AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan Era – Federalism/Constitutional Amendment and Ratification

*Timothy E. Flanigan*, **Congressional Pay Amendment** (1992)[[1]](#footnote-1)

*The adoption of the Twenty-Seventh Amendment to the U.S. Constitution was complicated. It was drafted by James Madison and accepted by the First Congress and sent to the states for ratification with the bundle of amendments that eventually became the Bill of Rights. The states chose not to act on this particular amendment when they ratified the others. The Congressional Pay Amendment specifies that no law passed by Congress altering the pay of members of Congress shall take effect until after the next election. Only six of the necessary eleven state had ratified the Congressional Pay Amendment by 1791, and there the ratification process stalled. In the 1980s, the American public’s dislike of Congress was once again peaking, and some activists floated the idea of reviving the Congressional Pay Amendment and some state legislatures embraced the idea. Rather than trying to move a new version of the amendment through Congress, activists went directly to the states and lobbied them to ratify Madison’s proposed amendment. The new ratification votes were added to the original six from the 1790s, and in 1992 Michigan became the thirty-eighth state to pass a resolution to ratify the Congressional Pay Amendment.*

*Michigan’s vote in 1992 raised an issue for the federal government: should the Congressional Pay Amendment be recognized as a valid amendment to the Constitution, and who should decide? Congress was not inclined to antagonize the public by attempting to reject the validity of the amendment. By law, the national archivist was tasked with the duty of certifying the ratification votes from the states and adding any valid constitutional amendments to the body of American law. The Office of Legal Counsel was asked for an opinion on whether the archivist had any discretion on this question, whether Congress had any role to play in validating the amendment, and whether the ratification process had an implicit time limit. The OLC concluded that the action of the states should be taken as decisive and that the amendment should be regarded as having been ratified and now a valid part of the Constitution.*

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That the ratification of the Congressional Pay Amendment has stretched across more than 200 years is not relevant under the straightforward language of Article V. Article V contains no time limits for ratification. It provides simply that amendments “shall be valid to all Intents and Purposes . . . *when ratified*.” Thus the plain language of Article V contains no time limit on the ratification process.

Nor are we aware of any other basis in law for adding such time limits to the Constitutional amendment process, other than pursuant to the process itself. Indeed, an examination of the text and structure of Article V suggests that the absence of a time limit is not an accident. . . . If the Framers had contemplated some terminus of the period for ratification of amendments generally, they would have so stated.

The rest of the Constitution strengthens the presumption that when time periods are part of a constitutional rule, they are specified. For example, representatives are elected every second year, and a census must be taken within every ten year period following the first census. . . .

The records of the drafting and ratification of the Constitution contain no hint that Article V was intended to contain any implicit time limit. *See, e.g., Dillon* v. *Gloss* (1921). The issue appears not to have arisen at the time of the framing, but has since been debated in Congress from time to time. Throughout most of those debates, the dominant view has been that the Constitution permits the ratification process to proceed for an unlimited period of time. The first discussion we have found of the question whether a proposed constitutional amendment remains viable indefinitely came in 1869, when Senator Buckalew introduced a measure to regulate the time and manner in which state legislatures would consider the Fifteenth Amendment. In support of his proposal, he stated that because of the confusion created by States that either ratify after rejecting, or reject after ratifying, “we are in this condition that you cannot have a constitutional amendment rejected finally at all in the United States; rejections amount to nothing, because ratifications at some future time, ten, twenty, fifty, or one hundred years hence, may give it validity.” Senator Bayard, opposing a related proposal, stated his belief that “as long as the proposed amendment has neither been adopted by three fourths of the States nor rejected by more than one fourth, it stands open for . . . action.”

The Senate and House debates regarding proposal of the Eighteenth Amendment in 1917 also indicate a common belief that Article V contains no time limits. For example, in his remarks on the need for limiting time for state ratification, Senator Ashurst explained that two of the first twelve amendments proposed by Congress “are still pending . . . and have been for 128 years.” Senator Borah expressed the view that “[t]he fundamental law of the land does say very plainly, that it places no limitation upon the time when or within which [an amendment] must be ratified. It says ‘when ratified’, and fixes no limit.” . . .

Thus, although there was much disagreement on the issue — later addressed in *Dillon v. Gloss* — whether *Congress* could impose time limits for state ratification of a proposed constitutional amendment in the absence of a separate amendment to Article V, there was little doubt as to the rule established by the Constitution itself: the proposed amendment remained viable, at least until rejected by more than one-fourth of the States.

