

# Adventures in the Article V Wonderland: Justiciability and Legal Sufficiency of the ERA Ratifications

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*This Article examines the paradoxical world of Article V—the amending power of the Constitution—in light of the recent ratification of the Equal Rights Amendment (ERA). It explores the question of whether Article V issues are justiciable, what role the federal and state courts play in determining Article V procedures, and who has the jurisdiction to evaluate the legal sufficiency of state ratifications. This is a confounding area of law, and with a few judicial precedents, some textualism and originalism arguments, and recourse to logic and scholarship, I conclude that the ERA is validly the Twenty-Eighth Amendment. I provide a detailed analysis of the congressional deadline and rescission issues that are currently before the courts and explore the unique role of the states in exercising their Article V powers to effect constitutional change.*

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#### INTRODUCTION

In Lewis Carroll's *Alice's Adventures in Wonderland*, Alice chases a white rabbit down a rabbit hole where she drinks tea with the Mad Hatter, chats up the Cheshire Cat, plays croquet with a flamingo, eats a mushroom that makes her shrink, and stands trial for stealing the Queen of Hearts' tarts.<sup>1</sup> During her adventure, she changes size, cries an ocean of tears, is asked, "Why is a raven like a writing

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1. See generally LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (Macmillan Co. 1920).

desk?”), and seeks the advice of a caterpillar smoking a hookah.<sup>2</sup> Alice’s Wonderland is known by all to be a world of riddles, absurdities, puns, mathematical satires, and historical references. Carroll’s beloved novel reminds us that the reality we take for granted is contested, that truths are relative, and that logic is a flawed endeavor. Yet we read the novel convinced that we can figure out its hidden meaning if we only try hard enough.

Article V of the U.S. Constitution, the amending provision, is similarly paradoxical.<sup>3</sup> Its pattern of interconnected relationships, logical gaps, and agonizingly spare direction make analyzing the process of amending the Constitution much like trying to make sense of Alice’s adventures. One can fall into any part of it and be led on an analytical journey that is remarkably full of unanswered questions, absurd results, and fallacious riddles. Yet at the end of the day, we have added twenty-seven amendments<sup>4</sup> without suffering a constitutional breakdown,<sup>5</sup> and we have persisted in our collective belief that there is some sense of order or legitimacy in the process.<sup>6</sup> This has been due, in large part, to our willful avoidance of certain rabbit holes and acceptance of certain outcomes despite the incontrovertible fact that underneath the patina of procedural regularity lie a swamp of irregularities and acts of questionable legality. But as with the unclothed emperor, the ratification of the Equal Rights Amendment (ERA) has pulled back the curtain on the dizzyingly convoluted and indeterminate process flaws of Article V.

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2. *Id.* at 97.

3. *See* U.S. CONST. art. V.

4. Arguably it is twenty-eight amendments now with the Equal Rights Amendment. Twenty-eight have met the technical requirements of Article V but only twenty-seven have been published.

5. Although we did have a near-breakdown in the 1860s when Congress proposed the Fourteenth Amendment with fewer than two-thirds majorities since the Southern Congressional delegations were excluded, and it was passed by recalcitrant legislatures in many states. Some have argued, even quite recently, that the Fourteenth Amendment was improperly ratified and therefore *ultra vires*, but no one seriously imagines that we could put that genie back in the bottle. *See generally* Douglas H. Bryant, Comment, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 556 (2002) (arguing the Fourteenth Amendment was not constitutionally proposed or ratified); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 375 (2001) (recognizing the irregularities in the Reconstruction Amendments and suggesting that the Constitution does not “invalidate ratifications made in the face of illegal threats”); Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627, 1629 (2013) (noting that the Fourteenth Amendment “can claim no warrant to democratic legitimacy through original popular sovereignty”). The courts, however, have rejected challenges to the legitimacy of the Reconstruction Amendments. *See generally* *White v. Hart*, 80 U.S. 646 (1871); *Leser v. Garnett*, 258 U.S. 130 (1922); *U.S. v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954).

6. *See generally* DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015* (2016). Kyvig argues that where amendments have occurred, the changes have been more lasting, while legislative responses to social problems during the New Deal and World War II eras have been more transient because they were not enshrined in the Constitution. *Id.*

On January 27, 2020, Virginia became the thirty-eighth state to ratify the Equal Rights Amendment.<sup>7</sup> However, despite having met the amending requirements of Article V, the ERA has not been published by the National Archivist (Archivist) as the Twenty-Eighth Amendment, as required by federal statute.<sup>8</sup> It remains in legitimacy limbo<sup>9</sup> awaiting resolution of numerous legal questions. Lamentably, the process of amending the Constitution and the procedures for ensuring that the Article V process is correctly followed are woefully underdeveloped. Moreover, for nearly two-and-a-half centuries, a number of procedural questions have lurked in the shadows of other constitutional amendments, potentially undermining their legitimacy and providing scope for legal challenges.<sup>10</sup> Yet no prior amendment has thrust us so directly down the rabbit hole that is Article V.

The ERA was born in procedural irregularity. It was first proposed in 1923, but it took a procedural technicality to get it out of committee, where it had languished for nearly fifty years, and to the House floor for a vote.<sup>11</sup> It was sent to the states by Congress in 1972, but it was saddled with a seven-year deadline when submitted for ratification.<sup>12</sup> Only thirty-five states had ratified by the end of the seven-year deadline, and five states had purported to rescind their ratifications. In

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7. S.J. Res. 1, Gen. Assemb., Reg. Sess. (Va. 2020). *See* Complaint at 10–11, *Virginia v. Ferriero*, 466 F. Supp. 3d 253 (D.D.C. 2020) (N. 1:20-cv-00242).

8. 1 U.S.C. § 106(b). On December 12, 2018, the National Archives and Records Administration (NARA) sent a letter to the U.S. Department of Justice's Office of Legal Counsel (OLC) asking it to weigh in on what exactly the Archivist should do if a thirty-eighth state ratified the ERA. The Archivist had been asked by Members of Congress to clarify what action he planned to take. While acknowledging that, "under 1 U.S.C. § 106b, he would be expected to publish the amendment to the Constitution when the requisite number of states have ratified it," the Archivist "request[ed] that OLC provide the Archivist with guidance on his role[.]" Letter from Gary M. Stern, General Counsel, The National Archives and Records Administration, to Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, (Dec. 12, 2018), <https://www.archives.gov/files/press/press-releases/2020/olc-letter-re-era-ratification.12-12-2018.pdf> [<https://perma.cc/C3X2-AW5V>]. A little more than one year later, the OLC issued a slip opinion in response, stating that it believed the Archivist could not certify the ERA because Congress's original deadline was binding and the post-1979 ratifications were thus invalid. *See* Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. at 1 (Jan. 6, 2020), <https://www.justice.gov/olc/file/1232501/download> [<https://perma.cc/LA9E-936S>]. Two days after OLC published this opinion, NARA issued a press release stating that it "defers to DOJ on this issue and will abide by the OLC opinion, unless otherwise directed by a final court order." Press Release, National Archives and Records Administration, NARA Press Statement on the Equal Rights Amendment (Jan. 8, 2020), <https://www.archives.gov/press/press-releases-4> [<https://perma.cc/6FMZ-5R7C>].

9. 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, 570 (1997).

10. Supreme Court litigation on procedural irregularities has centered around the controversial Eighteenth, Nineteenth, and Child Labor Amendments during a period of constitutional panic as six amendments in two decades were successful and the Child Labor Amendment was looking likely to succeed. KYVIG, *supra* note 6, at 240–67.

11. Representative Martha Griffiths of Michigan used a discharge petition to get the proposal out of the House Judiciary Committee, where Representative Emanuel Celler had refused to let it out. *Id.* at 404.

12. H.R.J. Res. 208, 92nd Cong., 86 Stat. 1523 (1972).

1978, Congress extended the deadline by three years and three months, until June 22, 1982; however, no states ratified or rescinded during the extension period. When the ratification period expired, the proposal lacked either three or eight ratifications to reach the thirty-eight required by Article V. Thirty-five years later, in 2017, Nevada ratified the ERA; Illinois did so in 2018; and Virginia did in 2020.<sup>13</sup> It took forty-nine years to get the ERA out of Congress and forty-eight years to be ratified, making that seven-year deadline on ratification look remarkably unreasonable.<sup>14</sup> With these three additional ratifications, a number of legal issues are no longer mere abstractions but pose direct, unresolved legal questions about the scope and interpretation of the Article V process.

On the face of it, the questions seem straightforward. There are two substantive legal issues that require resolution to determine the validity of the ERA, but these rely on a whole host of underlying procedural issues. First, it must be determined if the seven-year deadline for ratification is a permissible exercise of Congress's Article V powers or if it is an impermissible infringement of the states' sole power to control ratification.<sup>15</sup> Because no deadline has actually operated to potentially void an amendment that has met the technical requirements of Article V, all prior deadline concerns have been either moot or unripe.<sup>16</sup> It may also be necessary to determine, if Congress does have the power to impose a deadline,

13. S.J. Res. Const. Amend. 4, 100th Gen. Assemb., Reg. Sess. (Ill. 2018); S.J. Res. 2, 79th Leg. Reg. Sess. (Nev. 2017); S.J. Res. 1, 161st Gen. Assemb., Reg. Sess. (Va. 2020); see also Danaya C. Wright, "Great Variety of Relevant Conditions, Political, Social and Economic": The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V, 28 WM. & MARY BILL RTS. J. 45, 45 n.2, 46 nn.11–13 (2019).

14. Numerous scholars have shown that the holdup for all constitutional amendments has been Congress, which has rarely acted quickly or forthrightly in proposing constitutional amendments. See, e.g., Herman Ames, *The Amending Provision of the Federal Constitution in Practice*, in 63 PROCS. AM. PHIL. SOC'Y 62 (1924); see also RICHARD B. BERNSTEIN WITH JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? (1993).

15. Scholars have analyzed this issue and generally consider that it is impermissible. See generally Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437 (1999); Wright, *supra* note 13 *passim*; Michael C. Hanlon, Note, *The Need for a General Time Limit on Ratification of Proposed Constitutional Amendments*, 16 J.L. & POL. 663 (2000); Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113 (1997). Those scholars who accept that Congress may impose a time limit generally concede that Congress may change or waive the limit if the deadline is located in the preamble, as is the case with the ERA. See Robert Hajdu & Bruce E. Rosenblum, Note, *The Process of Constitutional Amendment*, 79 COLUM. L. REV. 106, 127 (1979); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 425 (1983) (suggesting that deadlines in the proposal may be valid but not in the preamble).

16. In the only case to discuss a deadline directly, *Dillon v. Gloss*, 256 U.S. 368 (1921), the issue was arguably moot because the amendment had been ratified within the deadline. The Eighteenth and Twentieth through Twenty-Sixth Amendments, with a deadline in either the text or the preamble, were all ratified within the time allowed. The D.C. Representation Amendment is the only outstanding proposal that has not been ratified within the deadline. And the ERA is now the only outstanding proposal that was ratified after the deadline expired.

whether it may extend, shorten, or waive the deadline after the proposal has gone to the states.<sup>17</sup>

Second, it must be determined if the five states that purportedly rescinded their ratifications may do so, thus necessitating additional state ratifications potentially beyond the three-fourths required by Article V. Although states have attempted to rescind in the past, no rescission has ever been recognized as valid, and the courts have not weighed in on the matter.<sup>18</sup> These two substantive questions represent only the first sally in our Article V analysis, however. As we try to ascertain the likely answers to these two questions, we find ourselves twisting around in a dizzying procedure maze, like Alice and the dodo in the Caucus-race.

Congress has made no laws governing the ratification procedures of the states, and doing so would raise serious constitutional questions, so matters involving the legal sufficiency of the three late ratifications, or the ratifications that were rescinded, are of first impression even though numerous questions about state ratifications have arisen in the past.<sup>19</sup> Once an amendment has been ratified, the Archivist is tasked with publishing that fact.<sup>20</sup> But what does the Archivist do if there are genuine questions as to whether the states have actually ratified? His is a ministerial duty, and the statute does not authorize the Archivist to judge the legal sufficiency of the ratifications he has received. However, at the time of writing, the Archivist has not published the ERA as the Twenty-Eighth Amendment.<sup>21</sup> He relies on a Department of Justice interpretation that the seven-year deadline is valid to

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17. Numerous scholars argued that Congress could change the deadline during the ERA extension debates. *See, e.g.*, Dellinger, *supra* note 15; Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979); Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, 4 WOMEN'S RTS. L. REP. 209 (1978). Others claimed it was impermissible. *See* Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 TEX. L. REV. 875 (1980); Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB. POL'Y 19 (1979).

18. There is extensive scholarship around the rescission issue with the general conclusion that rescissions are currently ineffective, but some have argued that they should be allowed. *See, e.g.*, Leo Kanowitz & Marilyn Klinger, *Can A State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979 (1977); A. Diane Baker, Comment, *ERA: The Effect of Extending the Time for Ratification on Attempts to Rescind Prior Ratifications*, 28 EMORY L.J. 71 (1979); William L. Dunker, Comment, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93 (1973); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63 (1978); Ishikawa, *supra* note 9, at 550; Hajdu & Rosenblum, *supra* note 15, at 171. *See generally* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 726 (1993) (proposing a theory that would allow for rescissions). The one court that did address the issue of rescissions, *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981) saw its opinion vacated by the Supreme Court when the issue became moot. *Carmen v. Idaho*, 459 U.S. 809 (1982).

19. *See* discussion *infra* Sections III.A and III.B.

20. 1 U.S.C. § 106(b).

21. *See* discussion *infra* notes 322–340 and accompanying text as to the ministerial duty of the Archivist.

justify his failure to act.<sup>22</sup> That reliance may violate his statutory obligation and potentially interpose the executive branch into the Article V amendment process. Moreover, the Supreme Court has held that an amendment becomes valid immediately upon ratification by the last state and that ratification certificates are conclusive, regardless of allegations of legal insufficiency.<sup>23</sup> So is the ERA already the Twenty-Eighth Amendment? Finally, Supreme Court precedent has been interpreted to suggest that determining the answer to some or all of these questions might fall within the political question doctrine and should be left to Congress, one of the parties whose Article V powers is being questioned.<sup>24</sup> Allowing Congress to decide is a bit like allowing the Queen of Hearts to accuse Alice the witness of being Alice the tart thief.

After repeated perambulations through the Article V wonderland, we find that the amending provision is a lot like the Swiss cheese served at the Mad Hatter's tea party—it is full of holes, completely unsatisfying, and raises more questions than answers. To get a handle on the complex issues underlying the ERA, one must first understand the process of amendment, the role of the Archivist, and the specific steps in the finely wrought procedure of Article V. Then, before we can decide if Congress has the power to impose a deadline on the states, or whether the states can rescind their ratifications, we need to consider the justiciability of these questions. What power the Archivist has to seek an opinion from the Office of Legislative Counsel (OLC), and what power the Archivist has to rely on that opinion, are also contested issues.<sup>25</sup> But until we know who will be deciding these questions, we cannot know whether the Archivist has breached his statutory duty to publish the Amendment. And who decides if the state ratifications are valid? Until we know the answers to these questions, we cannot begin to determine whether the states have overreached in rescinding or whether Congress has overreached in imposing a deadline.

In this Article, I focus first on the Article V process and its indeterminacy, exploring many of its gaps and ambiguities, including numerous procedural irregularities that have occurred in the past. I then analyze the role of the various parties in resolving those irregularities, including state legislatures, state courts, Congress, and the federal courts. I explore the Court's enigmatic opinions in *Leser*

22. Ratification of the Equal Rights Amendment, *supra* note 8, at 2.

23. *See generally* Dillon v. Gloss, 256 U.S. 368 (1921); *Leser v. Garnett*, 258 U.S. 130 (1922).

24. As discussed more fully below in Section II.C.2, the Supreme Court has suggested, although not held, that these procedural issues may be nonjusticiable political questions in *Coleman v. Miller*, 307 U.S. 433 (1939).

25. The State of Virginia sued the Archivist in the District Court for the District of Columbia, alleging that the deadline is unconstitutional and that the rescissions are ineffective and that consequently the ERA has become the Twenty-Eighth Amendment. *Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021), *appeal docketed*, No. 21-5096 (D.C. Cir. May 7, 2021). The case was dismissed on March 5, 2021 for lack of standing and is on appeal to the Court of Appeals for the DC Circuit. *See id.* at 48–49.

*v. Garnett*,<sup>26</sup> that state certificates of ratification are conclusive on the courts, and in *Coleman v. Miller*,<sup>27</sup> that Article V issues might be nonjusticiable political questions. These two opinions, in tandem, create a paradox that would have us running in circles like Alice in the Caucus-race. Working logically through the multitude of diverse directions, I offer a path forward in affirming the role of the federal courts in interpreting the Constitution and maintaining the federalism balance envisioned by the Framers. Although I do not go into great detail about the deadline and rescission issues on their merits because I have written about them more fully elsewhere,<sup>28</sup> I provide a brief analysis of their principal points and explain how they fit into our confusing Article V jurisprudence. After a discussion of the Archivist's role in this complicated process, I conclude the Article with the reminder that despite the constitutional panic of the 1920s and 1930s that prompted virtually all of our Supreme Court precedent on the subject, judicially manageable standards exist for resolving these issues, and they should be resolved now in favor of the ERA because it has met the technical requirements of Article V. At no time in our nearly two-and-a-half centuries has an amendment been voided when it has otherwise satisfied the Article V process, and now is not a time to deviate from that well-worn path even if the White Rabbit is enticing us down the rabbit hole with his proclamations of being late for a very important date.

#### I. EPILOGUE TO A PROLOGUE: THE BASIC STRUCTURE OF ARTICLE V

Article V sets out three steps for amending the Constitution and assigns those steps to either the states or to Congress. In its terse ninety words, Article V 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; . . . .<sup>29</sup>

According to this provision, Congress and the states share the power to propose constitutional amendments. The Framers originally gave only the states the power to propose amendments, but Congress was given a shared power late in the debates because it was assumed that Congress would be more attuned to the needs

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26. 258 U.S. 130 (1922).

27. 307 U.S. 433 (1939).

28. See Wright, *supra* note 13, on the deadline issue, and Danaya C. Wright, “*An Atrocious Way to Run a Constitution*”: *The Destabilizing Effects of Constitutional Amendment Rescissions*, 59 DUQ. L. REV. 12 (2021) on the rescission issue.

29. U.S. CONST. art. V. The remaining text of Article V imposes two limitations on the amending power that are irrelevant for our purposes: senate representation may not be diluted without a state's consent, and the slavery provisions may not be amended before 1808. *Id.*

of the national government and more willing than the states to propose changes that it deemed necessary.<sup>30</sup> To date, every constitutional amendment has originated from Congress, although thousands of state petitions for a convention have fallen upon deaf ears.<sup>31</sup> Congress is also given the sole power to determine the mode of ratification, as between state legislatures and state conventions. To date, all but one amendment has been ratified by state legislatures; only the Twenty-First Amendment was ratified by state conventions. The states have the sole power to ratify, either by legislature or convention, as dictated by Congress. Article V states that amendments shall be deemed “valid . . . *when* ratified by the legislatures of three-fourths of the several states . . . .”<sup>32</sup> Ratification by the states is, therefore, the final legally operative act in this multistep drama, and the Court has held that the amendment becomes effective immediately.<sup>33</sup> Although Congress and the President have occasionally “approved” or “accepted” an amendment in the past, it is now generally accepted that Congress has no role in accepting or affirming an amendment.<sup>34</sup> Similarly, the Supreme Court held that the President has no role in the amending function.<sup>35</sup>

The relatively spare language of Article V does not expressly provide Congress the power to impose deadlines on the states for ratification, nor does it expressly permit states to rescind their prior ratifications. It does not give Congress the power to determine when or whether an amendment has been ratified. Nor does it grant to Congress any power to determine the legal sufficiency of state ratifications. There is no explicit role for the executive or judicial branches, and there are no guidelines as to how the states shall ratify. As James Madison mused, such “difficulties . . . as to the form, the quorum, &c . . . in Constitutional regulations

30. Roger Sherman proposed allowing Congress to also propose amendments along with the states. See BERNSTEIN & AGEL, *supra* note 14, at 19. Hamilton first broached the idea, stating, “The State Legislatures will not apply for alterations but with a view to increase their own powers—The National Legislature will be the first to perceive and will be most sensible to the necessity of amendments, and ought also to be empowered, whenever two-thirds of each branch should concur to call a Convention—There could be no danger in giving this power, as the people would finally decide in the case.” *Id.* at 18–19.

31. Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 56 (1996); Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693, 697 (2011); see also JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES*, 1789–2002, at 108, 507 (2nd ed. 2003).

32. U.S. CONST. art. V (emphasis added).

33. *Dillon v. Gloss*, 256 U.S. 368 (1921) (holding that a criminal defendant was properly subject to the Volstead Act, passed under authority of the Eighteenth Amendment, which became effective one year after ratification).

34. See Congressional Pay Amendment, 16 Op. O.L.C. 85, 99 (1992) (“[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice.”).

35. *Hollingsworth v. Virginia*, 3 U.S. (3 Dallas) 378, 379 (1798); see also Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7 Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1275 (2005).

ought to be as much as possible avoided.”<sup>36</sup> In response, Richard Bernstein and Jerome Agel explain, “[a]s with so many other parts of the Constitution, the scope of the amending process codified in Article V awaited definition by those who would seek to wield it in the future.”<sup>37</sup> Nearly two-and-a-half centuries later, we are still awaiting that definition.

*A. Down the Rabbit Hole: Into the Article V Wonderland*

Like Alice falling down the rabbit hole, trying to unravel Article V procedure is a bit like having a conversation with the Queen of Hearts. Despite its deceptive simplicity—Congress proposes an amendment, the requisite number of states ratify, and voila!, the amendment becomes a part of the Constitution—there is so much uncertainty in the process that once one begins to think about it, one’s head quickly starts to spin. It is truly remarkable that things have worked as well as they have so far.<sup>38</sup>

To see why that is, consider what would happen if amendments had not passed quite so smoothly in the past. For instance, what if the House of Representatives voted to propose an amendment one year and the Senate refused to take it up that year but took it up the next year and passed it with the requisite two-thirds majority? There is nothing in Article V that mandates that both houses of Congress must pass a joint resolution to propose an amendment in the same year. And yet congressional rules and historical precedent establish that both houses of Congress must vote on a joint resolution in the same session.<sup>39</sup> The fact that Article V says nothing about when or how Congress shall execute its proposal power does not mean that Congress cannot make rules or constrain its Article V powers through reasonable procedures. That vagueness, or lack of express direction, leaves discretion in Congress to determine the procedures for how it will exercise its proposal power.

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36. BERNSTEIN & AGEL, *supra* note 14, at 21.

