bill. It had only been used two other times before its use to discharge the committee from further consideration of the ERA and to allow its passage to the floor. See Witter, *supra* note 34, at 215 & n.74.

³³⁷ Only six of thirty-three proposals have failed to receive the requisite number of state ratifications. With the ERA being ratified, that brings the success rate to 85% at the state level. See Trex, *supra* note 24.

³³⁸ Scholars tend to agree. See Hajdu & Rosenblum, *supra* note 63, at 128 ("From the perspective of the states, however, the unrestrained power of subsequent Congresses to

This interpretation is further supported by the clear textual command that the amendment becomes legally effective upon ratification.³⁴⁰ The Supreme Court has held that the president's signature is not required on the joint resolution,³⁴¹ that Congress does not need to affirm or legitimate an amendment once the requisite states have ratified,³⁴² that states may not impose additional barriers and requirements like public referenda or the interposition of an election,³⁴³ and the Tenth Amendment further supports the conclusion that the states have the ultimate legal power to bring an amendment to fruition.³⁴⁴ Although the Constitution contemplates a role for Congress in the proposal, that process was added only after the provisions allowing for state initiation of amendments, as Governor Morris and others felt the national government would likely be the first to recognize defects in its organic document.³⁴⁵ By providing a means for each to initiate the amendment process, the Founders provided a balance, but the requirement of state ratification means that amendments would be made only if a supermajority of the states, representing their people, willed the change.³⁴⁶ In essence, therefore, the states are both necessary and sufficient to the amendment process, and the possibility that Congress will use its mode-of-ratification power to thwart the wishes of the states seems counter to that most basic of premises.³⁴⁷

2. Changing Political, Social, and Economic Conditions

The idea that amendments become stale or that states should not be surprised by a sudden ratification years, decades, or even centuries later has an immediate appeal. But upon further consideration, the flaw in that position becomes clear. If the legally necessary act is state ratification, and barriers should not be thrown up

assess the reasonableness of time limits poses serious problems.”).

³³⁹ See *supra* notes 333–39 and accompanying text.

³⁴⁰ See U.S. CONST. art. V.

³⁴¹ See *Hollingsworth v. Virginia*, 3 U.S. 378, 381 (1798).

³⁴² According to the Department of Justice, there is no requirement of congressional approval. See O.L.C. Memorandum, *supra* note 244, at 99.

³⁴³ See *Leser v. Garnett*, 258 U.S. 130, 137 (1922) (invalidating a state law requiring interposition of an election for Congress between proposal and ratification); *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (invalidating a state law requiring a public referendum of a state legislature’s ratification of a proposed constitutional amendment).

³⁴⁴ See U.S. CONST. amend. X.

³⁴⁵ Amendment was a purely state function until August 30, 1787, when Governor Morris suggested that Congress should also be able to call a convention for amendments, and the strength of the states’ only position led to rejection of Morris’s suggestion the first time it was voted on. See *Abbott*, *supra* note 320, at 10–11. Hamilton ultimately suggested the process to allow Congress to make proposals. *Id.* at 11.

³⁴⁶ *Id.* at 10–11.

³⁴⁷ See *id.* at 12–13.

by the national legislature when the states determine changes are appropriate, should it not be on the states rather than Congress to determine whether the political, social, and economic conditions are ripe for an amendment? As David Watson queried, what government can tell the states when, how, or if they should ratify?³⁴⁸ The ratification of the Twenty-Seventh Amendment strongly supports the conclusion that determining when the political, social, and economic conditions call for an amendment is solely the province of the states, even if it takes over two centuries.³⁴⁹

This does not mean that Congress is powerless to act. In the case of the ERA, since Congress imposed the time limit in the resolving clause there is no reason why Congress would not be able to remove it or waive it if the states, through their recent ratifications, indicate a determination to effectuate the amendment.³⁵⁰ This is true only because the deadline in the ERA is in the resolving clause, which is a piece of ordinary legislation that can be amended by future Congresses.³⁵¹ The matter might be different if the deadline was in the text of the amendment itself. Based on my argument above, it would not matter where the deadline was located, one would always be unconstitutional. If, as with the Eighteenth Amendment, the deadline was in the text of the amendment,³⁵² it would simply be severed as void, leaving the substantive part of the amendment valid under ordinary severability rules.³⁵³ But even if a court were to adhere to the decision in *Dillon* that Congress may incorporate a time limit in the text of an amendment, presumably as part of its proposing power, there is no reason that a time limit in the resolving clause could not be waived or amended.³⁵⁴

But what if Congress refused to waive the deadline, and the states brought suit to validate their ratification, claiming the deadline was unconstitutional on its face? Such a showdown would likely require resolution by the courts, and the holding in *Coleman* suggests that state legislators would have standing to pursue

³⁴⁸ See WATSON, *supra* note 87, at 1311–12.

