AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Federalism/Constitutional Amendment and Ratification

*Steven A. Engel*, **Ratification of the Equal Rights Amendment** (2020)[[1]](#footnote-1)

*The modern practice of Congress in passing resolutions forwarding constitutional amendments to the states for ratification has been to include a deadline by which the states must act. When Congress passed the Equal Rights Amendment in 1972, it followed that practice and included a seven-year deadline for ratification. Thirty-five of the necessary thirty-eight states ratified the amendment within that seven-year window. In 1978, Congress passed a resolution by simple majority that purported to extend the deadline for ratification by another three years. No additional states ratified the amendment within that window. Before the original deadline expired, five of the thirty-five states that had voted to ratify the ERA had reversed course and formally rescinded their ratification. No state rescinded ratification after 1979. Several states challenged the constitutional validity of the congressional resolution extending the ratification deadline of the ERA, and a federal district court ruled in their favor, but the U.S. Supreme Court vacated that judgment as moot when the new deadline expired by its own terms in 1982.*

*In 1992, Michigan became the thirty-eighth state to ratify the Congressional Pay Amendment. That amendment was part of the package of constitutional amendments sent to the states for ratification by the First Congress. When it failed to receive enough votes for ratification, it was assumed to be legally dead, but it was revived in the 1980s by a lobbying campaign that encouraged modern state legislatures to adopt it. The Office of Legal Counsel issued an opinion in 1992 concluding that the amendment had been successfully ratified and that James Madison’s orphaned amendment had validly become the Twenty-Seventh Amendment to the U.S. Constitution.*

*In light of that success, the National Organization for Women began lobbying state legislatures to ratify the ERA as part of a “three-state strategy.” NOW contended that the congressional resolution setting a deadline on ratification was unconstitutional, and that the five state legislatures that had withdrawn their ratification could not validly do so, and thus the ERA only needed three more states to ratify in order to complete the process. After the 2016 presidential election, the lobbying effort gained new momentum and three states (Nevada, Illinois, and Virginia) quickly passed ratification resolutions. The national archivist, which has the statutory responsibility of certifying constitutional amendments as having been officially ratified, requested a legal determination from the Office of Legal Counsel. In January 2020, the Office of Legal Counsel issued an opinion concluding that the ERA had expired and was no longer available for ratification. A few weeks later, Justice Ruth Bader Ginsburg made public comments seemingly agreeing with the OLC, observing that the votes of the last three states had come too late and that the fight for the ERA would have “to start over.” Those comments in 2020 echoed previous remarks she had made about NOW’s three-state strategy to revive the ERA.*

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The proposing clause of the ERA Resolution contains a ratification deadline, which required that “the legislatures of three-fourths of the several States” ratify the amendment “within seven years from the date of its submission by the Congress,” resulting in a deadline of March 22, 1979. In 1971, Representative Griffiths, the ERA’s lead sponsor, defended the inclusion of the deadline, describing it as “customary,” as intended to meet “one of the objections” previously raised against the resolution, and as a “perfectly proper” way to ensure that the resolution “should not be hanging over our head forever.” The report of the Senate Judiciary Committee similarly explained: “This is the traditional form of a joint resolution proposing a constitution-al amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people.” Congress therefore made the deliberate choice to subject the proposed amendment to a seven-year ratification deadline.

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The Founders established a process for amending the Constitution that requires substantial agreement within the Nation to alter its fundamental law. As James Madison explained in *The Federalist*, the Founders chose to ensure a broad consensus in favor of any amendment to “guard[] . . . against that extreme facility which would render the Constitution too mutable,” while at the same time avoiding “that extreme difficulty which might perpetuate its discovered faults.” . . .

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The Constitution further grants Congress the authority to specify “one or the other Mode of Ratification” in the States, either by the legislatures thereof or by state conventions chosen for that purpose. . . . Congress therefore exercises discretion in determining not just the substance of the amendment, but which of the two modes of ratification is to be used.

In making such determinations, Congress has specified the mode of ratification in the proposing clause included within every resolution proposing a constitutional amendment. For every successful amendment, both Houses of Congress approved the proposing clause at the same time as the text of the proposed amendment, and they did so by a two-thirds vote. . . .

The proposing clause for the Bill of Rights not only specified the mode of ratification but also contained a procedural instruction authorizing the state legislatures either to ratify “all” twelve proposed articles or to ratify “any of ” them individually. This proposing clause was debated by the House and the Senate and considered of a piece with the substantive proposed amendments. Although the early resolutions proposing amendments did not include deadlines for ratification, seven-year deadlines were included in the texts of what became the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments. When proposing the Twenty-Third Amendment in 1960, Congress included a similar seven-year deadline in the proposing clause, and every subsequent proposed amendment has also included, in its proposing clause, a requirement that the amendment be ratified within seven years. Each of these deadlines was adopted as part of the same resolution that proposed each amendment by the required two-thirds majorities of both Houses of Congress.

Article V does not expressly address how long the States have to ratify a proposed amendment. The “article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress.” The text does direct that “[t]he Congress, *whenever* two thirds of both Houses *shall deem it necessary*, shall propose Amendments to this Constitution[.]” This language authorizes Congress to propose amendments for ratification *when* two-thirds majorities in each chamber deem it necessary, thereby implying that Congress may propose amendments *for the period* that the requisite majorities deem necessary. . . . Article V thus requires Congress to make a judgment concerning the needs of the moment and, from that, the Supreme Court has inferred the power to set a deadline by which the States must ratify, or reject, Congress’s judgment.