37. *Id.* at 30.

38. This is not to say that there have not been anomalies and legal challenges to various amendments. There were many questions with the Civil War Amendments, although no procedural challenges were litigated. Legal challenges with the Eighteenth and Nineteenth Amendments produced almost the entirety of our Article V procedure jurisprudence. Then, of course, the Twenty-Seventh Amendment, which many consider a joke, was ratified and affirmed over two hundred years after it was first proposed. So, the twenty-seven amendments are not exemplars of perfect adherence to the Article V procedure by any means.

39. Current congressional rules provide that constitutional amendments go to the House and Senate Judiciary Committees, but there is no special treatment of the process for proposing a constitutional amendment. STANDING RULES OF THE Senate, S. DOC. 113-18, r. XXV(2)(m)(4), at 26 (2013) (noting constitutional amendments are referred to the Committee on the Judiciary), <https://www.rules.senate.gov/rules-of-the-senate> [<https://perma.cc/ATH5-QZXR>]. The joint resolution process is not defined other than to treat it like the bill procedure. *See* RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED SIXTEENTH CONGRESS, H.R. DOC. 115-117, r. X(1)(L)(6), at 8 (2019) (noting that constitutional amendments are within the jurisdiction of the Committee on the Judiciary), <https://rules.house.gov/sites/democrats.rules.house.gov/files/documents/116-House-Rules-Clerk.pdf> [<https://perma.cc/Y97W-HWNM>].

But it would be safe to assume that the Senate cannot take up a resolution passed by the House thirty years earlier and suddenly pass it and send it to the states without triggering a lawsuit, complaints by House members, or stall tactics by opposing Senators.<sup>40</sup> Nor can either house be deemed to have approved a proposal on simply a committee vote. And yet if the Senate did either, would it have violated the text or the spirit of Article V? When the House voted to approve the Twenty-Second Amendment by a vote of 81-29, reflecting only about one-quarter of its total membership, the vote was not challenged.<sup>41</sup>

Similarly, Article V does not specify the procedures that state legislatures must follow in ratifying an amendment proposal. They are left to determine the rules themselves, and some states have adopted rules that require simple majorities, others require supermajorities, some require a simple majority of a quorum, and some require a simple majority of all elected legislators.<sup>42</sup> Again, the process for ratification is left to the discretion of the states, but one could reasonably assume that there are some implied constitutional limits to state discretion. Presumably, a state could not require legislative unanimity, nor could a state permit the governor or a legislative committee to decide.<sup>43</sup> But even if a state requires a supermajority, what happens if its legislature ratifies a proposal with only a simple majority?<sup>44</sup> Has it violated Article V? And who decides if it has violated Article V and on the basis of what rules, standards, or canons of construction?

This may seem more like the stuff of law school exams than established constitutional jurisprudence, but these issues have arisen before. For instance, in a

40. Although it would be against congressional rules to pass bills or resolutions in different sessions of Congress, each house establishes its own rules and one could, conceivably, change its rules unilaterally and there 'is not much the other house could do.

41. KYVIG, *supra* note 6, at 331.

42. For instance, Kansas House Rule section 2707 requires a two-thirds majority of all elected members to ratify a constitutional amendment, as do Colorado's Senate Rules. *See* LEGIS. COUNCIL, COLORADO LEGISLATIVE RULES, RSH. PUB. NO. 571, S. r. 26(b), at 76 (1st Sess. 2021); RULES OF THE KANSAS HOUSE OF REPRESENTATIVES: 2021–2022 BIENNIUM, H. r. 2707(b), at 32. The Illinois Constitution, Article XIV section 4, requires a three-fifths vote of all elected members of each house, as well as an intervening election. Delaware, Georgia, Idaho, and Alabama also require supermajorities of all elected members. The Illinois Constitution's three-fifths majority was held to be non-binding in *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill., 1975), but Illinois's legislature rules also call for a three-fifths majority vote. Florida has no rules on whether ratification follows regular bill procedures or resolution procedures, and the Florida Constitution requires an intervening election, which has been held to be unconstitutional. *See* FLA. CONST. art. X, § 1; *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973). Illinois and Florida both have provisions in their constitutions requiring an intervening election, but they were held to be unconstitutional in *Dyer v. Blair*, 390 F. Supp. at 1309, and *Trombetta*, 353 F. Supp. at 578. Seventeen states appear to require a simple majority, the same as is required for bill passage, while a handful (three) require different majorities between their two houses. *See Dyer*, 390 F. Supp. at 1305 n.34. Twenty-four states require a constitutional majority. *Id.*

43. This is not so far-fetched, as some states at the founding used executive councils to enact laws. *See Hawke v. Smith*, 126 N.E. 400, 404 (Ohio 1919).

44. As discussed below, this has happened, and the Federal District Court ruled that the ratification was ineffective because it did not comply with the legislature's supermajority rule. *See Dyer*, 390 F. Supp. at 1308–09.

case involving the Illinois ratification of the ERA, *Dyer v. Blair*,<sup>45</sup> Judge Stevens (before he was Justice Stevens) ruled that the Illinois Constitution's mandate of a supermajority to ratify a constitutional amendment was ineffective but that the Illinois legislative rules requiring the same supermajority was effective.<sup>46</sup> He reasoned that the constitutional amendment requiring a two-thirds majority was irrelevant because it was established by the electorate, which has no Article V powers, but the legislative rule was effective because the state legislature is the body granted the sole ratification power.<sup>47</sup> He did not render any opinion, however, on more extreme variations of state legislative discretion, such as whether a legislative committee could ratify or whether a legislature could require gubernatorial approval.<sup>48</sup> The Constitution merely requires that states "ratify" a proposal. If state legislatures get to decide what constitutes ratification, they could presumably impose all sorts of procedural requirements to make it easier or more difficult to ratify.

If that seems unlikely, consider that when Idaho ratified the ERA, it did so with a supermajority pursuant to its legislative rules, but it rescinded with a simple majority vote.<sup>49</sup> Are ratifications and rescissions different procedures? And when Kansas ratified the Child Labor Amendment in 1937, the Lieutenant Governor voted to break a tie in the Kansas Senate.<sup>50</sup> Tennessee ratified the Nineteenth Amendment in violation of a state constitutional requirement of an intervening election, and it was alleged that West Virginia violated its own legislative rules when it ratified the Nineteenth Amendment because a senator had to rush home from a trip to break a tie vote.<sup>51</sup> Missouri ratified the Nineteenth Amendment arguably in violation of its constitutional amendment that prohibited its legislature from ratifying any amendment that would "impair the right of local self-government, belonging to the people of [the] state."<sup>52</sup> And Tennessee ratified the Fourteenth Amendment by arresting and imprisoning opposing legislators in order to meet the quorum requirements, even though they were not allowed to vote.<sup>53</sup> It was alleged

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45. *Id.*

46. *Id.*

47. *Id.* at 1307.

48. Numerous ratifications have included gubernatorial approvals, though it is unclear if all were required by state procedure or it was simply added pro forma. See U.S. GOV'T PUBL'G OFF., AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1992) [hereinafter GOV'T PUBL'G OFF., AMENDMENTS] <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-7.pdf> [<https://perma.cc/MA2E-DDPN>].

49. The fact that Idaho was willing to litigate the issue of the rescissions even though it had rescinded with less than the required supermajority suggests that this was not so much about testing a real rescission case, but about the politics of the ERA and expressing the state's frustration with the impending deadline extension. H.R. Con. Res. 10, 44th Leg., Reg. Sess. (Idaho 1977). See KYVIG, *supra* note 6, at 415–16.

50. See 66 CONG. REC. 3212 (1925).

51. *Leser v. Garnett*, 114 A. 840, 841–42 (1921); see also KYVIG, *supra* note 6, at 248–49.

52. KYVIG, *supra* note 6, at 248–49.

53. *Id.* at 170.

in 2015 that the Seventeenth Amendment was not properly ratified because Wisconsin's ratification was of a text that contained punctuation differences and omitted a section and because California purportedly never voted at all.<sup>54</sup> Although not so great as to void an amendment, these procedural or substantive irregularities have been argued by political opponents of certain amendments as legal grounds for denying the validity of an amendment. The most controversial amendments—the Fourteenth, Fifteenth, Eighteenth, Nineteenth, the Child Labor Amendment, and the ERA—were challenged in court and their legal legitimacy called into question by these procedural irregularities.<sup>55</sup> What makes the issue so confounding, however, is that it is quite unlikely that Congress could impose any procedural regularity without an amendment to Article V itself since Congress has no role in the ratification process, arguably even to establish minimum standards.<sup>56</sup> Without such a clear-cut resolution, we find ourselves, like Alice, wandering through a world in which every path circles back on itself, dead ends appear like well-traveled thoroughfares, and the White Rabbit dashes by distracting us from our quest.

We do have a few guideposts, however. We know that states ratifying amendment proposals are engaging in a federal function defined by Article V and are not exercising their legislative function as part of their state sovereignty.<sup>57</sup> They are participants in the constitution-making process as the independent sovereign states' legal agents and their people who came together to cede a portion of their power to a national government.<sup>58</sup> As independent legal sovereignties that ratified

54. Brief of Appellant at \*2–8, *Kidd v. Cascos*, No. 03-14-00805-CV, 2015 WL 5001194 (Tex. App. June 29, 2015). The court held both of these objections to be meritless. *Kidd*, 2015 WL 9436655, at \*3–4.

55. *Kidd*, 2015 WL 9436655(; *Hawke v. Smith*, 253 U.S. 221 (1920); *Dillon v. Gloss*, 256 U.S. 368 (1921); *Leser v. Garnett*, 258 U.S. 130 (1922); *Dyer v. Blair*, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975); *Coleman v. Miller*, 307 U.S. 433 (1939); *Chandler v. Wise*, 307 U.S. 474 (1939).

56. There is serious question as to Congress's authority to legislate matters of detail regarding the Article V process. In 1869, a resolution was introduced to require that state legislatures discuss proposed constitutional amendments on the sixth day of their next legislative session and continue to discuss it until a final decision is made. CONG. GLOBE, 41st Cong. 1st Sess. 75, 102, 334 (1869); see also Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 208 (1951) (“Whether such a measure is within the power of Congress incident to the power of submission of amendments is doubtful.”). The consensus was that such a requirement would be unconstitutional. *Id.*; see also LESTER BERNHARDT ORFIELD, *THE AMENDING OF THE FEDERAL CONSTITUTION* 64–65 (1942). Since the states may not require popular referenda on proposed amendments, it is equally likely that Congress may not do so. The fact that Congress may not legislate the terms and conditions of state ratifications in ways that clearly contradict Article V suggests that Congress may not legislate the terms and conditions at all. For that reason, 1 U.S.C. § 106(b) has been the only legislation Congress has passed regarding the Article V process, and any more substantive legislation would seem to raise serious constitutional questions.

57. Numerous courts have noted that ratification is a federal function authorized under the Constitution and is not part of the states' independent sovereign power. See *Leser*, 258 U.S. at 137; *Dyer*, 390 F. Supp. at 1303.

58. *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316, 402–05 (1819).

the Constitution in the first place, the states had sole independent power to bind themselves and to cede their power to be governed by a constitution.<sup>59</sup> When they ratified the Constitution, they were acting as independent sovereignties. But when they amend, they are acting under the authority of Article V. Yet Article V treats them as the independent sovereignties they were in 1787. So is their ability to make rules on how to ratify a part of their retained sovereign powers or a power returned to them and constrained by Article V?<sup>60</sup> Where that power lies could have an impact on who determines whether they have acted within their constitutional bounds when they ratify or rescind.

The Supreme Court has held that the President has no role in the amending process,<sup>61</sup> which would possibly exclude the power of the Archivist, an executive branch official, or the Department of Justice, to provide binding determinations of the legal sufficiency of the ERA ratifications. Nor can the entire state electorate have Article V powers to ratify.<sup>62</sup> The Court established that the Framers meant “legislature” in its commonsense meaning in Article V and thus did not grant the electorate the power to validate a legislature’s ratification by popular referendum.<sup>63</sup> Nor can a state, by legislative rule or a constitutional amendment, require an intervening election of its state legislature before that body may ratify a proposed amendment.<sup>64</sup> But what if a state decided that its legislature would consist of every person who was born on July 4th? Would that body constitute a legislature for purposes of Article V? Of course, there might be Guarantee Clause issues here that get us out of that dead end,<sup>65</sup> yet Article V still does not specify what is meant by a legislature nor does it specify what the act of ratification means or how it is done. Perhaps, as with congressional rules on joint resolutions, we can safely assume that the popularly elected body that engages in the lawmaking function of the state is the

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59. *Id.*; see also Andrew G.I. Kilberg, Note, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061 (2014).

60. An interesting diversion to further complicate the issue is whether a state that permits constitutional ratification by referenda, or legislation by referenda, could see the population insisting that the legislature ratify or demanding that the legislature not ratify. Vikram David Amar discusses the role of the people in the Article V amendment process in *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

61. *Hollingsworth v. Virginia*, 3 U.S. (3 Dallas) 378, 381 n.\* (1798).

62. See generally *Hawke v. Smith*, 253 U.S. 221 (1920).

63. *Id.* at 231.

64. *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973); *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972).

65. Obviously, ratification means to affirm a proposal, but whether a lieutenant governor can break a tie in a state senate in order to reach a majority vote or whether a governor can veto a state’s rescission is unsettled. The Kansas Supreme Court said yes in *Coleman v. Miller*, 71 P.2d 518, 527 (Kan. 1937), but the United States Supreme Court failed to reach an opinion on that issue in *Coleman v. Miller*, 307 U.S. 433, 447 (1939). And Governor Ward of New Jersey vetoed its rescission of the Fourteenth Amendment but there was no judicial pronouncement on the appropriateness of that veto. See KYVIG, supra note 6 at 174.

legislature and that if it votes by at least a majority vote in favor of approving an amendment proposal, then Article V has been satisfied. Frankly, if a state legislature consisted of everyone born on July 4th, we would probably have far more of a constitutional crisis than just the Article V irregularities posed here.

Yet even with our basic guideposts, the rabbit hole continues on its winding path. If the Constitution allows a state to set its own legislative rules on ratification, what if it chose to violate its own rules? Would it have violated only a state legislative rule, or would the state have also violated Article V? Would it only violate Article V in certain circumstances? For instance, it would seem logical that if state legislative rules call for a supermajority vote to ratify a constitutional amendment, but the legislature ratifies with only a simple majority, it has violated state law but not Article V.<sup>66</sup> But if it ratifies with less than a majority at all, then it violates both. Can a state violate its own laws but not Article V when it engages in the constitutionally defined ratification function? Presumably, there is no reason why it might not if Article V allows states to set their own rules for ratification. So that leaves us in the sticky situation in which the question of whether states have properly exercised their Article V ratification function is a matter of federal constitutional law but the Constitution grants to the states broad discretion in how they exercise that function. Does that make Article V ratification questions matters of state law? And if a state chooses to impose a supermajority requirement on ratification and violates that law, has it violated the U.S. Constitution or state law or both or neither? Finally, who is going to tell us whether it has or not?

This indeterminacy in both the proposal and the ratification functions are first-level problems. What happens when we get to second-level issues, such as Congress imposing a limitation on the states' ratification function through its proposal power? If Congress issues a proposed amendment with a section requiring that states ratify the proposal with supermajorities, that they ratify within three years, that they must get the governor's signature, or that they must hold a popular vote, has Congress used its proposal power to invade the ratification power of the states?<sup>67</sup> It would seem the answer is clearly yes. Both the procedure for ratification as well as the determination whether to ratify are granted solely to the states. Using the proposal function, or the mode of ratification function, to influence or control how the states ratify would be unseemly.<sup>68</sup> Congress telling the states they must have

66. Although Judge Stevens affirmed the Illinois legislative rule requiring a super-majority, he did not venture to discuss whether the simple majority ratification satisfied Article V, and should therefore bind the state, in *Dyer v. Blair*. 390 F. Supp. 1291, 1305 n.35 (1975).

67. These issues have been discussed and attempts to impose congressional limits, like an intervening election, have failed. *See* discussion *infra* notes 243, 303–06.

68. Senator Cummins commented on the deadline added to the Eighteenth Amendment as follows: “[The deadline amendment] is not only an exercise of authority which has not been granted to us by the Constitution, but it is exceedingly unfair and unjust . . . . Our authority is exhausted when we declare that an amendment shall be proposed to the States.” 55 CONG. REC. 5652 (1917) (statement of Sen. Cummins).

a supermajority or they must ratify within a specified time would seem to infringe on the states' function to determine whether or not to ratify, even if it were located in a proposal issued under Congress's legitimate Article V proposal power. If a majority would ratify but a supermajority would not, and state law permits only a simple majority, then how can Congress impose a different standard? If states have the power to determine whether to ratify, then how can Congress impose a limit on when they can make that determination?<sup>69</sup> Both seem to be an infringement of the states' sole ratification power through an illegitimate expansion of Congress's proposal power. And what would happen if Congress or the Archivist were to accept Illinois's 1972 ratification of the ERA by a simple majority when its legislative rules call for a supermajority or were to deny ratification by a simple majority because Congress had required a supermajority? Only a ratified constitutional amendment to Article V detailing the ratification procedure would seem consistent with Article V.<sup>70</sup>

To add just one more teensy-weensy twist in our procedural path, there might be a difference if Congress imposes a ratification restriction in the text of the amendment proposal itself rather than in the mode of ratification.<sup>71</sup> For instance, when the first deadline was proposed in the Senate deliberations on the Eighteenth Amendment, Senator Warren Harding suggested a third section to the proposal, adding what eventually became a seven-year deadline on the states to ratify.<sup>72</sup> Senator Brandegee of Connecticut strongly opposed the deadline, explaining:

[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 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.<sup>73</sup>

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69. It is actually a matter of Congress limiting the right of states to change their minds and ratify after rejecting, or after taking no action, which is a right under Article V recognized in *Coleman v. Miller*, 307 U.S. at 472–73. States have a constitutionally recognized right to change their minds and ratify after rejecting, and a deadline certainly precludes them from doing so unless they do it within the short timeframe given. *Id.*

70. See Hanlon, *supra* note 15, at 684–85.

71. Four amendments (Eighteenth, Twentieth, Twenty-First, and Twenty-Second) contained deadlines in the text of the amendments themselves, while four later amendments (Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth) contain the deadline in the preamble, or resolving clause. See U.S. CONST. amends. XVIII, XX, XXI, XXII, XXIII, XXIV, XXV, XVI.

72. U.S. CONST. amend. XVIII, § 3 (“This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”) The Twentieth, Twenty-First, and Twenty-Second Amendments contain identical language. See U.S. CONST. amends. XX, § 6, XXI, § 3, XXII, § 2.

73. 55 CONG. REC. 5651 (1917) (statement of Sen. Brandegee).

In other words, the deadline could not be an effective limit on the states until the proposed amendment had been ratified, at which point the deadline would be irrelevant and inoperative. Only if the states ratified the amendment after the deadline would the restriction be potentially operative. And either the proposed amendment would have self-destructed as a result of the deadline even though the amendment *and its deadline* was not fully ratified or, more logically, the deadline could not operate to kill the amendment until after it was ratified beyond the deadline. And for that to happen, the late ratifications must have been effective in order to animate the proposed amendment, only to have the suddenly effective deadline snuff it out. But if the ratifications after the deadline were never effective, then the deadline never becomes operative. Only if the ratifications were operative, in violation of the deadline, could they breathe life into the deadline that would consequently render them inoperative. Like the riddle that says on one side of a piece of paper, “The statement on the other side of this paper is true,” and on the other side says, “The statement on the other side of this paper is false,” deadlines in the proposal that would void a tardy ratification would fit right into Alice’s Wonderland.<sup>74</sup>

Further puzzles appear when we consider the role of popular opinion in amendment ratification. The Court has held that legislative ratification is not subject to a subsequent popular referendum.<sup>75</sup> But what about advisory referenda, either before or after the legislative vote? This issue came up repeatedly in state courts as people signed petitions to bring amendment proposals to the public, especially in the case of Prohibition, after their state legislatures voted to ratify.<sup>76</sup> The states split on the issue, but the Supreme Court’s decision in *Hawke v. Smith* settled most of these questions. Questions of popular opinion and advisory referenda also arose in the case of the ERA,<sup>77</sup> but litigation on those issues was arguably unripe. Nonetheless, what if a state, like California, has a provision for popular instigation of legislation and the state votes to order its legislature to ratify, or not to ratify, a proposed amendment?<sup>78</sup> Could the electorate pass a state

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74. Deadlines and other limits exercised pursuant to the mode of ratification may be logically distinguished because the mode of ratification is established in a preamble that identifies whether the proposed amendment shall be ratified by state legislatures or state conventions. The preamble is not part of the amendment being ratified and does not become operative once the proposed amendment has been ratified by the requisite number of states. Nonetheless, it would seem especially problematic for a preamble that has no legally binding authority other than to specify the mode of ratification to void state ratifications undertaken pursuant to the states’ sole ratification power. For more on this, see Wright, *supra* note 13, at 55–58.

75. *Hawke v. Smith*, 253 U.S. 221 (1920).

76. *Prior v. Noland*, 188 P. 729 (Colo. 1920); *Barlotty v. Lyons*, 189 P. 282 (Cal. 1920); *Decher v. Vaughan*, 177 N.W. 388 (Mich. 1920); *Carson v. Sullivan*, 223 S.W. 571 (Mont. 1920); *State ex rel. Gill v. Morris*, 191 P. 364 (Okla. 1920); *State ex rel. Mullen v. Howell*, 181 P. 920 (Wash. 1920).

77. *Askew v. Meier*, 231 N.W.2d 821 (N.D. 1975); *Kimble v. Swackhamer*, 584 P.2d 161 (Nev. 1978).

78. See generally Amar, *supra* note 60.

constitutional amendment mandating the legislature ratify the ERA? These are not entirely far-fetched ideas, as Professor Amar discusses in his work.<sup>79</sup>

But before we tie ourselves up in logistical knots that even Houdini could not escape, we must remember that past procedural irregularities have been sidestepped or ignored, yet we have not found ourselves floundering on a constitutional seashore like a walrus out of water. But the Court's kicking the can down the road, just to add another random metaphor here, does not provide much comfort as we experience the constitutional crises of the Trump era, the politicized Department of Justice, and a Supreme Court willing to overturn well-established precedent.<sup>80</sup> The ERA directly presents some of the most important unanswered questions about Article V procedure at a moment in time when clarity is most needed and least likely to be obtained. In the case of the ERA, we are not dealing with the extreme examples of legislative committees ratifying a proposed amendment or Congress imposing a particular ratification requirement in the text of the amendment itself. Instead, we are dealing with state ratifications after a congressional deadline located in the preamble and rescissions after states have ratified and submitted their certificates of ratification to the Archivist. And although there are some simple-majority/supermajority issues raised in the rescissions, and a gubernatorial veto, we are not in the hinterlands of potential constitutional irregularities.