³⁴⁹ Held et al., *supra* note 36, at 121–22, 125.

³⁵⁰ Minnesota House Resolution 71 was proposed January 14, 2019, to call on the Congress of the United States to enact Senate Joint Resolution 15 or House Joint Resolution 113, proposed at the 113th Congress of the United States, or similar legislation, to remove the deadline for ratification of the Equal Rights Amendments by the states claiming that equality could not wait another 200 years. See H.R. 71, 91st Gen. Assemb., Reg. Sess. (Minn. 2019).

³⁵¹ Ruth Bader Ginsburg’s argument that the text of the resolving clause is simply ordinary legislation is compelling. See Ginsburg, *supra* note 19, at 928–30 (explaining that Congress could have used a two-step process to create the proposal, requiring a simple majority for the preamble, and a supermajority for the text of the proposal itself).

³⁵² U.S. CONST. amend. XVIII, § 3.

³⁵³ See 55 CONG. REC. 5652–53 (1917).

³⁵⁴ Dillon v. Gloss, 256 U.S. 368, 371, 374 (1921).

a judicial remedy.³⁵⁵ The determination whether a state had actually ratified after rejection, or presumably rescinded after ratification might be deemed a political question left to Congress.³⁵⁶ But the imposition of the deadline is clearly a different matter and would not, under normal political question jurisprudence, remove the case from the courts.³⁵⁷ It would seem that if the states brought suit to validate their ratification of the ERA, that would itself be proof that the issue was not stale and the amendment retained its vitality.³⁵⁸

3. Seven Years is Too Short

The Court in *Dillon* held that seven years was a reasonable time limit in light of the fact that no prior amendment had taken longer than four years for ratification,³⁵⁹ and most of those were in a time before the internet, telephones, and some even before the pony express. Again, there is an appeal to this idea, that amendments should be ratified within a timely manner, as the political and social conditions are ripe.³⁶⁰ On the other hand, considering the profound gerrymandering of states in the past thirty years, it is quite likely that it would take well over a decade for a heavily gerrymandered state to right itself and elect representatives who represent the will of the majority.³⁶¹ The repeal of Prohibition in 1933 revealed just how much state legislatures of the day did not reflect the general will of the people.³⁶²

Seven years seems like a long time, but when we consider election cycles, and the ability of legislators to use procedural mechanisms to block bills they do not favor for years at a time, seven years suddenly does not seem like such a long time.³⁶³ During a debate on the Twentieth Amendment, Representative Frear introduced a chart showing how often each state's legislature meets in an effort to defeat the seven-year deadline.³⁶⁴ He argued that in some states whose legislatures only meet every four years, a seven-year deadline would essentially

³⁵⁵ *Coleman v. Miller*, 307 U.S. 433, 438–46 (1939).

³⁵⁶ *Id.* at 450–54.

³⁵⁷ *Id.* at 438.

³⁵⁸ *Id.* at 451–54.

³⁵⁹ *Dillon*, 256 U.S. at 375–76.

³⁶⁰ *Id.* at 371, 374.

³⁶¹ See Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, A T L A N T I C (O c t . 2 8 , 2 0 1 7) , <https://www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/> [https://perma.cc/BKS2-AEC2].

³⁶² See Rotter & Stamburgh, *supra* note 177, at 624.

³⁶³ See 75 CONG. REC. 3835 (1932).

³⁶⁴ *Id.*

preclude consideration or ensure that consideration was likely to be hasty and ad hoc.³⁶⁵

The fact that all amendments so far have passed in fewer than five years, except for the Twenty-Seventh, is not an answer to those Congressmen who seek finality.³⁶⁶ The fact that James Madison rejected the idea of conditional ratifications supports the straightforward interpretation of Article V that Congress may not impose limits on the states, because they are the operative agents in constitutional change.³⁶⁷ Because their actions determine whether an amendment passes or not, states should be the entities to determine whether the appropriate political, social, or economic conditions militate in favor of a constitutional change and limits on their powers should be resisted.³⁶⁸

4. Limitations in a Preamble Are Generally Not Binding

The poster boy of originalism, Justice Antonin Scalia, in his opinion on the Second Amendment in *District of Columbia v. Heller*, stated that preambles are not binding.³⁶⁹ Only the operative part of the Second Amendment was given constitutional significance as Justice Scalia waived away the preamble as a limitation.³⁷⁰ The same can be said of the deadline in the resolving clause.³⁷¹ Preambles usually provide information about why a law is passed. They may provide for certain remedies, but, they usually do not articulate the limits of the law.³⁷² Courts often ignore preambles to legislation in interpreting the scope of

³⁶⁵ *Id.*; see also Kalfus, *supra* note 36, at 453–54 (admitting that time limits allow Congress to use short time limits to reap political gains but essentially kill a proposal by making the limit too short).