The Court reached this conclusion in *Dillon v. Gloss* (1921*)*, which upheld Congress’s authority to impose a deadline for ratifying the Eighteenth Amendment, which established Prohibition. . . .

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In upholding Congress’s authority to impose deadlines, the Court recognized that Article V does not expressly address the timing of ratification. It nevertheless read the text to imply a degree of contemporaneity between an amendment’s proposal and its ratification, which “are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time.” The Court inferred that the approval of three-fourths of the States needs to be “sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period.” . . .

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Unlike with the Eighteenth Amendment, Congress placed the ratification deadline for the ERA Resolution in the proposing clause, rather than in the text of the proposed amendment. But that judgment was entirely consistent with the four preceding amendments, and with *Dillon*’s recognition that a deadline is related to the mode of ratification, which has always been included in the proposing clause. In placing the ERA’s deadline in the proposing clause, Congress followed a practice that started with the Twenty-Third Amendment. . . .

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After Congress proposed the ERA Resolution, state legislatures considered whether to ratify it subject to all of the conditions imposed by Congress, including the seven-year deadline. Of the thirty-five state legislatures that ratified between 1972 and 1977, twenty-five expressly voted upon a state measure that included the text of the ERA Resolution in its entirety (and hence the deadline). Five others did not expressly vote on the entire text of the ERA Resolution, but the seven-year deadline was otherwise repeated in the measures that they approved. And South Dakota’s legislature expressly provided that its ratification would be formally withdrawn if the ERA were not adopted within the seven-year deadline. Accordingly, the States that ratified the ERA Resolution plainly did so with the knowledge of the timing condition and with the understanding that the seven-year deadline was part and parcel of the amendment proposal.

Although some ERA supporters have recently questioned the enforceability of the deadline, no one involved with the ERA around the time of its proposal seems to have done so. As the original ratification period neared its end, Congress weighed extending the deadline precisely to avoid the failure of the amendment. . . .

Even more telling, the Supreme Court necessarily recognized the enforceability of the deadline by finding that the legal controversy over the ERA extension became moot when the extended deadline lapsed. . . .

. . . . Because the deadline lapsed without ratifications from the requisite thirty-eight States, the ERA Resolution is no longer pending before the States, and ratification by additional state legislatures would not result in the ERA’s adoption.

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Those who believe that the ERA Resolution may be revived argue that Congress’s authority under Article V would allow simple majorities in each House to eliminate the earlier ratification deadline and thereby extend the ratification process. Relying upon Congress’s prior action to extend the ERA deadline, they argue that, since the deadline rests in the proposing clause rather than the amendment’s text, it is open to congressional revision at any time, including decades after its expiration. . . .

We do not believe that Article V permits that approach. Congress’s authority to fix a “definite period for ratification” is “an incident of its power to designate the mode of ratification.” Congress may fix such a deadline for a proposed amendment “so that all may know what it is and speculation on what is a reasonable time may be avoided.” Congress would hardly be setting a “*definite* period for ratification” if a later Congress could simply revise that judgment, either by reducing, extending, or eliminating the deadline that had been part of the proposal transmitted to the States. While Congress need not set any ratification deadline, once it has done so, “that determination of a time period becomes an integral part of the proposed mode of ratification.” “Once the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa.” *Idaho v. Freeman* (D.C.D.ID. 1981).

When Congress “propose[s]” an amendment, it also selects the “Mode of Ratification.” U.S. Const. art. V. The power to “propose” authorizes Congress to set the terms upon which the amendment will be considered by others, namely the States. . . . Once Congress has “propose[d]” an amendment and selected the mode of ratification as “may be proposed by the Congress,” the States then determine whether the proposal will be ratified. . . . The power to propose is thus a prospective power, and does not entail any authority to modify the terms of a proposed amendment once it has been offered for the consideration of the States.

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[C]onstitutional commentators have long recognized that “Congress may not withdraw an amendment once it has been proposed.” . . . Similarly, we believe that Article V does not authorize Congress to adjust the terms of an amendment previously proposed to the States, whether it seeks to alter the mode of ratification or the deadline for ratification.

Recognizing congressional authority to modify the terms of a proposed constitutional amendment would present numerous questions that lack answers in the text of the Constitution or the history of past amendments. Could Congress modify a substantive provision within a pending amendment, or is its modification power limited to procedural terms? Could a later Congress hostile to a pending amendment shorten the deadline or declare it expired (and if so, how would such a power differ from a power to withdraw the pending amendment)? Must Congress adopt such changes by the same two-thirds vote of both Houses by which an amendment is proposed, or would a simple majority vote of each House suffice? And must the President sign the joint resolution modifying a proposal, or would the modification become immediately effective without presentment? . . .

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Because Congress and the state legislatures are distinct actors in the constitutional amendment process, the 116th Congress may not revise the terms under which two-thirds of both Houses proposed the ERA Resolution and under which thirty-five state legislatures initially ratified it. Such an action by this Congress would seem tantamount to asking the 116th Congress to override a veto that President Carter had returned during the 92nd Congress, a power this Congress plainly does not have. Because the 1972 ERA Resolution has lapsed, the only constitutional way for Congress to revive the ERA, should it seek to do so, would be for two-thirds of both Houses of Congress to propose the amendment anew for consideration by the States.

In view of our foregoing conclusions, it is unnecessary for us to consider whether the earlier ratifications of the ERA by five state legislatures were validly rescinded. . . .

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1. Excerpt taken from Steven A. Engel, Ratification of the Equal Rights Amendment (January 6, 2020). [↑](#footnote-ref-1)