To keep from disappearing down the many dark side paths of our Article V perambulations, let's assume that Article V grants the states a certain amount of discretion to establish their own procedures for amendment ratifications. Let's also assume that certain processes may be beyond the range of Article V, and that those might include congressional deadlines and gubernatorial approval but not the simple-majority/supermajority divide. And we can reasonably analogize to the legislative process, so that congressional proposals, like a statute, must occur in the same session of Congress.<sup>81</sup> Further, state ratifications, like the Presidential signature or veto, are a reasonably defined act of their legislatures that follow standard law-making norms. But that leaves us still with the terribly important unanswered question of who decides when a state's ratification (be it a late one or one followed by a rescission) is legally sufficient under Article V. That power could lie with Congress as the national political body that is responsible for the political and policy decisions that underlie constitutional amendments and the structure of our republic. After all, the Supreme Court has held that Guarantee Clause issues are nonjusticiable political questions and, on the same reasoning, could rule that Article

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79. *Id.*

80. *See, e.g.*, Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129 (2019); RICHARD H. FALLON, JR., 'LAW AND LEGITIMACY IN THE SUPREME COURT (2018). These are just two of the more academic treatments of the current crisis in constitutionalism.

81. Michael Stokes Paulsen would adopt a legislative model analogy for Article V. *See* Paulsen, *supra* note 18, at 721–33.

V issues are political questions.<sup>82</sup> It could lie with the federal courts as the bodies responsible for interpreting the Federal Constitution. Justice Marshall's epic phrase that "[i]t is emphatically the province and duty of the judicial department to say what the law is"<sup>83</sup> provides direct support for judicial review of Article V issues. It could lie with the state legislatures as the principal agents in the constitution-making process and the legally binding agent of independent sovereignties.<sup>84</sup> Or, it could lie with the state courts as the entities that ensure compliance with state law and have constitutional authority to limit the state's independent sovereignty.<sup>85</sup>

There are valid arguments for all of these options, although scholars who have studied this subject generally agree that the federal courts are the most logical choice because they are not participants in the Article V process so they would not be guilty of aggrandizing themselves, as could be expected of Congress and the state legislatures.<sup>86</sup> But, as we learned in *Bush v. Gore*, the courts can and do participate in functions, like electing a president, to which they are not constitutional parties.<sup>87</sup> At the end of the day, the importance of constitution-making supports the conclusion that federal and not independent state courts should provide guidance, continuity, and a commitment to a uniform federal structure. For, as Judge Stevens stated in *Dyer*, "We are persuaded that the word 'ratification' as used in article V of the federal Constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making."<sup>88</sup>

Unlike Alice, who simply wakes up and finds herself back in her normal world, we cannot wake up to find the ERA puzzles have vanished. Even if they did, they would still exist for another amendment on another day. Therefore, to escape our rabbit hole, it makes sense to use the kind of navigation tools—original understandings, canons of construction, prior practices, and judicial precedent—that courts commonly use to construe the many ambiguities of our Constitution.

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82. *Luther v. Borden*, 48 U.S. (7 Howard) 1, 56 (1849); Ryan C. Williams, *The "Guarantee" Clause*, 132 HARV. L. REV. 602, 679 (2018). But some critics disagree with the nonjusticiability of Guarantee Clause disputes. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849 (1994).

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

84. If the state legislatures have the unlimited power to ratify, then their certificates of ratification should be, as they are, deemed conclusive.

85. See generally Hon. Chase T. Rogers, *Putting Meat on Constitutional Bones: The Authority of State Courts to Craft Prophylactic Rules Under the Federal Constitution*, 98 B.U. L. REV. 541 (2018); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST.L.Q. 93 (2000); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1 (2007).

86. See sources cited *infra* note 204.

87. *Bush v. Gore*, 531 U.S. 98 (2000).

88. *Dyer v. Blair*, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975).

*B. Escaping the Rabbit Hole*

We cannot really be surprised that Article V provides little guidance to these technical questions when the rest of the Constitution is equally enigmatic. But before we turn to those tools, let's be clear on the specific ERA questions that we seek to have answered. First, we want to know if Congress can impose a deadline on the states for ratifying. That means we want to know if ratifications after that date are valid (because Congress lacks the power to restrict the states' ratification function) or are invalid (because Congress may set conditions on states ratifying, either through its proposal power or its mode of ratification power).<sup>89</sup> This is a federalism question about the balance of power between the states and Congress. We also need to know if the Archivist may rely on the executive branch opinion, which, like that of the hookah-smoking caterpillar, is advice that comes from an official with no Article V authority. There is no role for the executive branch in the Article V process, so to imagine that the OLC can provide binding guidance to the Archivist is certainly problematic.<sup>90</sup> And if it is not binding and only advisory, then who judges whether the OLC's advice is accurate or not? Some states have alleged that the deadline is an unconstitutional usurpation of the states' sole ratification power and a violation of the federalism balance guaranteed by the Tenth Amendment.<sup>91</sup> Surely neither the states nor Congress should have the sole power to resolve that dispute, as they are parties to the transaction. That leaves the federal courts.

Second, we need to know if states may rescind their ratifications after submitting certificates of ratification to the Archivist. If the Archivist is going to

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89. The answer to this question may implicate further questions, such as whether Congress can extend or waive a deadline once given, whether in the text of the proposal or in the preamble. This was a big issue with the ERA extension debates, even after Congress voted by a simple majority to add three years and three months to the deadline. *See, e.g.,* Held, Herndon & Stager, *supra* note 15; Witter, *supra* note 17; Ginsburg, *supra* note 17; Rees, *supra* note 17; Hatch, *supra* note 17; Baker, *supra* note 18; Comment, *The Equal Rights Amendment and Article V: A Framework for Analysis of the Extension and Rescission Issues*, 127 U. PA. L. REV. 494 (1978).

90. When federal officers have legal questions as to their assigned roles and functions, they may submit those questions to the Attorney General. 28 U.S.C. § 511 provides: "The Attorney General shall give his advice and opinion on questions of law when required by the President." It makes sense that the Archivist may solicit a legal opinion from the Office of Legal Counsel, which was done in this case and in the case of the Twenty-Seventh Amendment. Ratification of the Equal Rights Amendment, *supra* note 8; Congressional Pay Amendment, *supra* note 34. However, OLC opinions cannot be legally determinative for multiple reasons. The Executive has no apparent role in the Article V process. Only Congress and the states are expressly granted power to effectuate amendments to the Constitution. U.S. CONST. art. V. The Supreme Court has held that the President has no role in that process. *Hollingsworth v. Virginia*, 3 U.S. (3 Dallas) 378, 381 n.\* (1798). If the opinion of the OLC were binding, that would impermissibly interject the Executive branch into the amendment process. If an OLC opinion could be determinative, the President could essentially subvert the will of Congress, the States, and the people.

91. Petitioners unsuccessfully made this argument in *Dillon v. Gloss*, but states have made the argument again in the ERA litigation in the District Court for the District of Columbia. *See* Complaint, *Virginia v. Ferriero*, 525 F. Supp. 3d 36 (D.D.C. 2021) (No.1:20-cv-00242).

publish the ERA, then he needs to know if the rescissions are valid. Again, does he look to the Department of Justice? Can Congress make that call? The Supreme Court has held that amendments become effective immediately upon ratification by the last state and publication is a ministerial duty only.<sup>92</sup> If the courts determine that the rescissions are ineffective, then the Twenty-Eighth Amendment became a part of the Constitution on January 27, 2020, and the two-year window to implement it is gradually closing.<sup>93</sup> The Court has also stated that ratification certificates are conclusive on the Archivist despite allegations of legal insufficiencies.<sup>94</sup> The Archivist has received thirty-eight ratifications, and yet he has not published the ERA. Has he breached his statutory duty? Can Congress impose anything more than statutory duties of publication on the Archivist if Article V is self-executing? But if it is self-executing, what happens if a state's ratification is legitimately called into question? Who decides if the ratification certificate complies with Article V or state law: Congress, the state courts, the federal courts, the Archivist, state legislatures, the Department of Justice? There seem to be too many forks in our Article V road, but most are dead ends.

## II. THE WHITE RABBIT OR THE CHESHIRE CAT: WHOSE ADVICE SHOULD WE FOLLOW?

In Alice's efforts to make her way through Wonderland, numerous characters give her direction and advice, but to whom should she listen? The Caterpillar tells her that one side of the mushroom makes her grow and the other makes her shrink. The Cheshire Cat tells her the way to the March Hare's house. The White Rabbit keeps running by apparently with some knowledge of where the different roads lead. If we know who to follow in our Article V wonderland, we can eventually return to stable ground. As noted earlier, these choices are the federal courts, the state courts, Congress, or the state legislatures. Let us take a few minutes to consider the merits of each, remembering that Article V does not provide an answer, nor do Articles I or III.

### *A. State Legislatures*

Because Article V grants the sole ratification function to state legislatures, we could rationally leave the decision about the legal sufficiency of state ratifications to the legislatures that enact them, assuming we can feel confident as to what body

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92. *Dillon v. Gloss*, 256 U.S. 368, 376–77 (1921); *U.S. v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988); *U.S. v. Stahl*, 792 F.2d 1438, 1441 (9th Cir. 1986).

93. Section 3 of the ERA provides that “[t]his amendment shall take effect two years after the date of ratification.” Equal Rights Amendment of 1972, H.R.J. Res., 92 Cong., 86 Stat. 1523 § 3.

94. *Leser v. Garnett*, 258 U.S. 130, 137 (1922); *see U.S. v. Sprague*, 282 U.S. 716 (1931); *Chandler v. Wise*, 307 U.S. 474, 477–78 (1939).

makes up the legislature.<sup>95</sup> The states apparently take their role in the process seriously, and legislatures have adopted rules that seem reasonably designed to execute that function. Although there is some deviation among states, there does not appear to be widespread differences. And there is little likelihood that legislatures will engage in some of the shenanigans discussed earlier, like allowing ratification by a legislative committee. Unfortunately, however, state legislatures are not monolithic entities, and there have been internal disagreements and some irregularities in their own procedures.

The most irregular procedure was Tennessee's ratification of the Fourteenth Amendment where opposing members were held under house arrest and counted as present even though they did not respond to the roll call or vote.<sup>96</sup> But that was an extraordinary time as most southern states were under military governments. Missouri failed to ratify section Two of the Fifteenth Amendment the first time around, but re-ratified to correct the situation.<sup>97</sup> Governors have approved ratifications apparently without authority from Article V, as in the Eighteenth and Nineteenth Amendments.<sup>98</sup> But when it comes to the serious job of ratification, state legislatures appear to have complied with basic norms of legislative approval, whether they have adopted supermajority requirements or not.

Yet when a legislature is deeply divided over controversial proposals, as with the Nineteenth, the ERA, and the Child Labor Amendments, differences among members of state legislatures have led to litigation and allegations of procedural improprieties. Where states voted to ratify after previously voting to reject, opposing members brought suit in Kansas and Kentucky, and those state courts split on whether the legislatures could legally vote again after initially rejecting the proposal.<sup>99</sup> The Kentucky Supreme Court ruled that the legislature could not pick up the proposal again, and the Kansas Supreme Court ruled that it could.

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95. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court defined the legislative body for Article V purposes as follows:

A Legislature was then the representative body which made the laws of the people . . . . There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the States . . . . It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented . . . . This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several States.

*Id.* at 228–30.

96. KYVIG, *supra* note 6, at 170.

97. GOV'T PUBL'G OFF., AMENDMENTS, *supra* note 48, at 7.

98. *Id.* at 35 nn.10–11.

99. See *Wise v. Chandler*, 108 S.W.2d 1024, 1028 (Ky. 1937); *Coleman v. Miller*, 71 P.2d 518, 526 (Kan. 1937).

Importantly, both state courts and the U.S. Supreme Court held that disgruntled members of state legislatures have standing to challenge legislative ratification actions for compliance with Article V requirements.<sup>100</sup> However, when Illinois legislators challenged its ERA ratification, in *Dyer v. Blair*, the federal district court held that a rule requiring a legislative supermajority was binding to support the state's refusal to transmit a certificate of ratification to Washington but that the courts would not consider challenges to certificates once transmitted.<sup>101</sup> And that's the rub.

In *Dyer*, Judge Stevens explored the different possibilities of how Article V could be interpreted in light of state ratification procedures, positing that states could adopt a variety of different rules on majorities, supermajorities, and definitions of a quorum.<sup>102</sup> In reconciling the variety of state rules with the lack of direction in Article V, Judge Stevens concluded:

We may take it as decided, therefore, that an extraordinary majority is not *required* by federal law. There is, moreover, some evidence that when article V was drafted the framers assumed that state legislatures would act by majority vote. That evidence, like the text of article V itself, is equally consistent with the view that a majority of a quorum would be sufficient, or with a view that a majority of the elected legislators would be required. And, of course, it is also consistent with the view that the framers did not intend to impose either of those alternatives upon the state legislators, but, instead, intended to leave that choice to the ratifying assemblies.

This last view seems most plausible to us. If the framers had intended to require the state legislatures to act by simple majority, we think they would have said so explicitly. When the Constitution requires action to be taken by an extraordinary majority, that requirement is plainly stated. While the omission of a comparable requirement in connection with ratification makes it quite clear that a bare majority is permissible, it does not necessarily indicate that either a simple majority or a constitutional majority must be accepted as necessary. We think the omission more reasonably indicates that the framers intended to treat the determination of the vote required to pass a ratifying resolution as an aspect of the process that each state legislature, or state convention, may specify for itself.<sup>103</sup>

Going further, he concluded:

Article V identifies the body—either a legislature or a convention—which must ratify a proposed amendment. The act of ratification is an expression of consent to the amendment by that body. By what means that body shall decide to consent or not to consent is a matter for that body to determine

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100. *Chandler*, 108 S.W.2d at 1033–34; *Chandler v. Wise*, 307 U.S. 474, 477 (1939); *Coleman*, 71 P.2d at 526; *Coleman v. Miller*, 307 U.S. 433, 439 (1939).

101. 390 F. Supp. 1291, 1307–08 n.40 (N.D. Ill. 1975).

102. *Id.*

103. *Id.* at 1305–06.

for itself. This conclusion is not inconsistent with the premise that the definition of the term 'ratified' is a matter of federal law. The term merely requires that the decision to consent or not to consent to a proposed amendment be made by each legislature, or by each convention, in accordance with procedures which each such body shall prescribe.<sup>104</sup>

But this conclusion begs the question: Can the legislature choose to permit ratifications by legislative committee or by less than a majority of those voting on the proposal? Could the legislature require unanimity? Does violation of the state legislature's rule violate Article V? To hold that Article V does not require a particular procedure is not the same as saying that any procedure the state comes up with is permissible. And we clearly know this because popular referenda and requirements of intervening elections have been held to violate Article V.<sup>105</sup>

But, just when one might have thought there was some stable ground here, Judge Stevens dropped a curious footnote to throw it all into disarray again. He stated:

This is not to suggest that we would entertain a cause of action attacking a state ratification certification on the grounds that the legislature had failed to comply with its own procedures. As the Court stated in *Leser v. Garnett*, . . . official notice to the Secretary, duly authenticated, that they had [ratified] was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.<sup>106</sup>

Our legislative path just hit a detour. Thus, states may establish their own procedures, and the federal courts will not review challenges alleging the state did not follow its own procedure so long as someone manages to get that certificate of ratification submitted to the Secretary of State or, today, the Archivist, before a legal challenge hits the courthouse.

This conclusion is profoundly troubling, especially in light of Tennessee's arrest of dissenting legislators and holding them under house arrest in order to reach a quorum, even though the body did not allow them to vote on the proposed Fourteenth Amendment.<sup>107</sup> It is troubling in light of the participation of executive officials in breaking ties or approving ratifications,<sup>108</sup> vetoing rescissions,<sup>109</sup> and legislatures violating their own requirements of an intervening election or a

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104. *Id.* at 1307.

105. *See generally* *Hawke v. Smith*, 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922); *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973).

106. *Dyer*, 390 F. Supp. at 1307 n.40.

107. KYVIG, *supra* note 6, at 170.

108. Governors approved legislative ratifications numerous times: Eighteenth Amendment (North Dakota and Louisiana governors approved); Nineteenth Amendment (Iowa, New Hampshire, Montana, Colorado, and New Mexico governors approved). *See* GOV'T PUBL'G OFF., AMENDMENTS, *supra* note 48, at 35 n.10–11.

109. Governor Ward of New Jersey vetoed its rescission of the Fourteenth Amendment, and Governor Stovall of Kentucky vetoed its rescission of the ERA. *See id.* at 30 n.6.

supermajority.<sup>110</sup> Even though intervening elections have been held to be an unconstitutional limitation on the states, the willingness of state legislatures to forego compliance with their own rules, or with state constitutional constraints, should give us pause. The propensity of state legislatures to withdraw their ratifications is also problematic if they believe they are acting in legally binding ways. Usually states rescind their ratifications when a subsequent election brings a new political majority to the state house and they feel it is important to go on the record with their disagreement about the state's earlier position on a particular amendment. But because rescissions have always been deemed ineffective, the political posturing of such votes, while understandable, emphasizes the political character of the Article V amendment process. And of course, the fact that legislatures can reverse course and ratify after having rejected, and that political partisanship is permissible in this way but not the other way around, can leave hard feelings and a sense of unfairness that can lead to litigation. That was the case with Idaho's rescission of the ERA.<sup>111</sup> The ability of state legislatures to change their minds simply highlights the political stakes of amendment ratifications, leaning into the political question solution. And yet, constitutional litigation is also a profoundly political process.

Idaho ratified the ERA in March 1972, within days of it being sent to the states. But as opposition ramped up against the amendment, Idaho rescinded five years later, in February 1977.<sup>112</sup> While Idaho had ratified with a supermajority as required by its legislative rules, it rescinded with only a simple majority.<sup>113</sup> South Dakota, frustrated with the congressional deadline extension for the ERA, voted years after its unequivocal ratification to impose a deadline on its own prior act, effectively sunsetting the earlier ratification as of the date of the original deadline.<sup>114</sup> In the case of Idaho, the legislature apparently violated its own house rules to rescind with a simple majority and, in the case of South Dakota, the legislature acted to condition its ratification, after the fact, in contravention of Madison's clear stricture that conditional ratifications were unacceptable.<sup>115</sup> The willingness of Idaho legislators to litigate the validity of its rescission and the willingness of South Dakota to stand by its rescission even forty years later as additional states have ratified the ERA<sup>116</sup> suggest that politics can not only guide the decision of whether or not to ratify but can also guide decisions about violating legislative rules or norms

110. See *Trombetta*, 353 F. Supp. at 575.

111. See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981).

112. Betsy Z. Russell, *Eye on Boise: Idaho's Role in the ERA Ratification Saga*, IDAHO PRESS (Dec. 14, 2019), [https://www.idahopress.com/news/local/eye-on-boise-idaho-s-role-in-the-era-ratification/article\\_445ead8f-d810-5933-9aca-929acdbe36b1.html](https://www.idahopress.com/news/local/eye-on-boise-idaho-s-role-in-the-era-ratification/article_445ead8f-d810-5933-9aca-929acdbe36b1.html) [<https://perma.cc/Q6WY-FFG4>].

113. H. Con. Res. 10, 44th Leg., 1st Reg. Sess. (Idaho 1977).

114. S.J. Res. 2, 96th Cong., 125 CONG. REC. 4861 (1979).

115. See discussion of conditional ratifications *infra* at note 316 and accompanying text.

116. South Dakota joined Alabama and Louisiana in a suit in the Northern District of Alabama seeking declaratory and injunctive relief against the Archivist to return its certificate of ratification and refuse to record Illinois, Nevada, and Virginia's (if the latter ratified). See *Complaint, Alabama v. Ferriero*, No. 7:19-cv-02032-LSC, 2019 WL 6894418 (N.D. Ala. Dec. 16, 2019).

that amendment opponents believe are interfering with their own political agendas. And with severe gerrymandering in many states, the notion that state legislatures not only have unchecked authority to set their own rules for Article V ratification but can violate those rules with impunity is troubling at the very least.

There is some limited precedent for the conclusion that state legislatures have free rein to set the terms and procedures of the ratification function granted to them by Article V.<sup>117</sup> But it is problematic that the courts will uphold a legislature's refusal to submit a certificate of ratification when the legislature violated its own rules but will not invalidate a ratification certificate that was submitted even when there is clear evidence that the state failed to follow its own procedure or potentially failed to follow the threshold norms of Article V.<sup>118</sup> If anything, the courts should do the opposite. If a legislature fails to submit a certificate of ratification that its members feel should be sent, even if the state's ratification vote purportedly violated its own procedures, the remedy would be mandamus issuing from the state courts that have jurisdiction over the official responsible for submitting the certificate of ratification. On the other hand, if a legislature submits a certificate of ratification purportedly in violation of its own procedures or Article V norms, the federal courts should be concerned because that action potentially disrupts and discredits the amendment process and jeopardizes the ratifications of other states. Thus, while Judge Stevens may have correctly determined that the Illinois ratification of the ERA by a simple majority, in violation of its own legislature rule requiring a supermajority, was ineffective, there was no need to impose the federal courts in a matter of state house procedure. But if Illinois were to submit a ratification certificate that was based on a vote of a legislative committee only, a gubernatorial order, or a vote in violation of its legislative rules, arguably the courts should not defer and refuse to review the case. Nonetheless, Judge Stevens asserted that this is precisely what the courts may not do.<sup>119</sup>

It would seem that so long as state legislative infighting results in a stalemate, politics and perhaps a state court ruling for mandamus or prohibition is the appropriate path forward. But where a state has submitted a purportedly improper certificate of ratification to Washington and other states might rely on that ratification, the national interest would militate in favor of federal judicial review in order to maintain and protect the national standard that, albeit in its less than clear form, undergirds the Article V process. I am not sure that we can take comfort in the fact that every time a state's ratification has been challenged it has been upheld,

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117. *Dyer v. Blair*, 390 F. Supp. 1291, 1307 (N.D. Ill. 1975); *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

118. In *Leser v. Garnett*, Tennessee violated its arguably unconstitutional requirement of an intervening election, as discussed more fully in *Trombetta v. Florida*. 258 U.S. 130 (1922); 353 F. Supp. 575, 577-78 (M.D. Fla. 1973). Tennessee finally struck down its impermissible requirement in *Walker v. Dunn*, 498 S.W.2d 102, 106 (Tenn. 1972).

119. *Dyer*, 390 F. Supp. at 1309.

even if it might have been stricken by a lower court.<sup>120</sup> At this point in our Article V jurisprudence, so long as the body that is plausibly the state legislature engages in some semblance of a ratification function and certifies that decision to Washington, judicial review seems to be foreclosed.