³⁶⁶ Ron Elving, *The Zombie Amendments to the Constitution You've Probably Never Heard Of*, NPR (Mar. 10, 2018), <https://www.npr.org/2018/03/10/591758259/the-zombie-amendments-to-the-constitution-youve-probably-never-heard-of> [https://perma.cc/53XA-3W3D].

³⁶⁷ See WATSON, *supra* note 87, at 1317.

³⁶⁸ *Id.*

³⁶⁹ 554 U.S. 570, 578 (2008).

³⁷⁰ Justice Scalia opined that “apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.” *Id.* at 578.

³⁷¹ H.R.J. Res. 208, 92d Cong. (1972).

³⁷² Justice Scalia cited for this purpose the following: FORTUNATS DWARRIS, A GENERAL TREATISE ON STATUTES 268–69 (Platt Potter ed., 1871); THEODORE SEDGWICK, THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 42–45 (2d ed. 1874). “It is nothing unusual . . . for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law.” JOEL PRENTISS BISHOP, COMMENTARIES ON WRITTEN LAWS AND THEIR INTERPRETATION § 51 (1882) (quoting *Rex v. Marks*, 3 East 157, 165 (1802)).

statutes.³⁷³ For that reason, many scholars and Congressmen believed that the deadline in the ERA could be extended back in 1979.³⁷⁴ It was seen to be fundamentally different from the proposal itself.³⁷⁵

Beyond that, however, we must consider the different functions of the proposal power and the mode of ratification power. The proposal power consists of the power to identify the need for constitutional change and articulate the text of the amendment.³⁷⁶ Imposing a deadline for ratification is fundamentally at odds with identifying the constitutional problem to be solved and the textual amendment designed to solve it.³⁷⁷ Proposing amendments logically means identifying the substance of the constitutional change and proposing that change to the states.³⁷⁸ Including a deadline within that proposal has no relation to the substance of the proposal itself.³⁷⁹ Certain amendments, like the ERA, have time limitations in the proposal but those are designed to identify when the amendment will become effective, in order to give states time to modify their laws in compliance.³⁸⁰ The Twentieth Amendment identifies when it will become operative, not whether it will become operative.³⁸¹ Section 3 of the ERA notes that it will become effective two years after ratification.³⁸² Both of these time constraints function to determine how the amendment will proceed once it is ratified.³⁸³ They are fundamentally different from a time limit on ratification, which highlights the differences between the proposal power and the mode of ratification power.

The deadline for ratification most logically falls within the mode of ratification power, yet Congress only has four express alternatives under the Constitution for identifying the mode of ratification.³⁸⁴ Calling the deadline a matter of detail, moreover, implies that it is a mere procedural technicality and not a substantive limit.³⁸⁵ Deadlines in the text seem completely inconsistent with a determination of the mode of ratification.³⁸⁶ Deadlines in the preamble, on the other hand, seem completely ineffective. Understanding the two powers, and

³⁷³ See *Heller*, 554 U.S. at 578.

³⁷⁴ See Witter, *supra* note 34, at 219.

³⁷⁵ *Id.* at 220.

³⁷⁶ *Id.*

³⁷⁷ See Kalfus, *supra* note 36, at 452–53.

³⁷⁸ *Id.* at 454–56.

³⁷⁹ See Ginsburg, *supra* note 19, at 923.

³⁸⁰ See H.R.J. Res. 208, 92d Cong. § 3 (1972); see also U.S. CONST. amend. XVIII, § 1.

³⁸¹ U.S. CONST. amend. XX, § 5.

³⁸² H.R.J. Res. 208, 92d Cong. § 3 (1972).

³⁸³ U.S. CONST. amend. XX, § 5; H.R.J. Res. 208, 92d Cong. § 3 (1972).

³⁸⁴ See Kalfus, *supra* note 36, at 438.

³⁸⁵ Dillon v. Gloss, 256 U.S. 368, 376 (1921).