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In upholding Congress’s power to limit to seven years the time for ratification of the Eighteenth Amendment, the Supreme Court in *Dillon* stated “that the fair inference or implication from Article V is that the ratification [of an amendment] must be within some reasonable time after the proposal.” If this reasoning is controlling and Article V does contain an implicit requirement that proposal and ratification be reasonably contemporaneous, the Congressional Pay Amendment almost certainly would be invalid.

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*Dillon* is not authoritative on the issue whether Article V requires contemporaneous ratification. As Chief Justice Hughes pointed out in *Coleman v. Miller* (1939)*,* the “reasonable time” discussion in *Dillon* was dictum because the issue before the Court was Congress’s authority to limit the period for ratification, not a State’s authority to ratify a long-dormant proposed amendment. . . .

Nor is *Coleman* authoritative as to contemporaneity. The *Coleman* Court’s discussion of *Dillon's* “reasonable time” inference was simply not part of its holding. . . . Having declined to address the content of an implicit time limit, it leaves open for Congress the conclusion that there is no time limit at all.

On its merits, the reasoning of *Dillon* is unpersuasive in both its specific arguments and in its broader methodology. The *Dillon* Court’s first consideration was that proposal and ratification are steps in a single process and hence should not be widely separate in time. This argument simply assumes its conclusion — that the process is to be short rather than lengthy.

Second, *Dillon* argued that because amendments are to be proposed only when needed, the implication is that they should be dealt with promptly. But necessity is not the same as emergency. . . . The States that have ratified the Congressional Pay Amendment only recently evidently consider it to be just as necessary today as the first Congress presumably thought it was in 1789.

Finally, *Dillon* suggests that Article V is designed to seek consensus, and that consensus must be contemporaneous. Again, even assuming that it is proper to interpolate terms into a constitutional provision in order to serve its purported end — a question we address below — this reasoning is faulty. Consensus does not demand contemporaneity. The sort of lasting consensus that is particularly suitable for constitutional amendments may just as well be served by a process that allows for extended deliberation in the various states. There have been occasions when it has taken decades to build the consensus within Congress needed for a two-thirds vote on a proposed amendment. . . .

More fundamentally, *Dillon* rests on a faulty approach to the interpretation of the Constitution, and in particular those provisions that determine the structure of government. The amendment procedure, in order to function effectively, must provide a clear rule that is capable of mechanical application, without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored. . . . The very functioning of the government would be clouded if Article V, which governs the fundamental process of constitutional change, consisted of “open-ended” principles without fixed applications. The alternative to procedural formalism is uncertainty and litigation.

According to the theory that Article V contains an implicit time limit, the State must deduce that it can ratify only if the time since proposal is still a reasonable one. The implicit reasonable time rule can take one of two forms. First, the Constitution might be said to impose the same time period with respect to all proposed amendments. Putting aside the implausibility of the suggestion that a legal rule includes a time certain without stating it, this reading would require each state somehow to decide for itself what limitation the Constitution implicitly imposes. This question is extremely difficult, and there is no reason to believe that the different States would answer it in the same way. . . .

The other possible form of the implicit time limit rule is that the “reasonable” time differs from amendment to amendment, depending on any number of unstated factors. This theory requires that the States undertake an inquiry even more difficult than the search for an implicit but specific time limit. . . .

. . . . The implicit time limit thesis is thus deeply implausible, because it introduces hopeless uncertainty into that part of the Constitution that must function with a maximum of formal clarity if it is to function.

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. . . . At most, *Coleman* stands for the proposition that the validity of a constitutional amendment is a political question. That proposition has no bearing on the actions of the Archivist, an officer of one of the political branches.

On its merits, the notion of congressional promulgation is inconsistent with both the text of Article V of the Constitution and with the bulk of past practice. Article V clearly delimits Congress’s role in the amendment process. It authorizes Congress to propose amendments and specify their mode of ratification, and requires Congress, on the application of the legislatures of two-thirds of the States, to call a convention for the proposing of amendments. Nothing in Article V suggests that Congress has any further role. Indeed, the language of Article V strongly suggests the opposite: it provides that, once proposed, amendments *“shall be valid* to all Intents and Purposes, as Part of this Constitution, when ratified by” three-fourths of the States. (Emphasis added.) . . .

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If congressional promulgation is required, Secretary Fish illegally certified that the Fifteenth Amendment was part of the Constitution. Indeed, the executive branch would have illegally certified every amendment except the Fourteenth. If only to avoid this absurd conclusion, we must reject the assertion that only Congress may promulgate an amendment.

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1. Excerpt taken from Timothy E. Flanigan, “Congressional Pay Amendment” 16 *Op. O.L.C*. 85 (1992) [↑](#footnote-ref-1)