### B. State Courts

It makes sense that state courts would have some limited jurisdiction to determine if a state legislature has followed its own procedures in ratifying an amendment proposal. However, prior precedent suggests that state courts are ill-suited to the task. They can certainly evaluate whether a legislature has followed its own legislatively enacted rule for ratification.<sup>121</sup> And certainly state courts can and do evaluate whether state actions conform to federal constitutional mandates. But on the latter question, it seems to me that state court decisions must be reviewable by federal courts in conformity with the Supremacy Clause and Article III.<sup>122</sup>

Although a handful of cases, including some that made it to the Supreme Court, were decided originally in the state courts, their record when it comes to interpreting Article V is mixed at best. Of the three state supreme court decisions on Article V procedures that were appealed to the Supreme Court, the state courts were reversed in two and the third was affirmed on different grounds. In *Hawke v. Smith*, the Ohio Supreme Court affirmed lower court decisions that the term “legislature” in Article V could encompass the Ohio public referendum, which was recently added to the state constitution for ratifying federal constitutional amendments.<sup>123</sup> The most compelling argument to the Ohio justices of the *Hawke* court was that it had recently held that the term “legislature” in Article I, Section 4 of the Constitution could encompass public referenda in setting the time, place, and manner of electing senators, and the U.S. Supreme Court had affirmed that broad meaning of “legislature.”<sup>124</sup> How, they argued, could “legislature” mean something different for purposes of Article I, Section 4 and Article V? But the brief, formalistic dissent by Justice Robinson in *Hildebrandt* prevailed when the Article V case came up to the Supreme Court. He argued that the founders understood legislatures to be the legislative bodies only and not to encompass newfangled institutions and mechanisms to express public sentiment and that the “judgment [affirming a public

120. See generally *Leser*, 258 U.S. 130; *Chandler v. Wise*, 307 U.S. 474 (1939); *Coleman v. Miller*, 307 U.S. 433 (1939).

121. See generally *State ex rel. Hatch v. Murray*, 165 Mont. 90 (1974); *Am. Fed’n of Lab. v. Eu*, 686 P.2d 609 (Cal. 1984); *Kimble v. Swackhamer*, 584 P.2d 161 (Nev. 1978); *Walker*, 498 S.W.2d 102.

122. State courts often have been called upon to interpret Article V issues, as in *Walker*, 498 S.W.2d at 102; *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933); *Trohimovich v. Dep’t of Lab. & Indust.*, 869 P.2d 95 (Wash. Ct. App. 1994); *State ex rel. Askew v. Meier*, 231 N.W.2d 821 (N.D. 1975); *Chase v. Billings*, 170 A. 903 (Vt. 1934).

123. *Hawke v. Smith*, 126 N.E. 400, 402 (Ohio 1919).

124. *State ex rel. Davis v. Hildebrandt*, 114 N.E. 55, 55 (Ohio 1916), *aff’d*, 241 U.S. 565 (1916).

referendum as a power included in ratification] here elevates state above nation, devitalizes the federal Constitution, makes it subject to as many interpretations as there are states, and destroys its uniform operation throughout the nation.”<sup>125</sup>

Surely the Ohio Supreme Court was not acting against all reason when it concluded that the legislative ratification power under Article V was relatively broad and expansive given Madison’s statement that matters of details were best not set in stone by the Framers.<sup>126</sup> Although the Ohio justices recognized ratification as a constitutional function, they saw it as a lawmaking function that could adjust to include a public referendum since it already presumably included gubernatorial assents that existed in some states and, as existed in at least three states when the Constitution was adopted, an executive council that engaged in lawmaking for the state.<sup>127</sup> But Justice Day, speaking for the U.S. Supreme Court, held that “legislature” in Article V means the lawmaking body understood by the Framers and that ratification is not typical legislating and therefore does not adjust to new forms that a state may adopt.<sup>128</sup> Distinguishing ratification from typical legislating, and overruling *Hildebrandt*, Justice Day insisted that ratification is a simple assent to a proposed amendment. “[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.”<sup>129</sup> It seems, therefore, Article V has boundaries that are more constraining than the lawmaking function envisioned by Article I.<sup>130</sup>

There is no doubt the Court was responding to a very real concern that amendments, especially the Eighteenth, were being used in potentially new ways to drive a legislative agenda that was being stalled by entrenched political interests.<sup>131</sup> If ratification were more like legislation, then logically amendments would be more like legislation, and just about everyone was growing uncomfortable with that prospect.<sup>132</sup> Because so much of our Article V jurisprudence arose during the constitutional panic of the Progressive and New Deal Eras, the Court’s reliance on

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125. *Hawke*, 126 N.E. at 400.

126. See Madison’s remark that details should not be set forth in the constitution, in BERNSTEIN & AGEL, *supra* note 14, at 21.

127. *Id.* at 397.

128. *Id.*

129. *Hawke v. Smith*, 253 U.S. 221, 229 (1920).

130. This is a tough distinction. It is straightforward to say that a legislature ratifying a constitutional amendment is doing something different than lawmaking, even though both purportedly bind the state, the legislature, and its people. On the other hand, ratification is only superficially different from legislating at its core; it is simply a more binding and less easily reversed form of lawmaking.

131. KYVIG, *supra* note 6, at 240–49.

132. *Id.*

formalism was consistent with its Article V and broader constitutional jurisprudence of the period.<sup>133</sup>

The other two state court decisions involving Article V were *Wise v. Chandler*<sup>134</sup> and *Coleman v. Miller*,<sup>135</sup> both involving state ratifications after prior rejections of the Child Labor Amendment. In *Chandler*, the Kentucky Supreme Court had issued a lengthy decision voiding the legislative ratification on the grounds that a legislature could only vote once on a proposed amendment and once it had done so its job was over.<sup>136</sup> The Supreme Court summarily reversed on mootness grounds as the Kentucky Governor had already submitted the certificate of ratification to Washington and, under *Leser v. Garnett*, that certificate was conclusive on the issue of the legal sufficiency of the state's ratification.<sup>137</sup>

The Court handed down its decision in *Chandler* concurrent with its lengthy opinion in *Coleman*, affirming the Kansas Supreme Court's approval of its legislature's post-rejection ratification, although on different grounds.<sup>138</sup> The Kansas Supreme Court had held that legislatures could ratify after rejecting because ratification was a one-way street; Article V spoke only of ratification and therefore, as with legislation, multiple attempts could be made until the proposal passed.<sup>139</sup> As in *Chandler*, the issue of rescissions was not before the Court. Justice Hughes' opinion in *Coleman* affirmed the result of the Kansas decision but on different grounds. Rather than engaging the substantive issue of whether Article V permitted states to change their minds, the Court simply held that, in the absence of congressional direction, the Court would not interfere when the technical requirements of Article V had been satisfied.<sup>140</sup> Again, as in *Hawke* and *Chandler*, the Court in *Coleman* adopted a formalistic interpretation that kept it from delving into the procedural details raised by Article V's vague lack of direction.

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133. The period between the Sixteenth and the Twenty-First Amendments was profoundly troubling to those on both sides of the aisle. For Progressives and New Deal democrats, the Supreme Court's blockading of popular legislation through its enhanced level of scrutiny during the *Lochner* Era seemed intractable, so that constitutional amendments appeared to be the only way around anti-democratic stonewalling and political brinkmanship protecting deeply entrenched political interests. For conservatives, the Progressive and New Deal Eras represented all that was frightening about populism and democracy as the constitution was at risk of becoming not only the Statutes at Large, but legislation that was virtually unamendable. Although the Twenty-First Amendment passed in record time, anti-prohibitionists turned to repeal only after extensive efforts to defeat the Eighteenth Amendment had failed in the courts. It was a disturbing lesson in the ways of constitutionalism that no one wanted to repeat. Six amendments in twenty years, a seventh being considered by the states, and a plethora of equal rights, labor, and old-age assistance proposals floating around Congress had virtually everyone on edge. *See generally* KYVIG, *supra* note 6.

134. *See* *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. 1937).

135. *See* *Coleman v. Miller*, 71 P.2d 518 (Kan. 1937).

136. 108 S.W.2d at 1033.

137. *Chandler v. Wise*, 307 U.S. 474, 477–78 (1939).

138. *Coleman v. Miller*, 307 U.S. 433, 450–51 (1939).

139. *Coleman*, 71 P.2d. at 525–26.

140. 307 U.S. at 450–51.

These three state-law decisions are informative and paradoxical. Although it is clear that the Supreme Court, in all of its Progressive and New Deal Era cases, refused to follow the White Rabbit down the Article V rabbit hole and instead applied a formalistic, technical-compliance approach to the challenges before it, it has inadvertently left us in the middle of a croquet game with nothing but hedgehogs and flamingos. With so little guidance except a blinkered adherence to the cryptic technical rules, the Court has stifled every state court attempt to directly address the procedural gaps of Article V.

This does not mean that state courts are inherently ill-equipped or unable to address the constitutional questions posed by these Article V procedural uncertainties, but the need for uniformity on such issues of national importance reinforces the conclusion that the federal courts are the more appropriate judicial bodies.<sup>141</sup> This is true even though state legislatures have large amounts of discretion to structure and exercise their Article V ratification powers to suit their own interests. Given the opposite conclusions drawn by the Kansas and Kentucky state supreme courts as to whether states could ratify after rejecting a proposal, a uniform national rule is not a bad idea.

Thus, where state courts are focused solely on the question of whether their state legislature ratified in compliance with their own legislative rules, the state courts could conceivably govern. Yet, what is the point of a state court holding that a legislative ratification violated its own legislative rules if the certificate of ratification has already been sent to the Archivist and has therefore become conclusive?<sup>142</sup> Because the state court has no jurisdiction to demand return or cancellation of a certificate of ratification from a federal official, it would seem that state courts could perhaps intercept a certificate before it is sent but would have no power once the certificate has left the state, even if it was sent without authorization.<sup>143</sup> If a legislative committee or the governor simply submitted a certificate of ratification to the Archivist, a state court writ of prohibition would be too late, and a writ of mandamus against the Archivist to return the certificate would be improper for lack of jurisdiction. As the Courts in *Hawke* and *Dyer* both noted, national standards are necessary for these kinds of issues, despite the fact that the Constitution leaves wide discretion to state legislatures to make procedural rules on how to ratify proposals. That leaves us with Congress or the federal courts as the best Article V decision makers.

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141. *Dyer v. Blair*, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975) (Judge Stevens explained: “We are persuaded that the word ‘ratification’ as used in article V of the federal Constitution must be interpreted with the kind of consistency that is characteristic of judicial, as opposed to political, decision making.”).

142. This is the real conundrum of *Chandler*. 307 U.S. 474 (1939).

143. This was discussed at length in the Kentucky Supreme Court decision in *Wise v. Chandler*, 108 S.W.2d 1024, 1034–36 (Ky. 1937).

*C. Congress*

As with Guarantee Clause questions,<sup>144</sup> there is some logic in thinking that Congress should have the power to determine the legal sufficiency of state ratifications. After all, state legislative ratifications are political decisions, just as the congressional decision to propose an amendment is a political decision. But like the Cheshire Cat, not all is immediately apparent about the logic of allowing Congress to make these determinations. Because Congress is a key player in the Article V process, it may have overstepped its authority in imposing a deadline on the states and therefore might be tempted to exercise its decision-making power in political rather than legal ways to cover up its constitutionally improper action. The decision to impose a deadline was a highly political one;<sup>145</sup> the decision whether the deadline is constitutional arguably should not be highly political nor should it be left to the entity that engaged in the highly political decision of imposing a deadline. Furthermore, because amendments are essentially self-executing, there is no further role for Congress once it has issued a proposal; the amendment becomes valid when the last state ratifies. Allowing Congress to determine if the last state's ratification is legally sufficient essentially returns the amendment back to the national legislature in contravention of the founders' plan of leaving amendments primarily to the control of the states. But to get through a logical analysis of Congress's authority under Article V, and the political question issue, we need to continue our ramble through the Article V wonderland with a lengthy detour through the history of Congress's role in the amendment process.

*1. Prior Precedents*

The Fourteenth Amendment provides a fertile source of precedents on the role of Congress in the Article V amendment process. The Fourteenth Amendment was proposed by Congress and sent to the states in June 1866, the result of extensive committee negotiations and compromises among different political factions.<sup>146</sup> Most northern states ratified it fairly quickly, but two issues quickly arose: did Article V's requirement of three-fourths of the states mean three-fourths of all the states or just the twenty-six states that remained after the rebellious states were excluded, and did Congress have a two-thirds majority to propose the Amendment when it lacked participation by the southern states?<sup>147</sup> During the fall and winter of 1866, ten southern states voted to reject the Amendment, which meant that even if all the other states had ratified, the Amendment would fail.<sup>148</sup> In addition, Tennessee's purported ratification was questionable at best as coercion, and

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144. See discussion *supra* at note 82 and accompanying text.

145. See Wright, *supra* note 13, at 62–66.

146. KYVIG, *supra* note 6, at 164–70.

147. President Johnson objected to the proposal on the grounds that only twenty-five out of thirty-six states were represented in Congress. *Id.* at 170.

148. *Id.* at 171–72.

imprisonment was likely not envisioned by the Framers to be within a state's discretion to set its own ratification process.<sup>149</sup>

Throughout 1867, most northern states voted to ratify, but consensus grew that the Fourteenth Amendment would require three-fourths (twenty-eight) of all states (thirty-seven) to ratify.<sup>150</sup> To speed the process, Congress passed the Military Reconstruction Act, which stripped provisional southern governments of all power and established military tribunals to hold elections and establish new southern governments. Readmission to Congress required drafting new state constitutions, conducting elections, and ratifying the Fourteenth Amendment.<sup>151</sup> By the end of 1867, all but Texas had rewritten their suffrage requirements and allowed reconstruction, allowing those states to begin considering the Fourteenth Amendment. By that time, only five southern state ratifications were needed to put the Amendment over the line, and that quickly happened by the summer of 1868.<sup>152</sup> Unfortunately, the fall 1867 elections in some northern states had resulted in Democratic victories, and Ohio and New Jersey both voted in early 1868 to repeal their ratifications of the Fourteenth Amendment, although Governor Ward of New Jersey vetoed its legislative rescission.<sup>153</sup> The rescissions left both the Ohio and New Jersey ratifications in limbo, as this was the first time a state had tried to rescind. With the Louisiana and South Carolina ratifications on July 9, 1868, opinion was split on whether the Fourteenth Amendment had been ratified or not.<sup>154</sup> On July 20, Secretary of State William Seward listed all the states that had ratified, including Ohio and New Jersey that had rescinded, and Louisiana, North Carolina, and South Carolina that had previously rejected, as ratifying states in a conditional certification of the Amendment.<sup>155</sup>

In acknowledging the withdrawal of support by Ohio and New Jersey, Secretary Seward stated that the withdrawal was “a matter of doubt and uncertainty whether such resolutions are not irregular, invalid and therefore ineffectual.”<sup>156</sup> In this proclamation, Seward also noted that neither the Act of April 20, 1818, chapter 80, section 2, 3 (now 1 U.S.C. § 106(b)), nor any law, “expressly or by conclusive implication, authorizes the Secretary of State to determine and decide doubtful questions as to . . . the power of any State legislatures to recall a previous act or resolution of ratification of any amendment proposed to the Constitution.”<sup>157</sup> In

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149. Opponents of the amendment in the Tennessee legislature hid to deny the two-thirds legislative quorum required by Tennessee legislative rules, but some absent members were located and arrested, thereby allowing them to be declared present, even though they did not vote. *Id.* at 170.

150. *Id.* at 173.

151. *Id.*

152. *Id.* at 173–74.

153. *Id.* at 174.

154. *Id.* There were twenty-nine ratifications if Ohio and New Jersey were counted, one more than necessary; there were only twenty-seven if they were not counted, one short. *Id.*

155. *Id.* at 174–75.

156. 15 Stat. app. at 706, 707 (1868).

157. *Id.*

this case, Secretary Seward certified the Fourteenth Amendment but included in his proclamation the outstanding legal question surrounding the withdrawal of support by two states and noted that his certification was dependent on a legal determination of this issue.<sup>158</sup> Upon further ratifications, Secretary Seward's qualifications were put to rest.

Seward's publication left to others the determination of whether the Fourteenth Amendment was fully ratified and ultimately time settled the matter. The next day, Congress adopted a concurrent resolution declaring the Fourteenth Amendment ratified, listing Ohio, New Jersey, Louisiana, North Carolina, and South Carolina as among the ratifiers.<sup>159</sup> And after additional state ratifications came in, Secretary Seward published an unconditional notice of the Amendment's ratification a week later, on July 28, 1868.<sup>160</sup>

The importance of the Fourteenth Amendment procedure cannot be underestimated, even if it has become overly influential. David Kyvig summarized Article V procedure and where it stood after it was put to its first significant test:

Thus the Congress held that states could continue to consider an amendment until they approved it but thereafter could not rescind that act. Constitutional amendment was a specific procedure, not an ordinary legislative process, and therefore conventional practices of reconsideration did not apply. Perhaps under different circumstances other considerations would have prevailed, but in 1868 Congress viewed the amendment ratification process as a ratchet wheel that could move ahead but not backward. The Fourteenth Amendment's adoption established a principle that courts and Congress have since left untouched.<sup>161</sup>

The exceptional circumstances underlying ratification of the Fourteenth Amendment have been used by countless scholars and advocates for a variety of conclusions about the procedure of Article V. Some asserted that Congress must ultimately accept a constitutional amendment and that it does not become automatically effective upon the last state's ratification,<sup>162</sup> but that view was rejected in 1920 by the Supreme Court in *Dillon v. Gloss*.<sup>163</sup> Others argued that the inclusion of Ohio and New Jersey meant that states are not permitted to rescind their ratifications, although no court weighed in on the matter since subsequent

158. Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment, 1 Op. O.L.C. 13, 13 (1977).

159. 15 Stat. app. at 709–10 (1868).

160. *Id.* at 710–11.

161. KYVIG, *supra* note 6, at 175.

162. See Paulsen, *supra* note 18, at 706–21. This view was limited to Congressmen who insisted that they continued to play a role in constitutional amending even after they had sent a proposal to the states. See *id.* at 706–21 (discussing at length *Coleman v. Miller*, 307 U.S. 433 (1939), and the possible role of Congress in accepting or promulgating amendments); see also Congressional Pay Amendment, *supra* note 34, at 99.

163. 256 U.S. 368 (1921).

ratifications made the question moot.<sup>164</sup> Fortunately, the exceptional circumstances of Reconstruction have not been repeated and the question of whether three-fourths of the states means three-fourths of all states or three-fourths of those represented in Congress has so far not required further explication. Some still argue that the Fourteenth Amendment was not validly adopted,<sup>165</sup> but there is little likelihood that the Court would reject the Amendment after a century and a half on the basis of Tennessee's irregular counting of arrested delegates or New Jersey's vetoed rescission.<sup>166</sup> Time has healed all irregularities, and Secretary of State Seward's proclamation of the Fifteenth Amendment as having been properly ratified despite New York's rescission remains an idiosyncrasy of Article V's procedure that can, like the Cheshire Cat, appear to reflect nearly any conclusion.<sup>167</sup>

The only other time Congress played a post-ratification role in an amendment occurred with the Twenty-Seventh Amendment that was ratified by the states over the course of more than two hundred years. Originally proposed as one of Madison's original twelve amendments (of which only ten were adopted in 1791 as the Bill of Rights), the Twenty-Seventh was ratified gradually throughout the centuries, though most ratifications occurred in the late twentieth century as states grew bitter at Congress's self-serving behavior.<sup>168</sup> Because of the procedural irregularity of an amendment proposal lingering for so long, the Office of Legal Counsel issued a memorandum stating that the Twenty-Seventh Amendment was validly ratified upon the last state's ratification vote, that Congress did not have authority to proclaim it, and that the Archivist's publication was purely ministerial.<sup>169</sup> Nevertheless, Congress,

[r]ecognizing that the pay raise amendment represented an outburst of anger at Congress, that its rejection on a technicality after endorsement by so many states would likely provoke even greater outrage, and that, in any case, it would only briefly delay pay raises, [overwhelmingly] . . . declared the Twenty-Seventh Amendment properly adopted.<sup>170</sup>

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164. Although the district court of Idaho ruled that rescissions were permissible in *Idaho v. Freeman*, 529 F. Supp. 1107, 1146–50 (D. Idaho 1981), that decision was vacated in *Carmen v. Idaho*, 459 U.S. 809 (1982).

165. See Colby, *supra* note 5; see also Bryant, *supra* note 5; Harrison, *supra* note 5 (both admitting there were irregularities but offering ways around them).

166. And the Supreme Court held that the Fourteenth Amendment is valid in the *Slaughterhouse Cases*, 83 U.S. (16 Wallace) 36, 71 (1872), and lower courts agree. See *U.S. v. Gugel*, 119 F. Supp. 897 (E.D. Ky. 1954); *Maryland Petition Comm. v. Johnson*, 265 F. Supp. 823 (D. Md. 1967). On the validity of the Fifteenth Amendment, see *United States v. Reese*, 92 U.S. 214 (1876); *Neale v. Delaware*, 103 U.S. 370 (1881); *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

167. Paulsen, *supra* note 18, at 718–20.

168. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 498, 534–39 (1992).

169. Congressional Pay Amendment, *supra* note 34, at 99.

170. KYVIG, *supra* note 6, at 469.

It seems safe to conclude that Congress has no role in accepting or declaring an amendment valid; that occurs immediately upon ratification by the last state.

Nevertheless, saying that Congress has no role once the last state has ratified is of little moment if we are concerned with whether a state has in fact ratified or not. The precedents of the Fourteenth and the Fifteenth Amendments support the conclusion that states may only ratify and may not rescind.<sup>171</sup> Yet even on that point there remains significant disagreement.<sup>172</sup> However, despite the Supreme Court's conclusion in *Dillon v. Gloss* in 1920 that amendments become effective upon ratification by the last state, the Court offered the tantalizing conclusion that Article V issues are nonjusticiable political questions and that Congress does have the power to impose deadlines, determine when unlimited proposals have passed their shelf life, and determine whether post-rejection ratifications or post-ratification rescissions are valid.<sup>173</sup> In other words, Congress may have a role to play in determining the legal sufficiency of ratifications but has none once those ratifications are confirmed. The notoriously convoluted opinion in *Coleman v. Miller* from 1939, the last of the Court's pronouncements on Article V procedures and the only decision suggesting that Congress has a decisive role after the states have ratified,<sup>174</sup> is problematic on many levels. For just as we thought we had reached some stable ground, the paradoxical decision floats out to us on the smoke of the hookah, making about as much sense as the mutterings of the Mad Hatter and the riddles of the Caterpillar. For if Congress has no role once the requisite number of ratification certificates are submitted, when might Congress assert its political authority to judge the sufficiency of the ratifications? Certainly not until enough states have ratified so the issue is no longer unripe. For that is the paradox of *Coleman*.<sup>175</sup>

## 2. *Coleman v. Miller*

In 1924, Kansas rejected the Child Labor Amendment when it was first proposed.<sup>176</sup> Thirteen years later, the Kansas legislature ratified the Amendment with the Lieutenant Governor casting the tie-breaking vote in the Senate.<sup>177</sup> Disgruntled senators brought suit claiming that the state could not ratify after it had rejected the Amendment, that the ratification violated Article V because the

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171. See Congressional Pay Amendment, *supra* note 34, at 104–05.