³⁸⁶ See Held et al., *supra* note 36, at 114.

their differences, helps us to see exactly why deadlines are unconstitutional.³⁸⁷ They do not address or resolve the constitutional provision being amended pursuant to the proposal power, and they are too limiting to be a mere detail under the mode of ratification.³⁸⁸

Besides the doctrine that preambles are generally not binding, Justice Scalia also spent many of his professional years articulating a series of canons of construction that argue against interpreting the silence on the part of Article V as including the power to impose a ratification deadline.³⁸⁹ The omitted-case canon holds that “[n]othing is to be added to what the text states or reasonably implies (*causus omissus pro omisso habendum est*). That is, a matter not covered is to be treated as not covered.”³⁹⁰ As R.W.M. Dias explains, “A judge may not add words that are not in the statute, save only by way of necessary implication.”³⁹¹ Unless there is a necessary implication that Congress’s mode of ratification power includes the power to impose a deadline on the states, the omitted-case canon suggests that courts should not imply the power.³⁹²

In teaching Constitutional Law, I often ask my students to identify the text of the Constitution at issue in a particular case. Then I ask if the text provides an explicit answer. The response is virtually always no; the text is silent. I then ask what the proper procedure should be for resolving the conflict when the constitutional text is silent. We then talk about original intent, logic, current need, past precedent, constitutional reason, and the proper weighing of these factors. There is no clear right or wrong answer to most of these questions, simply a process of reasoning through multiple factors, evidence, and consequences. The deadline issue is similar to the hundreds of other situations in which the Supreme Court has had to resolve a conflict arising from textual silence.³⁹³ In this case, however, I think the issue is relatively easy to resolve because the default rule of states’ rights, limited federal power, and logic all support the conclusion that ratification deadlines, of any sort, are unconstitutional limits on the states’ power of ratification.³⁹⁴

We can also learn something from the Court’s 1926 decision in *Myers v. United States* regarding the removal power.³⁹⁵ In that case, the President sought to remove an officer who had been nominated by a prior President and approved

³⁸⁷ See Kalfus, *supra* note 36, at 451–52.

³⁸⁸ *Id.* at 452–53.

³⁸⁹ See ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012).

³⁹⁰ *Id.*

³⁹¹ 4 R.W.M. DIAS, JURISPRUDENCE 232 (4th ed. 1976).

³⁹² See SCALIA & GARNER, *supra* note 389, at 93.

³⁹³ See Kalfus, *supra* note 36, at 463.

³⁹⁴ See discussion *supra* Section II.B.1–4.

³⁹⁵ 272 U.S. 52 (1926).

with the advice and consent of the Senate.³⁹⁶ In determining which body, the President or the Senate, had the power to act on an issue for which the Constitution was silent, the Court held that the power lay with the President because “[t]he power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment . . .”³⁹⁷ In similar fashion, Article V shares the amendment power between the states and Congress,³⁹⁸ but it seems clear to me that the power to determine when an amendment should be considered ratified is incident to the ratification power, not the proposal power.

5. Arguments for Constitutionality

There are two basic arguments for the constitutionality of the deadline. The first is that the text is silent and that Congress’s express power to prescribe the mode of ratification logically includes implied powers to express the details.³⁹⁹ Of course, one would question whether a deadline in the case of the ERA is a mere detail, but more about that later. Second, *Dillon* expressly states that Congress may impose reasonable time limits, without limiting its holding to deadlines within the text of the amendment itself.⁴⁰⁰ But do either of these withstand the force of the arguments to the contrary? When the ERA was originally proposed, there was much discussion about the addition of the deadline.⁴⁰¹ Senator Birch Bayh indicated that it was just a technicality, a procedural detail that all prior amendments had included.⁴⁰² Proponents of the ERA accepted the addition, despite the fact that the Nineteenth Amendment on women’s suffrage had not included a time limit, and it was felt that the issues of equality and individual rights were similar enough that the ERA should not be subject to one either.⁴⁰³ On the other hand, others felt that since no amendment had taken longer than four years to be ratified, the seven-year deadline was innocuous enough.⁴⁰⁴ With 20/20 hindsight, proponents later realized their

³⁹⁶ *Id.* at 106.

³⁹⁷ *Id.* at 1–22.

³⁹⁸ U.S. CONST. art. V.

³⁹⁹ See Held et al., *supra* note 36, at 114–15.

⁴⁰⁰ *Dillon v. Gloss*, 256 U.S. 368, 375–76.

⁴⁰¹ 116 CONG. REC. 36863 (1970).

⁴⁰² Witter, *supra* note 34, at 216; see also 116 CONG. REC. 36863 (1970) (Bayh’s amendment added the time limit to the joint resolution which ultimately failed, but all successive resolutions then contained the deadline).

⁴⁰³ Witter, *supra* note 34, at 215–16.