172. Paulsen, *supra* note 18, at 726–31 (suggesting that rescissions are allowed because they are analogous to legislation, which is clearly repealable). *But see* Kanowitz & Klinger, *supra* note 18 (rejecting the rescission power on the basis of text and precedent).

173. *Dillon v. Gloss*, 256 U.S. 368, 374 (1921).

174. *Coleman v. Miller*, 307 U.S. 433, 453–54 (1939).

175. Once sufficient states have ratified to satisfy Article V, the amendment is self-executing and there is no congressional role. If not enough states have ratified, then any statement Congress makes on the validity of state ratifications would be premature and ineffective.

176. *Coleman*, 307 U.S. at 435.

177. *Id.* at 435–36.

Lieutenant Governor participated in the ratification, and that the thirteen-year delay between proposal and ratification was unreasonably long and showed that the amendment proposal had lost its vitality.<sup>178</sup> The Kansas Supreme Court ruled that the ratification was valid.<sup>179</sup>

In a convoluted opinion on appeal, Chief Justice Hughes issued a majority ruling on three of the four issues.<sup>180</sup> The Court held that the individual senators had standing.<sup>181</sup> The Court was divided on whether the Lieutenant Governor could participate under Article V's dictate that ratification be by state "legislatures," and therefore the Court issued no opinion.<sup>182</sup> Ironically, on the one technical procedural irregularity the Court could come to no conclusion, thus allowing the lower court decision to stand that the vote was permissible.

On the issue of whether a state could ratify after it had rejected, the Court refused to interfere with the Secretary of State's recording of the ratification. Chief Justice Hughes explained:

Article V, speaking solely of ratification, contains no provisions as to rejection. Nor has the Congress enacted a statute relating to rejections. [The only statutory provision entails the Secretary of State causing an amendment to be published when it has been adopted]. The statute presupposes official notice to the Secretary of State when a state legislature has adopted a resolution of ratification. We see no warrant for judicial interference with the performance of that duty.<sup>183</sup>

The Caterpillar could not have said it any more enigmatically. Presumably, according to *Leser*, once official notice to the Secretary of State has been submitted, there is simply no further role for the Court. But if Congress were to legislate in some manner, the Court might have some issue to decide, although its decision would be deferential because the Court would not want to substitute its judgment for that of Congress. Because Congress had not legislated in regard to the efficacy of ratifications after rejections, however, the Court declined to intervene.<sup>184</sup> Yet again that begs the question: could Congress even legislate in the first place? And that question is not answered at all.

The Court's decision in *Coleman* must be understood in light of the fact that the Thirteenth through Seventeenth Amendments all experienced post-rejection ratifications<sup>185</sup> and yet, more than half a century after the ratification of the

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178. *Id.* at 436.

179. *Coleman v. Miller*, 71 P.2d 518, 527 (Kan. 1937).

180. *Coleman*, 307 U.S. at 435.

181. *Id.* at 438-39.

182. *Id.* at 456.

183. *Id.* at 450-51.

184. *Id.* at 456.

185. Georgia, Connecticut, and Massachusetts ratified the Bill of Rights a century and a half later in 1939 after having been unable to reconcile the different positions of their two houses; Massachusetts ratified the Twelfth Amendment more than a century and a half after rejecting it; New

Thirteenth Amendment, the Court was faced with the issue for the first time. And the 1937 challenges produced a split in the state courts.<sup>186</sup> With no guidance from Congress, the Court let sleeping dogs lie. It summarily reversed the Kentucky decision that its ratification was invalid on the grounds that the ratification certificate was conclusive, and it affirmed the Kansas decision that its ratification was valid on the simple grounds that Congress had not expressed an opinion by legislating on the issue. By no means should the decision be taken to mean that the Court would defer if Congress had acted; it simply means that without congressional action there was no reason to upset the apple cart. Essentially, without congressional action there was no case or controversy other than to resolve the split, which the Court did based on a technical reading of Article V and the Eighteenth Amendment cases stating ratification certificates were conclusive. Voila! Like the Cheshire Cat, all difficulties disappeared by affirming the Kansas Supreme Court's outcome on the grounds that Congress had not created a procedural speed bump.

Furthermore, in refusing to substitute its judgment when Congress had not chosen to act by legislating on these Article V issues, the Court was not saying that it was relinquishing its obligation to review congressional action now or in the future.<sup>187</sup> Were Congress to legislate that no state ratifications would be deemed valid unless they were endorsed by a public referendum, a requirement that would be clearly at odds with the plain text of Article V, the Court would surely strike the legislation. There is nothing in Justice Hughes's opinion to suggest that the Court had adopted the political question reasoning of the four concurring justices who argued that all ratification and Article V issues were nonjusticiable. Such reasoning would have required the Court to defer to Congress on all Article V matters, even if Congress were to legislate in a manner that clearly conflicted with the text of Article V, and dismiss all cases before it. Undoubtedly, Justice Hughes, the two

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Jersey and Delaware ratified after rejecting the Thirteenth Amendment; North Carolina, Louisiana, South Carolina, Georgia, Virginia, Delaware, Kentucky, and Maryland ratified after rejecting the Fourteenth Amendment; Ohio, New Jersey, Delaware, Oregon, California, Maryland, Kentucky, and Tennessee ratified after rejecting the Fifteenth Amendment; Arkansas and New Hampshire ratified after rejecting the Sixteenth Amendment, and Delaware ratified the Seventeenth Amendment nearly a century after first rejecting it. See GOV'T PUBL'G OFF., AMENDMENTS, *supra* note 48, at 25 nn.2–9.

186. Compare *See* *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. 1937) with *Coleman v. Miller*, 71 P.2d 518 (Kan. 1937).

187. It is important to note that the Court was merely refusing to legislate from the bench, a judicial action that has, historically, been frowned upon. The Court acknowledged that Congress could have legislated on this issue. So, instead of inserting its own judgment in the space left open by Congress' inaction, the Court relied on the plain text of Article V to hold that the Kansas ratification was valid. This is quite different from affirmatively relinquishing all jurisdiction to evaluate whether any future act by Congress might exceed the scope of its constitutionally granted powers under Article V. Congress had not asserted a constitutional power to determine the validity of a state ratification, so the Court did not need to resolve the issue of whether the courts would be prohibited from ruling on the constitutionality of any future acts of Congress in this area. It does not follow that, if the Court declines to fill a legislative void left by Congress, it would lose its power to review an act of Congress when it finally does choose to legislate.

dissenters, and the two justices who joined his opinion all rejected such an extreme abdication of judicial responsibility.<sup>188</sup> Had they adopted the reasoning of their four brethren, surely they would have done so more explicitly, since doing so would have overruled the decisions in every prior case involving Article V. But not getting involved when there was no dispute was the Court's way of punting on the issue until it required resolution, i.e., when and if Congress were to overstep its bounds and interfere with the discretion granted to the states by Article V, the courts would intervene.<sup>189</sup>

On the fourth issue of whether the proposal had become stale because of passage of time, the Court also refused to legislate from the bench when Congress had not acted. The Court held that if Congress did not choose to impose a deadline, it was inappropriate for the courts to determine whether an amendment had become stale.<sup>190</sup> Again, there was no reason to render a decision when Congress had not taken a position that was potentially at odds with Article V. Had Congress imposed a deadline, and that deadline had passed and states were ratifying regardless, then a justiciable issue would require the Court's resolution—the resolution that is now required as a result of the ERA ratifications.

In sum, the *Coleman* Court approved standing for the disgruntled legislators but denied them any remedy as Congress had not done anything that would potentially infringe the ratification function of the states. Hughes's opinion no doubt lacks the kind of clarity one would like to have on such an important matter. In the absence of a constitutional controversy, Chief Justice Hughes affirmed a technical, formalistic reading of Article V, affirmed the Court's jurisdiction, did not upset any historical or judicial precedents, and did not cede the Court's authority to settle a dispute in a case in which Congress or a state actually acted contrary to Article V. Nor did the Court upset the fifty years of prior practice in which post-rejection ratifications had been recognized. The *Coleman* decision is clearly an attempt to uphold state ratification without setting any precedent that might limit the Court in future cases and should therefore be understood as not providing much guidance for our Article V quest.<sup>191</sup> If *Coleman* is the battery for our headlamps, it casts a feeble light indeed.

### 3. *Congress Is Not an Appropriate Decision Maker for Article V Questions*

Of course, the Court saying it will not interfere if Congress does not act tells us nothing about what it should or might do if Congress does act, as with the

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188. See generally *Coleman v. Miller*, 307 U.S. 433 (1939).

189. This is arguably where we are with the ERA today.

190. *Coleman*, 307 U.S. at 459–60.

191. The Child Labor Amendment was proposed in response to the Supreme Court's ruling striking down the child labor provision of the Keating-Owen Child Labor Act in *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918). That case was not overruled until two years after *Coleman* in 1941, in *United States v. Darby*, 312 U.S. 100, 116–17 (1941).

congressional deadline. Thus, what if Congress were to legislate in a way that infringed the powers of the states or a state ratified contrary to Article V? These are quintessentially political decisions, so why not let Congress have the final word on the legal sufficiency of state ratifications under these circumstances? Despite the *Coleman* precedent, and the fact that it has not been repudiated by the Court, there are numerous reasons why Congress should not make Article V determinations about the legal sufficiency of state ratifications and, if it tried, the Court should step in to stop Congress from doing so.

One obvious reason is that *Coleman* is not really a precedent. And if it is, it is unclear what the precedent stands for. It does not stand for the broad proposition that all Article V matters are nonjusticiable political questions because only four justices espoused that view and later federal courts have denied that *Coleman* requires dismissal of Article V procedural cases.<sup>192</sup> Moreover, the political question doctrine is essentially a separation-of-powers issue and not a federalism issue. In outlining the parameters of the political question doctrine, the Supreme Court established that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question’ . . . . The nonjusticiability of a political question is primarily a function of the separation of powers.”<sup>193</sup> At heart, however, Article V issues center on federalism concerns, such as whether Congress has overstepped its bounds vis-à-vis the states in imposing time limits or other constraints. Article V issues also arise when considering state relations vis-à-vis each other, as whether rescissions should be permitted to destabilize the process of ratification. Neither is a separation of powers issue, which suggests that the political question complaint is a red herring. In allowing Congress to control the Article V process, courts would be permitting the national legislature to redefine the scope and procedures of constitutional amending in contravention of the Framers’ clear insistence that states have primary control over the process.<sup>194</sup>

But then the Court’s enigmatic statement in *Dillon* that Congress may have authority to set some technical details rears its head.<sup>195</sup> Now we are back in Wonderland trying to figure out if a deadline or a requirement of a supermajority or an intervening election or a public referendum or gubernatorial approval of a state ratification are matters of technical detail or unconstitutional constraints on the states. If some, according to *Dillon*, are technical details and others overstep Congress’s Article V authority, how do we know which is which and who decides?

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192. See, e.g., *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975); *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1982), *vacated*, *Carmen v. Idaho*, 459 U.S. 809 (1982).

193. *Baker v. Carr*, 369 U.S. 186, 210 (1962). It is also the case that the political question doctrine has been updated in recent years and the direction it has taken is away from, not towards, a conclusion that Article V issues are nonjusticiable. For a fuller discussion of this, see Hajdu & Rosenblum, *supra* note 15, at 147–59.

194. See discussion *infra* Section III.A.3.

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

One could reasonably accept Congress specifying that notice of a ratification should be sent to the Archivist, Secretary of State, or to itself; or that notice shall be sent by certified mail; or should be sent by the governor within ten days of the legislative vote. These are details that facilitate the orderly process of amending. Legislation requiring a public referendum or a supermajority or setting deadlines are all “technical details” that hamper, interfere with, and frustrate state ratification procedures. Details that make it harder on states should not be deemed mere matters of technical detail. And clearly it should not be up to Congress to decide on which side of the line its legislative details might fall.

Giving Congress sole authority to determine the legal sufficiency of state ratifications also could put Congress in the dubious position where it might hold against ratifications of a proposal that sought to limit federal authority, which was a prospect much feared by the Framers.<sup>196</sup> It might also vote in favor of questionable ratifications that serve its own goals, as we saw with the Fourteenth Amendment. One can easily imagine a lame-duck Congress affirming improper state ratifications in the face of an electoral loss that was caused by Congress’s unpopular position on an amendment. There are too many whiffs of the Eighteenth Amendment debacle here to simply shrug off the consequences.

Scholars have also agreed that *Coleman* is an unreliable precedent, as it was the product of the contemporary political situation in 1939, a mere two years after the threatened court packing plan and the validation of New Deal Legislation.<sup>197</sup> The Court had already been damaged by its *Lochner*-era activism, and the last thing Justice Hughes wanted to do in 1939 was damage it further. As Michael Stokes Paulsen has noted, the political question doctrine articulated in *Coleman* “could be interpreted to assert a degree of unchecked congressional authority over the ratification process that is arguably anti-constitutional.”<sup>198</sup> Paulsen also notes that the “congressional power theory . . . rationalizes *anything* Congress does concerning

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196. See *infra* Section III.A.3.

197. Michael Stokes Paulsen rails against *Coleman*’s bad history and bad law, in his *A General Theory of Article V*, *supra* note 18, at 707–18, and suggests that it was most likely the result of the awkward position in which the Court found itself of potentially judging the sufficiency of a ratification of an amendment that was designed to overturn a decision of the Court itself. *Id.* at 717. Robert Hajdu and Bruce Rosenblum, *supra* note 15, at 144–47 agree that the political question theory of *Coleman* is problematic. Dellinger, *supra* note 15, at 388, calls *Coleman* “profoundly wrong, and it should no longer be followed.” William H. White, Note, *Article V: Political Questions and Sensible Answers*, 57 TEX. L. REV. 1259, 1259 (1979) argues that “application of a prudential political question doctrine to article V issues is theoretically and precedentially unwarranted.” It would also be unseemly for the Court to interject in an amendment process designed to reverse its own decision. The Child Labor Amendment was proposed to reverse the Court’s 1918 decision in *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

198. THOMAS H. NEALE, CONG. RSCH. SERV., THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 27 (2019); see also Paulsen, *supra* note 18, at 706–07, 718–21.

the amendment process . . . [and] simply cannot be squared with the text of Article V or with basic principles of limited constitutional government.”<sup>199</sup>

Lower courts have also rejected the reasoning in *Coleman*, recognizing that it was an unusual set of facts with limited precedential value. The court in *Dyer v. Blair* distinguished *Coleman*, reasoning that the holding in *Coleman* “was based on the absence of any acceptable criteria for making a judicial determination of whether the proposed amendment had lost its vitality through lapse of time.”<sup>200</sup> The *Dyer* court further reasoned:

It is primarily the character of the standards, not merely the difficulty of their application, that differentiates between those which are political and those which are judicial. The mere fact that a court has little or nothing but the language of the Constitution as a guide to its interpretation does not mean the task of construction is judicially unmanageable.<sup>201</sup>

The *Dyer* court also pointed to the Supreme Court’s consideration of amendment ratification deadlines in *Dillon v. Gloss* as suggesting that even a lack of an “express provision on the subject” in the Constitution does not render an issue nonjusticiable.<sup>202</sup> And in addressing *Coleman* directly, Judge Stevens wrote:

There is force to . . . [the political question] argument since it was expressly accepted by four Justices of the Supreme Court in *Coleman v. Miller*. But since a majority of the Court refused to accept that position in that case, and since the Court has on several occasions decided questions arising under Article V, even in the face of “political question” contentions, that argument is not one which a District Court is free to accept.<sup>203</sup>

And the District Court in *Idaho v. Freeman* concurred.<sup>204</sup> That court explained why it asserted jurisdiction and rejected the political question doctrine in a case involving the ERA: “While the questions presented for this Court’s determination deal essentially with the relationship and allocation of authority between the Congress and the states pursuant to Article V of the Constitution, the antecedent question of who decides what that relationship is must be decided.”<sup>205</sup> In fact, the Idaho District Court expressed precisely the relevant consideration of the political question claim: “giving plenary power to Congress to control the amendment process runs completely counter to the intentions of the founding fathers in including Article V with its particular structure in the Constitution.”<sup>206</sup>

199. Paulsen, *supra* note 18, at 723.

200. 390 F. Supp. 1291, 1302 (N.D. Ill. 1975); 307 U.S. 433 (1939).

201. *Dyer*, 390 F. Supp. at 1302.

202. *Id.* (citing *Dillon v. Gloss*, 256 U.S. 368, 373 (1921)).

203. *Id.* at 1299–3000.

204. 529 F. Supp. 1107, 1125–26 (D. Idaho 1981).

205. *Id.* at 1124.

206. *Id.* at 1126. Judge Callister cited Professor Orfield as follows: “From the point of view of orderly amending procedure it is doubtful that the doctrine of political question should be extended to other procedural steps. If orderly procedure is essential in the enactment of ordinary statutes, should it

The point here is that if Congress has not done anything to violate the federalism balance of Article V, there is no reason for the courts to intervene. The same is true if the states have not violated their Article V powers, which they have only done in the case of Ohio's popular referendum that was quickly struck down and Florida and Tennessee's intervening election requirements that were also quickly struck down.<sup>207</sup> Thus, it would seem that only the federal courts are well suited to establish nationwide standards for how the states can exercise their Article V ratification function, and only the federal courts can impartially balance Congress and the states' federalism disputes if Congress oversteps its Article V bounds by passing legislation or imposing unreasonable constraints on the states through its proposal or mode of ratification powers, or if the states upset the delicate balance of ratification by rescinding.

#### D. Federal Courts

There is strong scholarly consensus that the federal courts should maintain jurisdiction over Article V cases, despite the one-off decision of *Coleman v. Miller*, and subsequent lower courts have agreed.<sup>208</sup> As noted above, the District Court of Illinois exercised jurisdiction in *Dyer v. Blair*, and the District Court of Idaho exercised jurisdiction in *Idaho v. Freeman*. And of course, the Supreme Court did not reverse any of its prior cases adjudicating Article V issues in *Coleman*. But unfortunately, the federal courts have not enthusiastically embraced their Article V jurisdiction either. Where possible, they have entirely avoided relevant issues. In other instances, they have decided only the specific issue at hand without providing guidance for similar issues in the future. And in some instances, they have made resolution by the federal courts even more difficult by holding that ratification certificates are conclusive despite allegations of impropriety. It is this last point that makes judicial resolution of the ERA issues so confounding and sends us deeper into the Article V maze.

The Supreme Court has issued only nine decisions on procedural issues involving Article V in its nearly two-and-a-half centuries of operation. Eight of those decisions occurred during the constitutional panic of the 1920s and 1930s and should be understood within that context.<sup>209</sup> Two of those were dismissed for lack

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not even more so as to the adoption of important and permanent constitutional amendments?" *Id.* at 1139 n.47.

207. *Trombetta v. Florida*, 353 F. Supp. 575 (M.D. Fla. 1973); *Walker v. Dunn*, 498 S.W.2d 102 (Tenn. 1972).

208. See, e.g., Marty Haddad, Note, *Substantive Content of Constitutional Amendments: Political Question or Justiciable Concern?*, 42 WAYNE L. REV. 1685 (1996); White, *supra* note 197; Dellinger, *supra* note 15; Dunker, *supra* note 18 (all arguing for justiciability of substantive issues involving amendment ratifications).

209. See KYVIG, *supra* note 6, at 240–67. By January of 1918, three constitutional amendments had been ratified in a span of five years, and another was working its way through Congress: woman's suffrage. *Id.* Only with ratification of the Bill of Rights and the reconstruction amendments had there

of standing or mootness grounds, and two others were challenges claiming that there were substantive limits to Article V to prevent certain types of amendments that might interfere with the state police power or dilute state suffrage rules.<sup>210</sup> In essence, in only five cases did the Court issue opinions that might have some relevance to the questions we are facing with the ERA.<sup>211</sup>

The first decision, *Hollingsworth v. Virginia* in 1798,<sup>212</sup> held that the President has no Article V function. After *Hollingsworth*, it was over a century before *Hawke v. Smith* held that Article V prohibited Ohio's constitutional amendment requiring a public referendum.<sup>213</sup> In *Hawke*, the Court adopted a technical and narrow reading of Article V that interpreted the word "legislatures" to mean only the commonly understood political bodies of the state and not the people themselves, even if the latter had legislative functions.<sup>214</sup> Striking down the referendum placed Article V's form over function and hewed closely to the technical requirements of amending. In striking the referendum requirement, the Court established that a ratified amendment will not be voided by the courts, a position from which it has never deviated.<sup>215</sup> Notably, *Hawke* was brought by a proponent of the Eighteenth Amendment who sought to divert any challenges that might undermine it.<sup>216</sup>

After *Hawke*, seven lawsuits were consolidated into the *National Prohibition Cases*, challenging the Eighteenth Amendment on substantive grounds for invading the sovereignty of the states, usurping the police power of the states, and

been such significant amendment activity, and both periods were characterized by profound social and political upheaval. *Id.* And conservatives were understandably very nervous about the direction the country was taking. *Id.* Constitutional amendments promoting populism, expanding democratic engagement, and usurping state police powers had passed and more seemed likely to pass in the near future. *Id.* The union of independent states was becoming a unitary nation, governed by a strong central government—everything the Anti-federalists had feared. *Id.* Using the amendment power of Article V to enshrine ordinary political preferences, like Prohibition and the Child Labor Amendment, was viewed as a tremendous threat to the balance of federal and state powers enshrined in the Constitution by the founders and as an existential threat to our constitutional republic. *Id.*

210. *Fairchild v. Hughes*, 258 U.S. 126 (1922); *Chandler v. Wise*, 307 U.S. 474 (1939).

211. *Hollingsworth v. Virginia*, 3 U.S. (3 Dallas) 378 (1798); *Hawke v. Smith*, 253 U.S. 221 (1920); *Dillon v. Gloss*, 256 U.S. 368 (1921); *Leser v. Garnett*, 258 U.S. 130 (1922); *Coleman v. Miller*, 307 U.S. 433 (1939).

212. 3 U.S. (3 Dallas) at 381 n.\*. In ruling that the Eleventh Amendment cut off all pending and future suits, the Court dropped a footnote that amendments are unlike regular legislation and do not require presidential approval. *Id.*

213. 253 U.S. at 231.

214. *Id.* at 227–28.

215. *Id.* An identical case against the Nineteenth Amendment, *Hawke v. Smith, No. II*, 253 U.S. 231 (1920), was summarily dismissed on the same grounds as *Hawke I*.

216. KYVIG, *supra* note 6 at 243. And there were many challenges at the state level that went nowhere, even before *Hawke* was handed down. As with *Coleman* and *Chandler*, however, there were state-level splits as to whether Article V procedures could include public participation. *State ex rel. Askew v. Meier*, 231 N.W.2d 821 (N.D. 1975); *Kimble v. Swackhamer*, 584 P.2d 161 (Nev. 1978); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933); *In re Opinion of the Justices*, 107 A. 673 (Me. 1919); *Brown v. Sec'y of State of Florida*, 668 F.3d 1271 (11th Cir. 2012).

encroaching on local self-government.<sup>217</sup> In those cases, anti-prohibitionists claimed that Article V powers were limited to *procedural* amendments that did not infringe on the self-governing police power of the states.<sup>218</sup> Again, the Supreme Court was unsympathetic to these arguments and upheld the Eighteenth Amendment as meeting the formalistic requirements of Article V, despite the effect of potentially negating the popular will and infringing on the autonomy of the states.<sup>219</sup> A decade later, in *U.S. v. Sprague*, a similar challenge to the Eighteenth Amendment succeeded in a District Court, which held that because Prohibition imposed substantive limits on the state and was not ratified by convention, it was invalid.<sup>220</sup> The Court swiftly disposed of the challenge, reversing the District Court's decision and stating that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition."<sup>221</sup>

By 1931 the Court was tired of judicial challenges to a properly ratified amendment, and it refused to accept any arguments that there were substantive or procedural limitations to Article V. Once ratified, the Amendment had become part of the Constitution regardless of any alleged improprieties or the Amendment's imprudence.<sup>222</sup> *Hollingsworth, Hawke, Sprague*, and the *National Prohibition Cases* are all irrelevant to the specific issues raised by the ERA, but they are valuable examples of the Court's formalism, textualism, and antipathy toward Article V disputes. The decisions are short, affirm the amendment, and do little else.

The first case to raise an issue that is relevant to the ERA was *Dillon v. Gloss*, which came before the Supreme Court seeking to void the Eighteenth Amendment based solely on the existence of the deadline.<sup>223</sup> It, too, failed. The Court held the deadline did not void the Eighteenth Amendment because, once again, the proposal met the technical requirements of Article V; it was passed by two-thirds of both houses, and the Amendment was then ratified by three-fourths of the states.<sup>224</sup> The Court did state, however, that Congress may have the power to impose a deadline as a "matter of detail." Justice Van Devanter stated:

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217. Nat'l Prohibition Cases, 253 U.S. 350 (1920).

218. *Id.* at 354, 367.

219. *Id.* at 386.

220. *United States v. Sprague*, 44 F.2d 967, 986 (D.N.J. 1930), *rev'd*, 282 U.S. 716, 733–34 (1931).

221. *Sprague*, 282 U.S. at 731.

222. *Id.* at 732. ("If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.")

223. 256 U.S. 368 (1921).

224. *Id.* at 373–74.

As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require: and article 5 is no exception to the rule. Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.<sup>225</sup>

Justice Van Devanter continues by noting that seven years was reasonable “if power existed to fix a definite time,” since the time period was not challenged and prior amendments had been ratified in much shorter times.<sup>226</sup> But here the Court has created a paradox that thrusts the ERA ratification into unmapped territory. The Twenty-Seventh Amendment took over two hundred years and the ERA took forty-eight years to be ratified. Historical practice does not necessarily support the reasonableness of a seven-year deadline, and the opinion itself calls into question whether Congress has the power in the first place. The qualification of “if power existed to fix a definite time” makes us realize that what the Court said earlier was mere dicta about deadlines being “matter[s] of detail.”<sup>227</sup> Under the Court’s textualist interpretation that the Eighteenth Amendment was properly ratified within the relevant time period, it was not necessary to rule on whether Congress has such power, and so the deadline was nothing but an irrelevant afterthought.

A year later, the Nineteenth Amendment was challenged in *Leser v. Garnett* by a Maryland citizen claiming that the Amendment was not properly ratified by a number of states.<sup>228</sup> Maryland had not ratified the Nineteenth Amendment, but the requisite number of states had. Three arguments were made that were disposed of in the brief, four-paragraph decision. The first, that adding women to the voter rolls violated a provision of the Maryland Constitution that limited suffrage to men, was rejected because the argument that adding to the voter rolls was unconstitutional would have voided the Fifteenth Amendment as well.<sup>229</sup> Plus, this was basically an argument that Maryland law conflicted with the Amendment and therefore should not be subject to its operation. After so many years, the Court was not going to accept an argument that non-ratifying states could not be bound by a ratified amendment. Second, petitioners argued that the legislatures of many states were prohibited from ratifying the Amendment because of various prohibitions in their state constitutions. The Court rejected this argument by noting that ratification of a federal constitutional amendment is a federal function, not a state function, and therefore state constitutional limitations on expanding suffrage were irrelevant.<sup>230</sup> Third, the Court dismissed the claim that Tennessee and West Virginia may have

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225. *Id.* at 376.

226. *Id.*

227. *Id.*

228. 258 U.S. 130, 136 (1922).

229. *Id.* at 136.

230. *Id.* at 136–37.

violated their own ratification procedures because additional states had ratified, making the issue moot.<sup>231</sup> However, in discussing this third matter, Justice Brandeis stated: “As the Legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.”<sup>232</sup>

Once again, the Court has made our Article V journey more difficult. If certificates of ratification are conclusive, then what is to stop a state from submitting a certificate on blatantly improper grounds? The better result would have been to get to the substance and hold that Article V does not permit Tennessee to require an intervening election, just like it does not permit a popular referendum, and that a state senator rushing home from a trip to break a tie vote is not a violation of a state’s ratification power.<sup>233</sup> But rather than assert jurisdiction and decide on the merits, the Court took an enigmatic position that state ratification certificates are conclusive. A similar challenge to the Nineteenth Amendment, *Fairchild v. Hughes*, was dismissed for lack of standing.<sup>234</sup> *Fairchild* and *Leser* together make it difficult to challenge the legal sufficiency of a state’s ratification if it has been submitted to the Secretary of State, or now the Archivist.

The final two cases, *Chandler v. Wise*<sup>235</sup> and *Coleman v. Miller*,<sup>236</sup> raised technical questions about irregularities in state ratifications that the Court again refused to upset based on technical satisfaction of Article V. In *Chandler*, the Court dismissed the case on mootness grounds, relying on the conclusiveness of state certificates, concluding:

We think that, while the state court had jurisdiction *in limine*, the writ of *certiorari*<sup>237</sup> should be dismissed upon the ground that after the Governor of Kentucky had forwarded the certification of the ratification of the

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231. *Id.* at 137.

232. *Id.* It was suggested in *Trombetta* that the challenge to the Tennessee ratification was that it violated a state constitutional requirement of an intervening election. *Trombetta v. Florida*, 353 F. Supp. 575, 577–78 (M.D. Fla. 1973). Thus, although the Court in *Leser* did not expressly strike down intervening election requirements, it upheld Tennessee’s ratification despite the state’s neglected constitutional requirement. *Leser*, 258 U.S. at 137.

233. See KYVIG, *supra* note 6, at 237.

234. 258 U.S. 126, 129–30 (1922).

235. 307 U.S. 474 (1939).

236. 307 U.S. 443 (1939).

237. The litigants in *Chandler* sought a restraining order and writ of mandamus to prohibit the Kentucky governor from transmitting the resolution to Washington or, in the alternative, to require that he ask for it to be returned or notify the Secretary of State that it was void and ineffective. Since the state courts would have no jurisdiction over the U.S. Secretary of State, the disgruntled legislators sued their Governor over whom the state court would have jurisdiction. On appeal to the U.S. Supreme Court, however, the justices dismissed because once the certificate had been submitted to Washington, it was deemed conclusive under *Leser v. Garnett* and no further action was appropriate.

amendment to the Secretary of State of the United States there was no longer a controversy susceptible of judicial determination.<sup>238</sup>

*Coleman v. Miller*, discussed at length above, is a rambling, convoluted opinion in which the Court could not agree on the technical issue of the Lieutenant Governor's role in the Kansas ratification and otherwise upheld the ratification after rejection because there was no case or controversy.<sup>239</sup>

Conclusions from this paucity of cases suggest the following: (1) the Court will read Article V procedures narrowly, according to the plain text, and will affirm an amendment if it meets the technical requirements; (2) an inoperative deadline will not void an otherwise properly ratified amendment; (3) states may ratify after rejecting a proposal; (4) regular citizens do not have standing to challenge an amendment; and (5) state ratification certificates and the Secretary of State's publication of ratification are conclusive on certain aspects of the legal sufficiency of state ratification procedures.<sup>240</sup>

From one perspective, it seems that we could have been making headway in escaping our Article V adventure by realizing that the *Coleman* suggestion of nonjusticiability is a red herring and that the federal courts have the jurisdiction and the tools to resolve our two substantive questions. But then we run right into that brick wall from *Leser*, repeated in *Chandler* and *Sprague*, that state ratification certificates are conclusive. If the Court wants to stick to that position, we may be truly lost in Wonderland with no path out.

For if they are conclusive, then there is no stopping an overeager governor from submitting certificates to Washington on her own accord, on the vote of a legislative committee, on a vote with all opposing members imprisoned and denied a voice, or even when passed by a simple majority instead of the legislatively required supermajority. Had the Illinois Secretary of State simply sent the ERA ratification to Washington, even though the vote violated both the Illinois Constitution and its own legislative rules, we might have had the ERA back in 1978.

In a wacky 2015 Texas case (of course it's from Texas), a petitioner claimed the Seventeenth Amendment was improperly ratified and therefore void because of purported irregularities in the Wisconsin and California ratifications.<sup>241</sup> The Texas

238. *Chandler*, 307 U.S. at 477–78.

239. See discussion *supra* Section II.C.2.

240. Lower courts have affirmed the narrow scope of the political question doctrine in the case of constitutional amendments. In *United States v. Wojtas*, No. 85 CR 45, 1985 WL 1963, at \*2 (N.D. Ill. 1985), the court stated in response to a challenge to the Sixteenth Amendment that “the Supreme Court has ruled that the Secretary’s proclamation is conclusive, and that courts cannot inquire as to the possibly erroneous basis of his finding.” In *United States v. Sluk*, No. M-18-304, 1979 WL 1474, at \*2 (S.D.N.Y. 1979), the court rejected an argument by a taxpayer that he did not owe his federal income taxes because the Seventeenth Amendment which provides for the popular election of Senators was an unconstitutional alteration of the Constitution and that therefore the tax provision enacted in part by the Senate was unconstitutional.

241. *Kidd v. Cascos*, No. 03-14-00805-CV, 2015 WL 9436655, at \*1 (Tex. App. 2015).

Court of Appeals handled this challenge to a century-old Amendment as it should have: by dismissing it. But the petitioner also made the claim that the conclusive presumption of legal sufficiency espoused in *Leser*, *Sprague*, and *Chandler* is itself a violation of the Fourteenth Amendment's Due Process Clause. And that, as farfetched as it appears in a case challenging the Seventeenth Amendment, is precisely the problem with the Court's Article V jurisprudence, as limited as it is.

Ironically, virtually every issue left open by these cases is raised by the ERA. First, will the Court follow precedent in *Hawke* that the ERA has met the strict formal requirements of ratification authorized by Article V? Second, will the deadline be operative to cause the ERA to self-destruct, an issue not discussed in *Dillon* and never yet presented? Third, may states change their minds and rescind after ratification just as they may change their minds and ratify after rejection, upsetting more than a century and a half of historical precedent? Fourth, who has standing to challenge the ERA?<sup>242</sup> Fifth, may the Archivist refuse to certify the ERA after having received the requisite number of state ratification certificates in contradiction to the conclusory status of the state ratifications as dictated in *Leser*, *Sprague*, and *Chandler*? Sixth, are any of these issues nonjusticiable political questions left to Congress to resolve as hinted at by *Coleman*?

It is safe to say that our Supreme Court guideposts are about as helpful in escaping the Article V wonderland as the advice of the Caterpillar or the White Rabbit. But assuming we are ever to get out of the Article V maze, we should look to traditional tools such as judicial norms, prior practice and precedents, original intent, scholarly opinion, and canons of construction common with constitutional disputes. Toward that end, therefore, I turn to our substantive issues of the deadline and the rescissions briefly before returning to the beginning to determine what role, if any, the Archivist has or should have in determining the legal sufficiency of state ratifications.

### III. MAKING OUR WAY OUT OF THE ARTICLE V WONDERLAND

Using the navigational tools of judicial interpretation, we can see that even if we had clarity that the federal courts are the appropriate decision makers, we are still left in a field of ambiguity when it comes to deciding whether Congress may impose a deadline, whether ratifications after the deadline are valid, and whether states may rescind their ratifications. Embracing that uncertainty, we can continue on our ramble, like Alice, taking each adventure in stride.

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242. This is not an issue here exactly although, as I argue below, the Archivist should certify the ERA and leave it up to a plaintiff with standing to challenge it. *See infra* Part IV. If the conclusiveness issue were reversed, then anyone who is prosecuted pursuant to laws passed by virtue of the amendment would have standing, as in the case of *Dillon v. Gloss*, 256 U.S. 368 (1921).

### A. Congressional Deadlines

Despite the Court's statement in *Dillon* that deadlines might be a "matter of detail"<sup>243</sup> within Congress's mode-of-ratification power, the real question behind the deadline is whether Congress may impose a restriction on the states that would have the effect of voiding an amendment that has met the technical requirements of Article V. More specifically, to what extent may Congress use its proposal or mode-of-ratification power to frustrate the states in the exercise of their ratification power? This is a federalism question that is entirely unprecedented because the deadline in *Dillon* did not actually operate in any way to void a state's ratification.<sup>244</sup>

Analyzing the deadline issue requires, first and foremost, that we see it as a limitation on the states' decision when, as well as whether, to ratify. The three states that have ratified the ERA after the deadline have done so in opposition to a congressional, not a state, limitation. It is unlikely that a state could even impose such a deadline on its own ratification of constitutional proposals. The question facing us is whether a congressional deadline is a mere matter of technical detail, like the statute requiring certificates be sent to the Archivist, or a matter of substance that infringes on the states' Article V powers and violates the federalism balance of the Tenth Amendment. To unpack the answer to these questions, we must use our traditional tools of constitutional interpretation.

#### 1. History and Prior Precedent

The first deadline was imposed on the Eighteenth Amendment in an effort to defeat it by then-Senator Warren Harding.<sup>245</sup> Although earlier efforts by opponents to hamper amendment proposals by imposing deadlines had been suggested, they ultimately failed.<sup>246</sup> And there was extensive debate at the time with strong opinions that the deadline was unconstitutional.<sup>247</sup> When the Eighteenth Amendment passed

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

244. *See generally id.*

245. In the height of controversy surrounding the Civil War Amendments, numerous attempts had been made to stall the Fourteenth and Fifteenth Amendments by limiting the time the states could consider and ratify, by requiring intervening state legislative elections, and other roadblocks. *See* CONG. GLOBE, 39th Cong. 1st Sess. 2771 (May 23, 1866) (amendment of Sen. Buckalew adding an intervening election, permitting no states to change their minds either way, and allowing only three years to ratify); CONG. GLOBE, 40th Cong. 3rd Sess. 912 (Feb. 5, 1869) (amendment adding an intervening election requirement).

246. *Id.*

247. Senator Cummins explained:

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.

55 CONG. REC. 5652 (1917) (statement of Sen. Cummins). Senator Borah argued numerous times that the deadline proposal was unconstitutional:

in a little over a year, well within the seven-year deadline, opponents who wanted to sink the proposal realized that it was a relatively ineffective strategy.<sup>248</sup> Consequently, the Nineteenth Amendment and the Child Labor Amendment of 1924 were issued with no deadlines, although attempts were again made by opponents to add deadlines along with other revisions to hinder or stall their passage.<sup>249</sup>

With the Twentieth Amendment, opponents again succeeded in placing a deadline in the text of the proposal itself, hoping that the deadline would limit its chances of being ratified in time.<sup>250</sup> Yet once again the deadline proved ineffective.<sup>251</sup> When the Twentieth Amendment was ratified in under twelve months, members of Congress began to view the deadline as pro forma.<sup>252</sup> The Twenty-First and Twenty-Second Amendments both included a deadline in the text of the proposals, and both were ratified relatively quickly.<sup>253</sup>

The Court's decision in *Dillon* helped prompt this reversal of fortune and, with the Court's apparent imprimatur, deadlines became less controversial when added to proposals. And if the amendment proposal was properly ratified and became effective, then no harm, no foul. But if the proposal was not ratified within the allotted time period, it was generally believed that the deadline would cause the amendment to self-destruct.

But holding that an ineffective deadline would not void an otherwise properly ratified amendment is far from holding that the deadline itself could stop the states from exercising their sole ratification power under Article V after the date provided. Complicating the issue even further is that, beginning in the 1960s, Congress moved

I have very grave doubts about whether or not this can be done. If this proposed constitutional amendment goes to the States at the present time, as the Constitution of the United States now stands the States have a right to ratify it within any time they may see fit. The number of years within which they may take action is not limited.

55 CONG. REC. 5649 (1917) (statement of Sen. Borah).

248. 55 CONG. REC. 5649 (1917) (statement of Sen. Borah).

249. U.S. CONST. amend. XIX; Child Labor Amendment H.R.J. Res. 184 (1924) (proposing a constitutional amendment). A deadline, a requirement for state convention ratification, and other efforts all failed. See KYVIG, *supra* note 6, at 236.

250. U.S. CONST. amend. XX, § 6. The Twentieth Amendment, although seemingly commonplace to us, was quite controversial at the time because many in Congress felt that, with four amendments having passed in the first two decades of the twentieth century, the country was on a downhill slide toward using constitutional amendments to resolve substantive political differences. See KYVIG, *supra* note 6, at 278.

251. An earlier version of the Twentieth Amendment was subjected to an amendment to include a deadline and a requirement that an intervening election take place before states could ratify it, both with the apparent intent of making it harder to ratify. When that proposal failed to make it out of the House, however, it died, to be replaced in the next Congress with an almost identical proposal that retained the deadline but omitted the intervening election. By 1924 Congress had the benefit of the Supreme Court's decision in *Dillon v. Gloss*, which held that the existence of a deadline did not void the amendment, although whether an operative deadline could be valid was not raised, briefed, or decided. KYVIG, *supra* note 6, at 273; *Dillon v. Gloss*, 256 U.S. 368 (1921).

252. Wright, *supra* note 13, at 66–68.

253. U.S. CONST. amend. XXI, §3; U.S. CONST. amend. XXII, §2.

the deadlines from the text of the proposal and into the preamble in order to remove the deadline from the final text that would make its way into the Constitution.<sup>254</sup> The Twenty-Third through the Twenty-Sixth Amendments all included seven-year deadlines in the preamble, or resolving clause, as did the ERA proposal.<sup>255</sup> But as debate over the ERA extension grew, Congress opted to place the deadline for the D.C. Representation Amendment back into the text, where many believed it would not be amendable by a later Congress.<sup>256</sup> These congressional turnabouts could lead one to reasonably conclude that deadlines in the preamble function differently than deadlines in the text.<sup>257</sup>

Until the ERA timed out, no deadline has ever been legally operative. Every amendment proposal that was issued from Congress containing a deadline was ratified under the time limit. Of the two amendment proposals that did not contain a deadline, one passed relatively quickly and became the Nineteenth Amendment and the other, the Child Labor Amendment, has still failed to pass. And until January 27, 2020, the deadline in the ERA was inoperative as fewer than thirty-eight states had ratified. Any challenge to the deadline in a ratified amendment would fail under the reasoning of *Dillon*, and any challenge to the deadline in an unratified amendment proposal would fail on ripeness grounds. Thus, only now have we reached a triable issue on the constitutionality of the congressional deadline, and we should follow our constitutional guideposts to see if we can get out of the deadline maze without feeling like we are running circles in a Caucus-race.

## 2. Textualism

The Court's commitment to textualism in all of its prior Article V cases is incontrovertible.<sup>258</sup> Ratifications and proposals that meet the plain language of Article V have been upheld against substantive and procedural challenges. But of course, Article V makes no explicit mention of a deadline or the power to impose deadlines in the text of an amendment itself.<sup>259</sup> If there is any power to impose a deadline on the states, that power must be implied either from the power to propose amendments or the power to specify the mode of ratification. The inclusion of time

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254. KYVIG, *supra* note 6, at 468.

255. Ratification of the Equal Rights Amendment, *supra* note 8, at 20–21.

256. *Id.*

257. Hanlon, *supra* note 15, at 694–95; Ginsburg, *supra* note 17, at 923; Held, Herndon & Stager, *supra* note 15, at 123–28.

258. The Supreme Court has held that Article V should be read for its plain language and plain meaning. In *United States v. Sprague*, 282 U.S. 716, 731–32 (1931), the Court explained that [t]he Constitution[’s] . . . words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition . . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.

259. *Id.*

periods and restrictions in other parts of the Constitution, including within Article V itself, suggests that the omission of such a deadline for the ratification of constitutional amendments was intentional.<sup>260</sup> The lack of an explicit deadline power in Article V and the inclusion of deadlines elsewhere support the conclusion that the Framers did not intend to grant such a power to Congress. Senator Brandegee insisted that the provision of Article V, providing that an amendment shall be deemed valid “when ratified,” means “whenever ratified.”<sup>261</sup>

That Congress does not have the power to subvert the ratification function of the states was the view of Senator Borah, who objected to the deadline in the Eighteenth Amendment, stating:

We having submitted [it] to the States, it is in the possession of the States, and we cannot control it. They have a perfect right to say, ‘we shall ratify this now,’ or ‘We shall ratify it in 10 years from now,’ and when they shall ratify it they will have acted in accordance with the provisions of the Constitution of the United States.<sup>262</sup>

Furthermore, there is no express provision to imply the power to impose deadlines in Article V, such as the Necessary and Proper Clause of Article I.<sup>263</sup> Although Congress has the power to choose the mode of ratification, the two choices facing Congress in making that decision are clearly articulated: state legislatures or state conventions. The power to qualify or to expound on that decision is nowhere granted. And the Supreme Court has held that any other modes or limitations are unconstitutional, such as a public referendum or the requirement of an intervening election,<sup>264</sup> regardless of whether they are appended by the states or by Congress.<sup>265</sup> In the absence of any express power or language granting implied powers to impose additional conditions or regulations on the mode of ratification, *Sprague’s* admonition makes sense, that we should not add words to the plain text or construe and interpolate additional powers,<sup>266</sup> especially when those powers can substantially frustrate the ratification power granted solely to the states.