⁴⁰⁴ Representative Martha Griffiths, a critical proponent of the ERA, accepted the seven-year deadline so that it would “not be hanging over [their] head[s] forever.” 117 CONG. REC. 35815 (1971) (statement of Rep. Griffiths). However, she incorrectly thought the momentum was such that it would pass quickly. *Id.* at 35814–15; see also Witter, *supra* note 34, at 215–16.

complacence was misplaced.⁴⁰⁵ But the deadline was a moot point since thirty-eight states had not ratified.⁴⁰⁶ However, we are in a very different position in 2019 than we were in 1972. With passage of the Twenty-Seventh Amendment, the question of political and social viability raises profound concerns about the deadline.⁴⁰⁷ With an understanding of the Founders' fears about Congress frustrating the will of the states, and the recognition that political and social salience may remain for far more than ten or fifteen years, the better interpretation of the text's silence is that the power does not lie with Congress.⁴⁰⁸

As for *Dillon v. Gloss*, that case can be distinguished since it concerned a deadline in the text.⁴⁰⁹ It can also be read for what it actually stood for, that an amendment with a deadline that was in fact ratified fully within the time period was not rendered void simply because of the surplus verbiage of a deadline.⁴¹⁰ *Dillon* says nothing about the validity of a deadline that would have the operative effect of defeating an amendment that was otherwise properly ratified by all the requisite states, a situation that has never yet arisen.⁴¹¹

It is notable that some senators viewed the power to impose a deadline as a part of the necessary-and-proper power of Congress to effectuate the mandate granted to it by the Constitution.⁴¹² Because Congress has the power to dictate the mode of ratification, so the argument goes, the Necessary and Proper Clause gives it the power to dictate the details and the means to effectuate its Article V powers.⁴¹³ But one must ask whether a deadline is either necessary or proper. Even given the Court's generous reading of necessary as "convenient,"⁴¹⁴ there is no reason why Congress needs to impose a deadline at all. Unlike chartering a national bank in order to manage revenues and pay debts and expenses, imposing a deadline serves no federal purpose. And the Necessary and Proper Clause is located in Article I, not Article V, which may also limit its reach.⁴¹⁵

⁴⁰⁵ See 117 CONG. REC. 35814–15 (1971).

⁴⁰⁶ See Witter, *supra* note 34, at 210.

⁴⁰⁷ See Held et. al., *supra* note 36, at 121–23.

⁴⁰⁸ See discussion *supra* Section II.B.1–4.

⁴⁰⁹ 256 U.S. 368, 376–77.

⁴¹⁰ *Id.* at 374–75.

⁴¹¹ *Id.*

⁴¹² See 56 CONG. REC. 445 (1917) (statement of Rep. Steele).

⁴¹³ See *id.*

⁴¹⁴ Justice Marshall gives a broad discussion of the Necessary and Proper Clause in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. 316, 421 (1819); see also Hajdu & Rosenblum, *supra* note 63, at 134–35.

⁴¹⁵ See Hajdu & Rosenblum *supra* note 63, at 139. Compare U.S. CONST. art. 1, § 8, cl. 18, with U.S. CONST. art. V.

Arguably, once Congress makes the decision to propose an amendment, all power is out of its hands as the matter proceeds to the states.⁴¹⁶ A deadline operates like a take-back, neither of which is arguably available under the text or an ordinary reading of Article V.⁴¹⁷ There is nothing necessary or proper about a take-back. Although typical legislation can be rescinded, and one congress generally cannot bind future congresses, the amendment procedure is unique in that regard.⁴¹⁸ Because states arguably cannot rescind their ratifications, it would seem that the proposal power under Article V is also a one-way street.⁴¹⁹ Rescission is a matter better left to another article, but the general consensus is that states that initially reject a proposal may later ratify, while states that ratify may not later rescind, for Article V speaks only of state ratification.⁴²⁰

The argument that silence means Congress has the power to limit the states in the amendment process goes against the history and theory of the founding.⁴²¹ It also gives Congress the power to propose a limited or conditional amendment, one that includes within itself an acceptance of a limitation on the states.⁴²² That philosophical conundrum, of itself, should be enough to argue against a broad reading of the constitutional silence.⁴²³ Despite the appeal of the argument that the greater power includes the lesser power, that argument does not work in this context. By limiting the time within which the states can exercise their ratification function, Congress is asserting a greater power, not a lesser one.⁴²⁴ And since power in this context is a zero-sum game, more power in Congress to impose deadlines means less power in the states to ratify when they feel it is appropriate.⁴²⁵

⁴¹⁶ See Leo Kanowitz & Marilyn Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?* 28 HASTINGS L.J. 979, 981–82, 1000 (1977).

⁴¹⁷ See U.S. CONST. art. V; Ginsburg, *supra* note 19, at 921 n.7, 939.

⁴¹⁸ See Kanowitz & Klinger, *supra* note 416, at 983, 1002.