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260. For instance, Article V specifies that “no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article.” U.S. CONST. art. V. Article I, Section 2 provides that representatives be elected every second year and the census be taken within every ten-year period following the first census. U.S. CONST. art. I, § 2. Article I, Section 5 states that neither house of Congress may adjourn for more than three days without the consent of the other. *Id.* at § 5. Article I, Section 7 states that the President has ten days, notwithstanding Sundays, within which he may sign or veto a bill that has been presented to him. *Id.* at § 7.

261. 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 the word ‘when’ always has been interpreted, and is correctly interpreted, as though it were ‘whenever.’”).

262. 55 CONG. REC. 5649 (1917) (statement of Sen. Borah).

263. U.S. CONST. art. I, § 8.

264. *Hawke v. Smith*, 253 U.S. 221, 227–30 (1920).

265. KYVIG, *supra* note 6, at 181, 251, 273.

266. *United States v. Sprague*, 282 U.S. 716, 731 (1930).

### 3. Originalism

The history of the drafting of Article V, and of the Constitution generally, also supports the view that Congress does not have the power to limit the time during which the states can exercise their sole ratification power. Original drafts did not include any role for Congress in amending the Constitution. The Virginia Plan provided that amendments would originate only with the states and would not require any congressional participation.<sup>267</sup> The concern of many of the drafters was that the national legislature would erect barriers to any amendments intended to limit its power. Maintaining the federal/state balance justified giving sole amendment power to the states.<sup>268</sup> This was consistent with the Framers' general beliefs that an unrestrained federal government would tend to amass greater and greater power at the expense of the states.<sup>269</sup>

Alexander Hamilton was concerned, however, that the states might be out of touch with the needs of the federal government and might not be inclined to grant additional powers in cases of great national need.<sup>270</sup> Roger Sherman, voicing Hamilton's concerns that the states alone should not have sole proposing power, suggested adding the provision allowing for congressional proposal of amendments but kept Congress's role limited only to proposing.<sup>271</sup> Thus, Congress was given the ability to make proposals, but no changes were made to the sole primacy of the states in the ratification process.<sup>272</sup> Even after Congress was granted the power to propose amendments along with the states, Hamilton affirmed the primacy of the states: "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."<sup>273</sup>

The states are both necessary and sufficient parties to an amendment because they have the ability to propose amendments without consent of the national legislature through conventions and then ratify them. At the same time, Congress has only a limited, potentially ministerial, role. If Congress, with its limited power, could substantially impair the states' exercise of their constitutional function by dictating when or how they are to ratify, the federal/state balance envisioned by the drafters would be fundamentally undermined.<sup>274</sup>

267. KYVIG, *supra* note 6, at 56–60.

268. MICHAEL J. KLARMAN, *THE FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 539 (2016).

269. *Id.* at 592–93.

270. *Id.* at 539.

271. KYVIG, *supra* note 6, at 57.

272. *Id.* at 57–58.

273. THE FEDERALIST NO. 85 (Alexander Hamilton).

274. Had the drafters envisioned congressional power to limit the states to ratifying within a specified time period, they would surely have mentioned it, since leaving that decision to congressional discretion might allow Congress to frustrate the will of the states by allowing only a very short time in

#### 4. *Logic*

Senator Brandegee's complaint that the deadline was a paradoxical impossibility makes sense in the context of deadlines in the text of the amendment itself.<sup>275</sup> But the ERA deadline is in the preamble and could, perhaps, logically be imposed as a technical detail under Congress's mode-of-ratification power. But we face both a substantive and a procedural paradox again. The substantive paradox assumes that seven years is a reasonable time, and the procedural paradox assumes that matters of procedural detail could be left to Congress, rather than to the states.

On the substantive side, a deadline of six years<sup>276</sup> might seem reasonable in theory but could be virtually impossible to satisfy in practice if legislatures met only quadrennially, as was the case in some states until quite recently.<sup>277</sup> And of course, with no textual parameters to frame such a deadline power, arguably there would be no constraints on Congress imposing a short deadline of one year, or even one month, on the states. Arguments that a "reasonable time period" must be provided, or that there is some element of contemporaneousness between proposal and ratification, ask the courts to substitute their judgment for that of the states, the parties tasked with determining when an amendment is necessary.

It would seem that the ratification of the Twenty-Seventh Amendment has exploded the myth of contemporaneousness, and the fact that Congress sat on the ERA proposal for more years than the states have makes a seven-year deadline coming from Congress a bit Janus-faced. Seven years provide sufficient time for ratification in thirty-eight states only if there is bipartisan support for an amendment or if the states are sufficiently gerrymandered to ensure that the political party that supports an amendment also controls the requisite number of state houses. Gerrymandering the other way, in only thirteen states, is enough to block a popular amendment proposal well past the expiration date allowed by Congress. Although

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which to ratify a proposal, especially if it was a proposal initiated by the states and not by Congress. KYVIG, *supra* note 6, at 60 ("Like the rest of their creation, Article V evinced the essential compromise struck between the proponents of a strong central government and the advocates of retained state power. Although Congress was granted a powerful role in the process, constitutional ratification and amendment were not to be achieved solely by the central government, nor merely with the concurrence of some majority of an undifferentiated national population. States, as distinct entities with separate populations and political institutions, occupied as significant and unavoidable a position in the process as did the national government; majorities in the legislatures or conventions of individual states would decide constitutional issues. The possibility of the states in concert initiating constitutional change as well as checking congressionally initiated reform were notable characteristics of the amending system.").

275. See *supra* note 73 and accompanying text.

276. Senator Harding's original deadline was just six years. 55 CONG. REC. 5648 (1917). It was later changed to seven in the House. Deadlines of from three to twenty years have, at various times, been suggested. See Congressional Pay Amendment, *supra* note 34, at 89.

277. See ROBERT LUCE, LEGISLATIVE ASSEMBLIES: THEIR FRAMEWORK, MAKE-UP, CHARACTER, CHARACTERISTICS, HABITS, AND MANNERS 25 (1924) (noting that Alabama and Mississippi had quadrennial sessions and Maryland had triennial sessions, with a shift around the turn of the twentieth century to lengthen the period between sessions).

seven years might have seemed reasonable to Justice Van Devanter in 1921, it seems far less reasonable today when state houses reflect deeply entrenched political interests that do not reflect the popular will. As Justice Breyer stated in *Vieth v. Jubilerer*, it could take decades to get out from under a powerful gerrymander, and by that time the seven-year deadline could have come and gone many times over.<sup>278</sup> With redistricting happening after each decennial census, it could take decades for a heavily gerrymandered legislature to be dislodged to allow popular support for an amendment to be reflected. As a matter of simple politics, a deadline designed to subvert and prevent an amendment proposal's ratification should be viewed in the clear light as an attempt to gain political points while ensuring that no changes occur.<sup>279</sup> Although such behavior is eminently reasonable in the world of partisan politics, it seems patently unreasonable in the realm of constitutional interpretation.

As a procedural matter, deadlines too are illogical, even when located in the preamble. Although they do not cause an amendment proposal to self-destruct, like deadlines in the text, they pose a different paradox. On the basis of what authority or power would a deadline operate? The Court has held that preambles are nonbinding. Justice Scalia in *District of Columbia v. Heller* stated explicitly that only the operative words of a constitutional provision are legally binding: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose . . . . But apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause."<sup>280</sup> On this understanding, preambles may clarify but generally do not limit or bind and have no legally operative effect.

Some Senators during debate of the Eighteenth Amendment argued that the deadline acted like a condition in a contract.<sup>281</sup> Congress could offer the states an unlimited time to ratify, or it could offer them a shortened time to ratify: kind of a "clearance sale," a time-limited chance to get an amendment. But like the Cheshire Cat, the condition argument reveals its true stripes upon further reflection. For states that are ready to buy now, the deadline is irrelevant. For states that never want to buy, the deadline is also irrelevant. But for states that cannot, or perhaps do not, want to buy now but might want to later, the deadline is a serious constraint on their Article V powers to ratify after rejecting, a power expressly affirmed in *Coleman* and

278. 541 U.S. 267, 364 (2004). Justice Breyer explains in his dissent in *Vieth* that "[t]he combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge." *Id.*

279. This was clearly Senator Harding's goal. See Wright, *supra* note 13, at 64–65 and accompanying citations.

280. *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008).

281. 55 CONG. REC. 5650 (1917) (statement of Sen. Pomerene) ("I know of nothing in the Constitution which says that the Congress can not attach any condition or qualification to a proposition which it submits in the form of a proposed amendment to the Constitution.")

*Chandler*. Those cases provide that states may change their minds and ratify after they have rejected.<sup>282</sup> But a congressional deadline provides that the state that might want to change its mind may only do so within seven years. After that, its Article V power to change its mind is foreclosed.

But why, you might ask, didn't states object to one of the eight prior instances in which the deadline had been imposed? In no case has a state's decision to change its mind mattered until the Illinois, Nevada, and Virginia ratifications of the ERA because this was the only time yet that a state had asserted its rights to change its mind and ratify after the deadline and those ratifications would be legally significant in the absence of the deadline. Yet, it should be noted that numerous states have exercised their power to change their minds and have ratified amendments after the deadline has passed.<sup>283</sup> And in all of these instances, these states are listed as ratifying states even though they changed their minds and ratified many years after the congressional deadline had passed. But these late ratifications, although recognized as valid, ultimately did not matter because the requisite number of other states had already ratified, and the amendments had already become effective. But that should not be taken to mean that the states that ratified before the deadline expired, or those that ratified after the amendment had become effective, consented to Congress limiting the time in which they could change their mind and choose to ratify after rejecting.<sup>284</sup> Those states simply had no reason to object.

### 5. *Scholarly Opinion*

Lawmakers and legal scholars in the past also agreed that deadlines were inconsistent with the states' ratifying power and were unconstitutional. Justice Story

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282. See generally *Coleman v. Miller*, 307 U.S. 433 (1939); *Chandler v. Wise*, 307 U.S. 474 (1939).

283. Alabama ratified the Twenty-Third Amendment forty-two years after it was proposed. See *Ratification of Constitutional Amendments*, U.S. CONST. (Nov. 11, 2010), <https://www.usconstitution.net/constamrat.html> [<https://perma.cc/H84Q-KNZH>]. Virginia, North Carolina, Alabama, and Texas ratified the Twenty-Fourth Amendment fifteen, twenty-seven, forty, and forty-seven years, respectively, after that amendment was proposed. See Bill McAllister & Megan Rosenfeld, *Va. On Amendments: No!*, WASH. POST (Feb. 24, 1977), [https://www.washingtonpost.com/archive/politics/1977/02/24/va-on-amendments-no/57623fcd-f270-47cc-ad9b-7bfd4134e59/?id=ss\\_mail](https://www.washingtonpost.com/archive/politics/1977/02/24/va-on-amendments-no/57623fcd-f270-47cc-ad9b-7bfd4134e59/?id=ss_mail) [<https://perma.cc/5DX9-U2GN>]; H.R. JOURNAL, 1989 Gen. Assemb., 1st Sess. 542 (N.C.); H.R. JOURNAL, 2002 Gen. Assemb., Reg. Sess. (Ala.); Jena Williams, *Righting a Wrong*, TEX. MONTHLY (June 2009), <https://www.texasmonthly.com/articles/righting-a-wrong/> [<https://perma.cc/YEA2-Q73A>]. South Dakota ratified the Twenty-Sixth Amendment forty-three years after it was proposed. See, e.g., Caheidelberger, *SJR 1: 43 Years Later, South Dakota to Ratify Vote for 18-year-Olds*, S. D. MADVILLE TIMES, (Jan. 24, 2014), <https://madvilletimes.com/2014/01/24/sjr-1-43-years-later-south-dakota-to-ratify-vote-for-18-year-olds/> [<https://perma.cc/4FJA-QA8Y>]; GOV'T PUBL'G OFF., AMENDMENTS, *supra* note 48. Gabriel Chin views these post-adoption ratifications as symbolically important. See Gabriel J. Chin & Anjali Abraham, *Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments*, 50 ARIZ. L. REV. 25, 33–37 (2008).

284. Where the states ratified, presumably they would have no standing to challenge the deadline, and where they ratified after the deadline but the amendment was already effective, their challenge would be moot.

interpreted Article V to permit an unlimited time for states to deliberate.<sup>285</sup> David Watson, in his 1910 treatise on the history of the Constitution, even before the first deadline was successfully imposed on an amendment proposal, explained that

The Constitution does not prescribe a 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.<sup>286</sup>

Watson went on to explain

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 someday become of great importance.<sup>287</sup>

More recent scholars have argued that deadlines violate the Article V function and the federalism balance. Mason Kalfus, analyzing the history and text of Article V, concluded that any and all deadlines are unconstitutional.<sup>288</sup> I have concluded the same in an earlier article.<sup>289</sup> Michael Hanlon concluded that deadlines might be a good idea, but to effectuate them a constitutional amendment would be necessary.<sup>290</sup> Walter Dellinger, in an influential article in the *Harvard Law Review* in 1983, noted that time limits in the text might be permissible, but not in the resolving

285. Justice Story stated:

The guards [in Article V] against the too hasty exercise of the [amendment] power, . . . are apparently sufficient. Two thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring amendments to be proposed; and three fourths of the states must ratify them. Time 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.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 688 (Melville M. Bigelow ed., 5th ed. 1905).

286. DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 1310–11 (1910). Although no deadline had been successfully appended to an amendment proposal when Watson wrote this, at least two attempts had been made in relation to the Fourteenth and Fifteenth Amendments. Earlier efforts to impose deadlines, as well as impose other barriers, had also been rejected by Congress. In 1866, Senator Buckalew offered a three-year deadline on the Fourteenth Amendment proposal, which was ultimately rejected. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2771 (1866) (proposing an amendment of Sen. Buckalew to add an intervening election, permit no states to change their minds either way, and allow only three years to ratify). And in 1869, Senator Buckalew again offered an amendment to the Fifteenth Amendment proposal to require intervening election of state legislators. *See* CONG. GLOBE, 40th Cong., 3rd Sess. 912 (1869) (proposing an amendment adding an intervening election requirement). Senators viewed these revisions as motivated by a desire to frustrate the amendments' ratification and as procedural barriers that were likely unconstitutional. *See* WATSON, *supra* note 186, at 1310–11.

287. WATSON, *supra* note 286, at 1311–12.

288. Kalfus, *supra* note 15, at 467.

289. Wright, *supra* note 13, at 46.

290. Hanlon, *supra* note 15, at 678–79.

clause.<sup>291</sup> Michael Stokes Paulsen rejected the idea that there is an implied requirement that amendments be ratified within some reasonable period in order to ensure contemporaneity.<sup>292</sup> Jean Witter concluded that “*Dillon* was not dispositive of the validity of a time limit as an integral part of an amendment. The case has even less value regarding validity of a time limit in a resolving clause.”<sup>293</sup> Brendon Ishikawa argued that Madison’s “argument that a constitutional text may not be conditionally accepted seems as applicable in the context of a time condition as it does in the context of rescission of a state’s earlier ratification.”<sup>294</sup> Ishikawa noted that time limits allow the federal government to engage in self-dealing, especially in the convention context, but also in the context of congressional proposals.<sup>295</sup> A time limit allows congressmen to gain the political benefits of voting in favor of popular amendment proposals but ensuring that they will fail. Richard Albert came to the same conclusion: that time limits increase the risk of political brinkmanship.<sup>296</sup>

And of course, David Watson, well before any successful deadline had been appended, stated in 1910 that no political entity could tell the states when or whether to ratify an amendment.<sup>297</sup> But perhaps David Kyvig put it most clearly:

Article V specified no time limit on ratification of a constitutional amendment by the states. The drafters of Article V left no evidence that they thought in terms of restricting the rights of states to endorse at any time a constitutional change approved by Congress. The sovereign right of the people to sanction constitutional change through the agency of a state legislature or convention was fundamental and unqualified. Before Warren Harding’s 1917 attempt to derail the national prohibition amendment, no amendment that Congress proposed ever contained any limitation. The ratification time-limit issue arose only because clever politicians sought, in effect, to vote both yes and no on constitutional change. The stratagem was shrewd in theory but disastrous in practice, judged not only by the failure of Harding’s maneuver but also by the subsequent role of time-limit considerations in distracting attention from the substance of proposals such as the child labor and District of Columbia representation amendment and, above all, the equal rights amendment.<sup>298</sup>

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291. Dellinger, *supra* note 15, at 425. (“The text of article V places no time limit on ratifications, but if Congress wishes to limit the time within which an amendment may be considered, it may do so by placing a limit within the text of the proposed amendment. When Congress does not act in this fashion, the time for ratification is simply not limited by article V.”).

292. Paulsen, *supra* note 18, at 690–91.

293. Witter, *supra* note 17, at 218.

294. Ishikawa, *supra* note 9, at 580.

295. *Id.* at 581.

296. RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 212 (2019).

297. WATSON, *supra* note 286, at 1310–11.

298. KYVIG, *supra* note 6, at 467–68.

A cursory analysis of the deadline issue reminds us that we are in Alice's Wonderland, for if the Court follows prior precedent and treats certificates as conclusive, then the late ERA ratifications should be deemed valid and the textualist in all of us can feel relieved. Federalism and originalism both support such an outcome. But if the Court simply punts on the issue once again, relying on the conclusory nature of the certificates, there is no resolution for future cases and the victory is pyrrhic. As with the Progressive Era cases, the decision would have little precedential value, and we would continue to wander in our Article V wonderland. On the other hand, if the Court follows the dicta in *Dillon*, then it must decide if the seven years are inherently reasonable. If it says they are, it will be opening the door to Congress imposing greater and greater constraints on the states, such as a popular referendum, an intervening election, or any other procedural barrier. The real problem with a holding in favor of the deadline, however, is that it will cause the ERA to be voided, even though it has met the technical requirements of Article V. That has never happened before, as the Court has always erred on the side of affirming ratifications and amendments that have met the straightforward requirements of Article V.

Ruling in favor of Congress's power to impose a deadline goes against logic, textualism, originalism, history, and precedent if that precedent is *Leser*, *Sprague*, and *Chandler*. It is only marginally consistent with precedent in *Dillon* if the Court upholds the deadline because the *Dillon* precedent is in dicta and would result in the opposite outcome, an outcome the Court has consistently avoided in the past. To get us out of our Article V web of uncertainty, we need the Court to reject its conclusory presumption of legal sufficiency; address the deadline on the merits and see it for what it is, which is an infringement of the states' sole power to control the ratification function; overrule *Dillon* to the extent *Dillon* is inconsistent (which I have argued it isn't necessarily<sup>299</sup>); and articulate the federalism issue at the heart of the deadline.

The paradox of the deadline is that the Court must overrule its precedent that purportedly supports the deadline but also overrule its precedents that ratification certificates are conclusive on the courts. Any other decision leaves us running in circles because following *Dillon* means voiding an otherwise properly ratified amendment and following *Leser*, *Sprague*, and *Chandler* means allowing arbitrary factors, like whether the state governor acted quickly and sent a ratification certificate in promptly, to prevail over legally important questions of whether states have actually violated Article V in their ratification procedures.

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299. See Wright, *supra* note 13, at 70–74. I argued *Dillon* is wrong and should be overruled on federalism grounds generally, because Congress does not have the authority to impose a deadline on the states. But in the alternative, I also argued that *Dillon* is not inconsistent with the ERA deadline because it is inapposite. *Dillon* involved a deadline in the text while the ERA deadline is in the preamble. *Id.*

### B. Rescissions

Not surprisingly, our adventures through Article V, which conclude that the Court should reverse virtually all of its prior precedents (or at least distinguish them), are not at an end. The issue of state rescissions does not raise federalism concerns, but it does raise profound questions about the ability of states to frustrate the Article V ratification powers of other states. And the real puzzle here concerns the reliance interests of later-ratifying states on the solidity of the ratifications of earlier states. But we can work our way through the rescission issue the same way we did through the deadline issue, by using our traditional tools of constitutional construction to find a path out of the Article V maze.

#### 1. Prior Practice and History

As noted earlier, there were attempts to rescind the Fourteenth Amendment (Ohio and New Jersey), the Fifteenth Amendment (New York), and the Nineteenth Amendment (Tennessee), but none have been recognized as valid, and all four states have been listed as having ratified the relevant amendments.<sup>300</sup> The five rescissions of the ERA are different, however; the former Amendments were all ultimately ratified by additional states so that their validity made no difference.

Despite the fact that there have been a handful of attempted rescissions, the general understanding by politicians is that rescissions were ineffective. Senator Roscoe Conkling in 1870 opined that rescissions were impermissible, as did Representative Harold Volkmer a century later.<sup>301</sup> Congressman Garrett, in 1925, stated that “it is generally regarded to be . . . the law that a State . . . may not reconsider and change a ratification.”<sup>302</sup> And a Senate Report of 1973 concluded that “Congress previously has taken the position that having once ratified an amendment, a State may not rescind.”<sup>303</sup> The Supreme Judicial Court of Maine came to the conclusion that rescissions were impermissible in an opinion issued responding to a question by the Governor in 1919.<sup>304</sup> Governor Ward of New Jersey vetoed the New Jersey rescission of the Fourteenth Amendment on the grounds that “New Jersey’s initial 1867 endorsement had completed the amending process and bound the state to a federal contract.”<sup>305</sup> When Kentucky’s legislature brought a resolution to rescind its prior ratification of the ERA, the interim Governor, Thelma Stovall, vetoed the resolution, stating the rescission resolution was invalid

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300. See GOV'T PUBL'G OFF., AMENDMENTS, *supra* note 48.

301. CONG. GLOBE, 41st Cong., 2d Sess. 1477 (1870); 124 CONG. REC. 5261, 5270 (1978).

302. 66 CONG. REC. 2119, 2159 (1925) (remarks of Rep. Garrett).

303. S. REP. NO. 93-293, at 14 (1973).

304. *In re* Opinion of the Justices, 107 A. 673, 675 (Me. 1919).

305. KYVIG, *supra* note 6, at 174.

because once a legislature has voted to ratify an amendment, it is final.<sup>306</sup> The Kentucky decision follows the longstanding precedent set when, in 1865, the Kentucky Governor also determined that rescissions were impermissible.<sup>307</sup> Later, the Supreme Courts of Kentucky and Kansas also rejected the validity of rescission after ratification in dicta.<sup>308</sup> No state rescission has ever been given legal effect.