⁴¹⁹ Numerous scholars have addressed the issue of rescission, which is likely to be the next issue before the Court when the ERA deadline issue is resolved. Most see rescissions as impermissible. See, e.g., Bernstein, *supra* note 256, at 548; Ginsburg, *supra* note 19, at 939–42; Hajdu & Rosenblum, *supra* note 63, at 120–22; Heckman, *Ratification of a Constitutional Amendment: Can a State Change its Mind?*, 6 CONN. L. REV. 28 (1973); Kanowitz & Klinger, *supra* note 416, at 981. It is notable that both houses rejected amendments to the extension of the ERA that would have allowed states to rescind. See 124 CONG. REC. 26227, 26236, 33222, 33354 (1978).

⁴²⁰ See U.S. CONST. art. V; 124 CONG. REC. 33168 (1978); Ginsburg, *supra* note 19, at 940–41, 940 n.127.

⁴²¹ See 124 CONG. REC. 33168 (1978).

⁴²² See *id.* at 33174, 33227.

⁴²³ See Ginsburg, *supra* note 19, at 926 n.40.

⁴²⁴ See Dillon v. Gloss, 256 U.S. 375, 379 (1920).

⁴²⁵ See *id.*

The argument from *Dillon* also does not hold much sway. The question in *Dillon* was a narrow one of whether the entire amendment was void because of the deadline.⁴²⁶ The dicta that time limits are permissible and reasonable are just that: dicta.⁴²⁷ And the *Dillon* situation involved a time limit within the text, not in the preamble.⁴²⁸ There is plenty of Supreme Court precedent that the preamble should not be given weight over the operative language in constitutional interpretation.⁴²⁹ Justice Scalia's lengthy analysis of the text and history of the Second Amendment, in *District of Columbia v. Heller*, and his rejection of the preamble as a limitation on the operative language of the second part of the right, supports a narrow reading of constitutional powers in line with federalism principles.⁴³⁰

III. IMPLICATIONS OF HOLDING THE DEADLINE TO BE UNCONSTITUTIONAL

The most obvious implication of holding the deadline to be unconstitutional is that the ERA would likely become effective.⁴³¹ I suppose one cannot be too critical of that outcome if the requisite thirty-eight states in fact have ratified the amendment.⁴³² It would be worse if the states all wanted the ERA and the Court held it to be invalid because of a congressional time limitation. Striking the deadline would be a case of allowing majority will to prevail and not of allowing a minority or a procedural technicality to frustrate the will of the majority.

Perhaps of more concern are the other five amendments lurking out there which might be ratified by state legislatures at some point in the future.⁴³³ Of course, the example of the Twenty-Seventh Amendment does not seem to have caused the government to melt down, and it is unlikely that adoption of either the Titles of Nobility (proposed in 1810)⁴³⁴ or the House Apportionment (proposed in 1789) amendments would throw our government into chaos.⁴³⁵ The Titles of Nobility Amendment revokes citizenship for people accepting titles of nobility

⁴²⁶ See *id.* at 369, 375–76.

⁴²⁷ See Kalfus, *supra* note 36, at 446–47.

⁴²⁸ See NEALE, *supra* note 3, at Summary; Kalfus, *supra* note 36, at 438 & n.7.

⁴²⁹ See, e.g., *Jacobson v. Massachusetts*, 25 S. Ct. 358, 359–60 (1906).

⁴³⁰ *District of Columbia v. Heller*, 554 U.S. 570, 578, 610 (2008).

⁴³¹ See NEALE, *supra* note 3, at 1.

⁴³² See *id.*

⁴³³ See *Constitutional Amendments That Have Failed*, LEXISNEXIS, https://lexisnexis.com/constitution/amendments_failed.asp [<https://perma.cc/W2F6-SF6L>] (last visited Sept. 8, 2019).

⁴³⁴ See 11 ANNALS OF CONG. 613 (1810).

⁴³⁵ See 1 ANNALS OF CONG. 773 (1789) (Joseph Gales ed., 1836).

from a foreign sovereign, which happens quite rarely.⁴³⁶ George H.W. Bush was made a Knight Grand Cross of the Most Honorable Order of the Bath by Queen Elizabeth, but it is not a common event these days.⁴³⁷ The Apportionment Amendment, the last of the initial twelve proposed by Madison, is essentially obsolete.⁴³⁸ If it were ratified, the House of Representatives could expand to over 6,000 members and that might require some new office buildings.⁴³⁹ The Child Labor Amendment (proposed in 1924) prohibits child labor,⁴⁴⁰ but that is already prohibited by statute and Supreme Court precedent.⁴⁴¹ These three amendments do not have deadlines imposed by Congress and thus, hypothetically, could be revived, but it seems unlikely that states would bother.⁴⁴² And if they were, the effects would be of little moment.