## 2. Textualism

From a textualist perspective it makes sense that rescissions are ineffective. Article V does not mention rescissions, only ratifications, and there is no implied power to rescind. Efforts to permit rescissions have all failed. Senator James Wadsworth of New York and Representative Finis Garrett of Tennessee proposed an amendment to Article V that would have permitted rescissions in 1921, but the proposal failed to get the requisite two-thirds support of Congress.<sup>309</sup> Senator Sam Ervin proposed legislation in 1971 that would have permitted rescissions, but it too failed.<sup>310</sup> During the ERA extension debates, other bills to permit rescissions were proposed but also failed.<sup>311</sup>

There is a suggestion that an 1866 proposal to prohibit rescissions implies that rescissions were permitted,<sup>312</sup> but within twenty years the reverse became the consensus. Judge Jameson, expressing the prevailing view of the late nineteenth century in 1887, and the view that continues to prevail today, stated

The power of a State legislature to participate in amending the Federal Constitution exists only by virtue of a special grant in that Constitution . . . . So, when the State legislature has done the act or thing which the power contemplated and authorized—when power [to ratify] has been exercised— it, *ipso facto*, ceases to exist.<sup>313</sup>

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306. Livingston Taylor, *ERA Rescission Vetoed in Kentucky*, WASH. POST (Mar. 21, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/21/era-rescission-vetoed-in-kentucky/b6a72232-f433-40b5-b2be-ddd23914e204/> [https://perma.cc/XXC7-2JRT].

307. See JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING § 581 (4th ed. 1887) (quoting the message of Governor Bramlette).

308. *Wise v. Chandler*, 108 S.W.2d 1024, 1033 (Ky. 1937) (“[A] State can act but once . . . upon a proposed amendment; and, whether its vote be in the affirmative or be negative, having acted, it has exhausted its power further to consider the question without a resubmission by Congress.”); *Coleman v. Miller*, 71 P.2d 518, 524 (Kan. 1937) (“[A] ratification once given cannot be withdrawn.”), *aff’d*, 307 U.S. 433 (1939).

309. KYVIG *supra* note 6, at 251–53.

310. S. 215, 92d Cong. (1971).

311. The Railsback and the Garn Amendments were both defeated. See 124 CONG. REC. H., D704 (daily ed. Aug. 15, 1978); 124 CONG. REC. S., D860 (daily ed. Oct. 4, 1978).

312. CONG. GLOBE, 39th Cong. 1st Sess. 2760, 2771 (1866) (amendment of Sen. Buckalew to add an intervening election, permit no states to change their minds either way, and allow only three years to ratify).

313. JAMESON, *supra* note 307, at 631–32.

The Supreme Court in *Coleman* noted that Article V only refers to ratifications, that rescissions are nowhere mentioned. The Court concludes from this evidence that without something more (congressional legislation or constitutional amendment), rescissions are unavailing.<sup>314</sup>

With no textual commitment to the power to rescind and the historical practice that has rejected state rescissions, the logical conclusion is that rescissions are ineffective. And that position was taken by the Office of Legal Counsel in a Memorandum to Congress during the ERA extension debates.<sup>315</sup>

### 3. Originalism

The rescission question may also be illuminated with reference to the debates and considerations of the framers. Most notably, in considering the question whether states could conditionally ratify the constitution, James Madison replied with an emphatic no. In discussing whether New York could conditionally ratify the new constitution, he explained

My opinion is that a reservation of a right to withdraw if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification, that it does not make N. York a member of the New Union, and consequently that she could not be received on that plan. Compacts must be reciprocal, this principle would not in such a case be preserved. The Constitution requires an adoption *in toto*, and *for ever*. 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.<sup>316</sup>

To get the new constitution ratified, Madison realized it was fundamentally important that states not be given the power to condition their ratifications on the actions of other states or on inclusion of a bill of rights; ratification needed to provide certainty for subsequent states engaging in the deeply consequential process of adopting a new constitution. Because ratification is the only legally effective act recognized in Article V, implying a power to rescind would seem to go against the principles of constitutionalism by undermining the methodical step-by-step process of achieving consensus. The Framers viewed ratification of the Constitution as a simple, unconditional acceptance with no take backs, and there is no evidence that they wanted to treat amendments differently.

This need for certainty is perhaps the most important aspect of ratification, and it is more important today than it was in 1787, as the number of states and their

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314. “Article V, speaking solely of ratifications, contains no provision as to rejection.” *Coleman v. Miller*, 307 U.S. 433, 450 (1939).

315. *See* Power of a State Legislature to Rescind its Ratification of a Constitutional Amendment, *supra* note 158.

316. Letter from James Madison to Alexander Hamilton, (July 20, 1788) (on file with Founders Online) <https://founders.archives.gov/?q=Volume%3AHamilton-01-05&s=1511311112&r=97> [<https://perma.cc/PH75-7CCC>].

populations and political views are more diverse. With greater political, economic, social, and cultural pressures facing state legislatures, they need to feel confident about the status of an amendment proposal before they expend the political capital and scarce legislative time to consider ratifying a proposed amendment. If a state legislature believes that its ratification effort will put an amendment over the line, it would be intolerable if an earlier ratifying state could rescind just as another state's legislature is involved in the complex politics of ratifying. For what state legislature would expend the political resources to ratify if it could not rely on the stability of earlier ratifications? And what state would ratify a constitution containing an amendment procedure that would allow for ever-changing positions on constitutional structures and procedures?

Richard Bernstein and Jerome Agel explain:

[T]he prevailing view is that the amending process may be understood as working in only one direction. Once a state rejects an amendment, it is free to reconsider and ratify it; however, once a state ratifies an amendment, it may not rescind that ratification. Why should this be the case? A state's decision to adopt an amendment forms the basis for later states' decision to adopt or to reject. To permit rescission of a ratification would be to confuse and perhaps derail the amending process's orderly functioning. By contrast, if a state reconsiders its rejection of an amendment, its action does not undercut the basis for later states' decisions. A state should be free to change its mind about rejecting an amendment if other states' actions demonstrate that the amendment has general popular support.<sup>317</sup>

When we consider Madison's rejection of conditional ratifications, and the textual absence of a power to rescind or any language that implies such a power, the prevailing view that rescissions are impermissible makes sense. As Professor William Van Alstyne put it, allowing rescissions would be "an atrocious way to run a constitution."<sup>318</sup> And Judge Jameson reasoned that if the Framers had intended to permit rescissions, Article V would read

[T]hat the amendment should be valid "when ratified by the legislatures of three-fourths of the States, each adhering to its vote until three-fourths of all the legislatures should have voted to ratify." It is enough to say that such is not the language of the Constitution; but that it shall be valid when ratified by the legislatures of three-fourths of the States.<sup>319</sup>

The Framers viewed ratification as an up or down vote of assent, and the disruptive nature of rescission would destabilize this all-important process.

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317. BERNSTEIN & AGEL, *supra* note 14, at 254.

318. *Joint Resolution Extending the Deadline for the Ratification of the Equal Rights Amendment: Hearing on H.J. Res. 638 Before the Subcomm. on Civ. and Const. Rts. of the Comm. on the Judiciary of the H.R.*, 95th Cong. 138 (1977–1978) (testimony of Prof. Van Alstyne).

319. JAMESON, *supra* note 307, at 632.

#### 4. *Logic*

If we have learned anything in our adventures through the Article V wonderland, it is that riddles abound, and paradoxes rule the day. To the extent Article V leaves a wide amount of discretion for the states to determine when and how they will ratify, what is the harm in allowing them to rescind as well? For isn't that an affirmation of the primary role of the states in the amendment process? The problem, however, is that the primacy of the states is a fundamental principle of federalism that helps define the boundary between Congress's Article V powers and the states' Article V powers. That principle does not prevail, however, when we are considering rescissions because those affect the relations between the states. Thus, rescission is really a question of whether a state that has ratified, and upon whose ratification other states are relying in their decision whether to engage in ratification proceedings, may rescind just when it looks like another state is about to ratify and put the amendment over the threshold. Rescissions essentially involve some states utilizing their Article V discretionary powers to undermine the actions of other states. And that is a fundamentally different issue than the issue of congressional deadlines or congressionally mandated procedures.

Despite the fact that no state rescission has been given effect, rescissions are simply unreasonable in the profoundly heady realm of constitution-making because allowing rescissions would undermine the ratification process and go against the plain language outlined by Article V. Unlike legislation, that can be amended and revoked at any time, constitutional amendments may not be revoked unless they are repealed through the same process that got us the amendment in the first place. It is an accepted part of the law-making process that a current Congress may not bind future Congresses. But constitutions operate differently. Allowing the political shenanigans of the legislative process to invade the sphere of constitutionalism would be an unwise decision, especially with the deeply partisan divide we are seeing in today's Congress and state houses.

Much more can be expounded on the issue of rescissions, but we must keep our end goal in sight. If we want an Article V process that is not too unwieldy or does not impose more roadblocks than the supermajorities Article V already requires, then we need to think critically about what benefit accrues from allowing states to rescind. Like the tardy ratifications of the Child Labor Amendment and the ERA, post-rejection ratifications and post-ratification rescissions allow states to reflect the changing views of their people. But post-rejection ratifications do not impact the decisions or acts of other states. Post-ratification rescissions do. By destabilizing the ratification process and creating uncertainty for other states, rescissions threaten the very heart of Article V's finely wrought procedure. As Justice Marshall explained in *M'Culloch v. Maryland*, it is not acceptable for the government of one state to undermine the interests of the people of other states.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union,

though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them.

...

... Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it is as it really is.

...

... The people of all the states have created the general government, and have conferred upon it the general power of taxation . . . . But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.<sup>320</sup>

This principle, expounded so early in our national history, explains why states should not be permitted to rescind, for their actions undermine the constitutional participation of other states.

Finally, we must return to where we began, with the executive official who proclaims the validity of a new amendment: the Archivist. For only through him may we be able to get out of our Article V wonderland with the ERA intact.

#### IV. ROLE OF THE NATIONAL ARCHIVIST

Federal legislation provides that the Archivist, formerly the Secretary of State, has the duty to publish a constitutional amendment once it has been ratified by the required number of states.<sup>321</sup> Opponents of amendments have often tried to enjoin that publication by challenging the legal sufficiency of state ratifications and by

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320. *McCulloch v. State of Maryland*, 17 U.S. (4 Wheaton) 316, 405, 431, 435–36 (1819).

321. 1 U.S.C. § 106(b).

requesting the return of ratification certificates.<sup>322</sup> As the questions around the legal sufficiency of ratifications mount, especially in the case of the ERA, they settle on the Archivist and his power to judge the merit of any legal challenges in deciding whether or not to publish an amendment. And not surprisingly, the lack of precedent and reliable practice contributes to further uncertainties that keep us wandering in circles through our Article V wonderland.

1 U.S.C. § 106(b) is the only legislation governing the procedural details of the Article V amendment process, and it provides that

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.<sup>323</sup>

This statute leaves open a host of important questions, such as what state official should notify the Archivist; is the Archivist's publication necessary for the amendment to be legally effective; does Congress or the President have any role in publishing an amendment; and if there are questions as to the legal sufficiency of any state certifications, what does the Archivist do while we await judicial determination? Nothing in the statute suggests that this is anything but a purely ministerial role, and nothing suggests the Archivists undertake a judicial analysis to determine the legal sufficiency of the states' ratifications. But fortunately, we have a few guideposts, cryptic as they are.

The Supreme Court in *Dillon* held that an amendment becomes effective on the date of the last state to ratify.<sup>324</sup> There is no requirement that the Archivist certify the amendment or that Congress proclaim its passage. Justice Van Devanter, writing for the majority in *Dillon*, stated 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."<sup>325</sup> However, the time gap between ratification and publication has been recognized by commentators as creating undesirable uncertainty, a situation fully embraced by the ERA. Corwin and Ramsey concluded that

[I]n view of the decision in *Dillon v. Gloss* that an amendment takes effect on the date of the final ratification required for its adoption, rather than on the date when it is proclaimed, there is a further possibility of a period

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322. *Wise v. Chandler*, 108 S.W.2d 1024 (Ky. 1937); *Chase v. Billings*, 170 A. 903 (Vt. 1934).

323. 1 U.S.C. § 106(b), (Added Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710; amended Pub. L. 98-497, title I, § 107(d), Oct. 19, 1984, 98 Stat. 2291).

324. 256 U.S. 368, 374-76 (1921).

325. *Id.* at 374.

of serious confusion and uncertainty while the validity of ratification is being determined.<sup>326</sup>

So what is a responsible Archivist to do? If he refuses to publish an amendment after receiving the requisite number of certificates, he has potentially violated his statutory duty, which requires publication upon receipt. If he publishes the amendment and there are legal insufficiencies in one or more of the ratifications, then he risks binding the courts and presumably his publication exercises a purported discretion that he has the power to judge the sufficiency of the ratifications. For as we have discussed above, ratification certificates are binding on the courts. Of course, it is possible that the publication by the Archivist is not the binding part, but rather the submission to the Archivist by the states is the legally relevant act. He could also publish the amendment subject to a statement, as Secretary Seward did with the Fourteenth Amendment,<sup>327</sup> so that it is considered ratified on condition that the irregularities are determined by some court in the future or by later ratifications to be irrelevant.

For once, the path ahead seems to be coming into focus. In the case of the ERA, the Archivist should publish the Amendment with the caveat that there may be legal questions to some of the state ratifications. In doing so, he will have abided by his ministerial duty to publish when he has received the relevant number of ratification certificates. He will not, through a refusal to publish, be relying on the executive branch or some nonjudicial body's opinion as to the sufficiency of the late and rescinded ratifications. And since it appears to be the case that the certificates of ratification are deemed conclusive once they have been submitted by the states and not once they have been counted by the Archivist, his act is not binding on the courts. Walking backwards, we can see how this might get us out of our dilemma.

In 1920, a petition was brought against Acting Secretary of State, Frank Polk, after he certified the Eighteenth Amendment.<sup>328</sup> The petitioner sought a writ of mandamus commanding the Secretary of State to cancel the proclamation and certification because the petitioner believed the Amendment had been invalidly adopted.<sup>329</sup> The District Court distinguished between the certification of the Amendment and the actual validity of the adoption: "As soon as he had received the notices from 36 of the states that the amendment had been adopted, he was obliged, under the statute, to put forth his proclamation. No discretion was lodged in him. The act required was purely ministerial."<sup>330</sup> The court further held that canceling the Acting Secretary of States' proclamation and certificate wouldn't change the fact that the Eighteenth Amendment had been ratified. The Eighteenth

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326. Corwin & Ramsey, *supra* note 56, at 211.

327. *See supra* note 158 and accompanying text.

328. *United States ex rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920).

329. *Id.*

330. *Id.*

Amendment had already become part of the Constitution when it was ratified by the necessary number of states regardless of whether Polk acted to certify the Amendment.<sup>331</sup>

The Supreme Court agreed that the submission of the certificates by the states was the legally relevant act in *Leser's* challenge to the Nineteenth Amendment.<sup>332</sup> The Court held that Tennessee and West Virginia both had the power to ratify the Amendment and that “official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him and, being certified to by his proclamation, is conclusive upon the courts.”<sup>333</sup>

In 1987, the U.S. District Court for the District of Connecticut considered whether 1 U.S.C. § 106(b) was an improper delegation of power by Congress to the Secretary of State.<sup>334</sup> The court held that the “language of article 5 also demonstrates that a constitutional amendment is valid when ratified, and, as a result, that the act of certification is ministerial in nature . . . Since the ultimate authority to ratify lies within the states, their official declaration of ratification is conclusive on the Secretary.”<sup>335</sup>

These cases continue the constitutional paradox of our Article V wonderland. If a state’s ratification is conclusive, and the Archivist’s role is purely ministerial, then there is no room to judge the legal sufficiency of any state’s ratification once it has issued from the state house. The Archivist must simply count the number of ratifications and, if they have reached the requisite number, he must publish the amendment. But what if, as in the case of the ERA, there are legitimate questions about the constitutionality of the congressional deadline or the purported state rescissions? May the Archivist await a judicial determination of the legal sufficiency of the three ratifications that occurred after the deadline? Or must the Archivist publish the amendment, noting that legal questions exist around the tardy ratifications and the purported rescissions as was done by Secretary of State Seward with the Fourteenth Amendment?

Furthering the paradox, on March 5, 2021, District Court Judge Rudolph Contreras granted the Archivist’s motion to dismiss in a suit brought by the States of Virginia, Illinois, and Nevada to force the Archivist to publish the ERA.<sup>336</sup> Judge Contreras held that the late-ratifying states had no standing because the Archivist’s promulgation had no legal effect. Since the Archivist’s duty is purely ministerial, whether it performs that duty or not has no legal impact on the ERA or on the

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331. *Id.* at 1000 (“Its validity does not depend in any wise upon the proclamation. It is the approval of the requisite number of states, not the proclamation, that gives vitality to the amendment and makes it a part of the supreme law of the land.”).

332. *Leser v. Garnett*, 258 U.S. 130, 137 (1922).

333. *Id.*

334. *United States v. Sitka*, 666 F. Supp. 19, 22 (D. Conn. 1987).

335. *Id.*

336. *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 61 (D.D.C. 2021).

rights of the plaintiff states. “[The Archivist’s] refusal to publish and certify the ERA . . . does not cause them a concrete injury that could be remedied by ordering him to act.”<sup>337</sup> Because the Archivist’s act is not legally significant, mandamus against the Archivist provides no relief and therefore the states lack standing.

But how then should the states proceed to obtain a judicial determination on the validity of the late ratifications and the rescissions? They cannot sue Congress because Congress has no further role. They cannot sue the executive because the President has no role to play. They cannot sue the other states to, for instance, determine the validity of the late ratifications or the rescissions because, as independent actors in a federal dance, what the other states do does not affect the individual plaintiff states. This leaves only the Archivist as the only potential defendant in a suit to determine whether the ERA has been validly ratified. Thus, even if the Archivist’s publication of the ERA is a purely ministerial act with no legal significance, the Archivist is the only federal actor with any role to play once the last state has ratified.

The better reasoning is that the Archivist must publish the Amendment but may indicate that there are legal questions about the sufficiency of some of the state ratifications. The legal sufficiency can then be determined by a court faced with a plaintiff who is challenging the applicability of a law that was passed pursuant to the questionable amendment.<sup>338</sup> In undertaking its analysis, however, the court should not treat the ratifications as conclusive of legal sufficiency, for doing so would abdicate the court’s responsibility to interpret the Constitution. Thorough judicial review, although after certification, would be far preferable than the Archivist judging the legal sufficiency of the state ratifications on his own, or even with advice from the Justice Department. The Archivist is not a lawyer, the publication process is not the act that makes a law legally binding, and the Archivist and Attorney General are executive branch officials who have no role in the Article V process.<sup>339</sup> This is a delicate question, however, as compliance with state ratifying procedure would seem to be a state court issue, while determining whether the states have ratified pursuant to Article V would appear to be a federal constitutional issue. And although the issues may dovetail, they are not necessarily coextensive.

In *United States v. Colby*, the District of Columbia Court of Appeals held [T]he Acting Secretary of State . . . was not required, or *authorized*, to investigate and determine whether or not the notices stated the truth. To

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337. *Id.* at 45.

338. This was the process used in *Dillon*, where the defendant was charged with unlawful transportation of alcohol in violation of the Volstead Act, passed pursuant to the Eighteenth Amendment and would be available after January 27, 2022, for the ERA. *Dillon v. Gloss*, 256 U.S. 368 (1921).

339. See Elder, *supra* note 18, at 73–79.

accept them as doing so, if in due form, was his duty . . . . No discretion was lodged in him. The act required was purely ministerial.<sup>340</sup>

Because the Archivist is not authorized to judge the legal sufficiency of state ratifications, that task must logically lie with the courts. But the small hiccup of the two-year window before the ERA becomes effective means that no individual plaintiff can sue for two years. During that time, we must simply wait out the legitimacy limbo to see if the Twenty-Eighth Amendment has been validly ratified because, according to Judge Contreras, no one has standing to sue.<sup>341</sup> How can there be profound constitutional issues of first impression regarding one of the most important amendments of our time, and how can the issues be deemed unresolvable just because there is no one in any government who can be sued? That is an “atrocious way to run a constitution.”<sup>342</sup> This is not to say that if the Archivist issued a conditional certification as to the validity of the ERA that the legal issues would go away, but it would provide a place to start mapping our way out of the Article V wonderland.

#### CONCLUSION

Whether the ERA has validly become the Twenty-Eighth Amendment is a matter of keen importance, not just for women but for the sake of our Article V jurisprudence. Numerous matters of technical detail remain indeterminate, leaving the ERA in legitimacy limbo. For over two centuries, Article V has operated relatively smoothly with a judicial presumption in favor of ratification as Congress and the courts skirted serious questions about amendment procedures. For the first time, however, we have reached a point where the lack of judicial answers about the constitutionality of the congressional deadline and the state rescissions risks invalidating a constitutional amendment that has met the technical requirements of Article V. Furthermore, unreliable dicta emerging from exceptional cases has been misunderstood by scholars as establishing precedents that Congress may impose deadlines on the states or that Congress has the sole authority to determine Article V issues. And for only the second time, the Archivist must comply with his statutory duty to certify a constitutional amendment that involves serious questions about the legal sufficiency of state ratifications.

Not since the Eighteenth Amendment have there been so many questions about constitutional amendment procedures, nor has a fully ratified amendment been held in legitimacy limbo for so long. Fortunately, we have two years before the amendment becomes effective in order to settle these matters. But the ERA has

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340. *United States ex rel. Widenmann v. Colby*, 265 F. 998, 999 (D.C. Cir. 1920) (emphasis added).

341. *Ferriero*, 525 F. Supp. 3d. at 45.

342. *Joint Resolution Extending the Deadline for the Ratification of the Equal Rights Amendment: Hearing on H.J. Res. 638 Before the Subcomm. on Civ. and Const. Rts. of the Comm. on the Judiciary of the H.R.*, 95th Cong. 138 (1977–1978) (testimony of Prof. Van Alstyne).

been ninety-seven years in the making and, for many people hoping for a sex-based equality mandate, their patience is gone. It is truly an atrocious way to run a constitution to have so few answers to so many technical questions. But, at the end of the day, there is a logical path through the uncertain terrain of Article V. The federal courts should exercise their jurisdiction to interpret the balance of power between the states and Congress, and they should do so with a keen understanding of the states' important role in the amendment process. Ambiguities and doubts should be resolved in favor of the states that have the power to determine whether, and when, the political, social, and economic conditions are ripe for constitutional change. For that is the structure the founders intended; they provided a mechanism for the states to rein in a national legislature that was out of touch and to rein in states that would not comply with the great promise of a just and equitable democracy.