The D.C. Representation Amendment was proposed with a deadline.⁴⁴³ Assuming the Court were to strike the deadline as unconstitutional, it could also be revived.⁴⁴⁴ However, giving representation to the District also would not throw the country into chaos. It is likely that this is the only extant amendment for which there would be any interest, but at this point only sixteen states have

⁴³⁶ See Gideon M. Hart, *The “Original” Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment*, 94 MARQ. L. REV. 311, 316 (2010).

⁴³⁷ Nadine Brozan, *Chronicle*, N.Y. TIMES, Dec. 1, 1993, at B5.

⁴³⁸ It provided that there shall be one representative for every 30,000 people until the number of representatives shall reach 100, after which the proportion shall be regulated by Congress. There shall never be fewer than 100 representatives, nor less than one for every 40,000 persons until the number shall reach 200, after which the proportion shall be regulated by Congress so long as there shall not be fewer than 200 representatives nor more than one per every 50,000 persons. 1 ANNALS OF CONG. 773 (1789) (Joseph Gales ed., 1839). Since today Congress has capped the number of representatives at 435, and each represents roughly 700,000 persons, the Apportionment amendment is essentially being followed. See Permanent Apportionment Act, 2 U.S.C. § 2a (2012); Peter Baker, *Expand the House?*, N.Y. TIMES (Sept. 17, 2009), <https://www.nytimes.com/2009/09/18/us/politics/18baker.html> [<https://perma.cc/34RB-LQUX>]. There is not more than one representative for every 40,000 persons and there are more than 200 representatives. See *Debate the Constitution: More House members?*, NAT’L CONST. CTR. (Apr. 28, 2016), <https://constitutioncenter.org/blog/debate-the-constitution-more-house-members> [<https://perma.cc/FR98-QPSR>].

⁴³⁹ See Celmons v. U.S. Dept. of Commerce, 710 F. Supp. 2d 570, 580 (N.D. Miss. 2010).

⁴⁴⁰ See 65 CONG. REC. 7251 (1924).

⁴⁴¹ See United States v. Darby, 312 U.S. 100 (1941).

⁴⁴² See *Hearing on the Equal Rights Amendment Before the Comm. on the Judiciary*, 116th Cong. 4 (2019) (statement of Elizabeth Price Foley, Professor of Law, Florida International University College of Law).

⁴⁴³ See NEALE, *supra* note 3, at 29.

⁴⁴⁴ See HOUSE RESEARCH DEP’T, UNITED STATES CONSTITUTIONAL AMENDMENTS: MINNESOTA’S LEGISLATIVE HISTORY 26 (2016).

ratified it.⁴⁴⁵ If it were to pass, however, the effect would also be relatively narrow.

The fifth extant amendment, however, the Corwin Amendment (proposed in 1861) would prohibit constitutional amendments abolishing or interfering with slavery.⁴⁴⁶ It was proposed without a deadline and could presumably rear its ugly head.⁴⁴⁷ However, only two states have currently ratified it,⁴⁴⁸ it has been essentially negated by passage of the Thirteenth Amendment,⁴⁴⁹ and I would hope that any effort to reimpose slavery would not be accepted. Furthermore, there is something fundamentally unacceptable about using the Article V amendment process to pass an amendment that provides that no further amendments could be enacted on a subject.⁴⁵⁰ Such a limitation would likely be stricken by the Court as irreconcilable with Article V.⁴⁵¹

The fact that the D.C. Representation Amendment might be revived, and the ERA might become effective if the deadline were held to be unconstitutional are certainly not reasons to fear such a result. Only the Corwin Amendment should give one pause.⁴⁵² But there are other ways to deal with that amendment.

Possibly, Congress could withdraw it if it appeared likely to rise like a phoenix from its ashes.⁴⁵³ More importantly, passage of the ERA would have significant impact, which is precisely why the amendment is still alive, being considered at the state levels, and receiving the recent ratifications it has received.⁴⁵⁴ The political, social, and economic conditions favor its passage, and that is not a reason to fear but rather to celebrate its accomplishment.⁴⁵⁵

In the future, however, Congress would not be able to impose deadlines if the Court were to find the ERA deadline unconstitutional. Would that be so bad? For a century-and-a-half Congress did not impose deadlines and the country did not collapse, nor did the government run amok.⁴⁵⁶ It is hard to see what irreparable problems might arise from nullifying Congress's power to impose time limits.

⁴⁴⁵ See NEALE, *supra* note 3, at 30.

⁴⁴⁶ See CONG. GLOBE, 36th Cong., 2d Sess. 1283 (1861).

⁴⁴⁷ See *id.*

⁴⁴⁸ See UNITED STATES CONSTITUTIONAL AMENDMENTS, *supra* note 444, at 23.

⁴⁴⁹ See U.S. CONST. amend. XIII.

⁴⁵⁰ See Philip L. Martin, *Illinois' Ratification of the Corwin Amendment*, 15 J. PUB. L. 187, 189 (1966).

⁴⁵¹ See U.S. CONST. art. V; Martin, *supra* note 450, at 191.

⁴⁵² See A. Christopher Bryant, *Stopping Time: The Pro-Slavery and "Irrevocable" Thirteenth Amendment*, 26 HARV. J.L. PUB. POL'Y. 501, 536 (2003).

⁴⁵³ See Frank E. Packard, *Constitutional Law: The States and the Amending Process*, 45 A.B.A.J. 161, 161 (1959).

⁴⁵⁴ See Bridget L. Murphy, Note, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 938–39 (2018).

⁴⁵⁵ See *id.* at 944–45.

⁴⁵⁶ See NEALE, *supra* note 3, at 1.

Most likely, Congress will propose fewer amendments so it does not put the country through another experiment like Prohibition.⁴⁵⁷ But Congress's willingness to propose amendments may also depend in large part on whether Congress can recall proposals if it felt that the political, social, and economic conditions required withdrawal.⁴⁵⁸ Assuming that Congress possessed such power, which is admittedly another assumption for which there also is no guiding precedent, the deadline issue would not raise such profound implications.⁴⁵⁹

CONCLUSION

Whether the deadline in the ERA is deemed to be constitutional or not, the stakes are high and the battle is likely to be fierce.⁴⁶⁰ Although few are likely to argue expressly that men and women should not be treated as legal equals, opposition to the ERA will take many forms.⁴⁶¹ Technical and procedural hurdles are always the first resort of those hoping to thwart change.⁴⁶² The congressional deadline is precisely the kind of procedural detail that opponents will use to bolster their argument that the ERA is a dead letter.⁴⁶³ And if the legislatures of the states agreed that the ERA was dead, they would not have continued to ratify it nearly five decades after it was initially proposed.⁴⁶⁴ The actions of those states are setting up a Tenth Amendment challenge between the states and Congress as to who controls when and if constitutional amendments will become operative.⁴⁶⁵

Based on the Founders' philosophy of a limited federal government,⁴⁶⁶ the inclusion of the Tenth Amendment providing that powers not expressly granted to the national government are reserved to the states and the people,⁴⁶⁷ and the silence of Article V on the issue of deadlines,⁴⁶⁸ I argue that Congress has

⁴⁵⁷ See *id.* at 26.

⁴⁵⁸ See Packard, *supra* note 453, at 161.

⁴⁵⁹ See Arthur Earl Bonfield, *Proposing Constitutional Amendment by Convention: Some Problems*, 39 NOTRE DAME L. REV. 659, 667 (1966).

⁴⁶⁰ See Julie C. Suk, *An Equal Rights Amendment for the Twenty-first Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 384–85 (2017).

⁴⁶¹ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 96 CAL. L. REV. 1323, 1324, 1337, 1402 (2006).

⁴⁶² See *supra* notes 143–149 and accompanying text.

⁴⁶³ See NEALE, *supra* note 3, at Summary.

⁴⁶⁴ See *id.*

⁴⁶⁵ Ruth M. Ferrell, *The Equal Rights Amendment to the United States Constitution—Areas of Controversy*, 6 URB. LAW. 853, 871 (1974).

⁴⁶⁶ See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1937–38 (2003).

⁴⁶⁷ See U.S. CONST. art. X; Sullivan, *supra* note 466, at 1937.

⁴⁶⁸ See U.S. CONST. art. V.

exceeded its power by imposing any deadlines on state ratifications of constitutional amendments. This view is further supported by constitutional philosophy⁴⁶⁹ and the grave concerns of many of the Congressmen who opposed the imposition of deadlines in numerous twentieth century proposals.⁴⁷⁰ It is possible, however, that Congress may choose to waive or extend the deadline once the thirty-eighth state has ratified, perhaps mooted the question of the constitutionality of the deadline and thus avoiding a judicial determination that may limit its control over the mode of ratifications.⁴⁷¹ Such a move may be preferable to a constitutional showdown. But as the Twenty-Seventh Amendment has illustrated, states do take seriously their only real leverage to control the reach of the federal government.⁴⁷² How ironic it would be for the states to enforce their sovereign control over the national government through an equality amendment that limits both federal and state power in the name of individual rights. Although I cannot predict the final outcome, I can most assuredly predict that it will be an interesting ride.

⁴⁶⁹ See discussion *supra* Section I.A.

⁴⁷⁰ See NEALE, *supra* note 3, at 2–5.

⁴⁷¹ See *id.* Summary.

⁴⁷² See *id.* at 17.