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## Legislative Testimony

### Examining Proposed Constitutional Amendments

Hearing before the House Judiciary Subcommittee on the Constitution and Limited Government

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The Heritage Foundation

Thank you, Mr. Chairman, for the opportunity to participate in this hearing and to provide a sketch of the constitutional amendment process. My name is Thomas Jipping and I am a senior legal fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation.<sup>1</sup> For 15 years, I served on the staff of U.S. Senator Orrin Hatch, including several years as his chief Judiciary Committee counsel. As he was a strong advocate of amending the Constitution to require a balanced federal budget, I studied both amendment processes provided for by Article V.

Today, more than 180 nations have a written constitution of government. Even tiny Tuvalu, in the South Pacific, has one, with three times as many words as Tuvalu has citizens.

It was not always so. The U.S. Constitution, which was ratified by the necessary ninth state on June 21, 1788, is “the world’s longest surviving written charter of government.”<sup>2</sup> Its lifespan is nearly 13 times longer than the average national constitution. Our constitution is also one of the shortest, only one-third the length of the average national charter around the world.

In 1795, just seven years after the Constitution was ratified, the Supreme Court offered this counsel:

What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental law are established. The Constitution is fixed and certain; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and *can be revoked or altered only by the authority that made it.*<sup>3</sup>

President George Washington published his farewell address to the American people 227 years ago today, on September 19, 1796, in the Philadelphia Daily American Advertiser. He explained that “the basis of our political systems is the right of the people to make and alter their constitutions of government; that the constitution which at any time exists, *till changed by an explicit and authentic act of the whole people*, is sacredly obligatory upon all.”<sup>4</sup>

Together, this means that only the American people can revoke or alter the Constitution, which remains fixed until they do so by an explicit and authentic act. Article V of the Constitution defines that act this way:

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.

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<sup>2</sup> The Constitution of the United States of America, S. Pub. 103-21 (1994), [https://www.senate.gov/civics/resources/pdf/US\\_Constitution-Senate\\_Publication\\_103-21.pdf](https://www.senate.gov/civics/resources/pdf/US_Constitution-Senate_Publication_103-21.pdf).

<sup>3</sup> VanHorne’s Lessee v. Dorrance, 2 U.S. 304, 308 (1795) (emphasis added).

<sup>4</sup> [https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons\\_Farewell\\_Address.pdf](https://www.senate.gov/artandhistory/history/resources/pdf/Washingtons_Farewell_Address.pdf).

## **Proposing Constitutional Amendments**

The Articles of Confederation, our first constitution, provided that amendments be proposed only by Congress and required unanimous ratification by the states. Congress could choose never to propose amendments, or it could propose amendments certain to lack unanimous state support for ratification.

The 1787 convention that drafted the Constitution we know today struck a different balance. Some delegates wanted to exclude Congress altogether by giving the power to propose amendments exclusively to state legislatures.<sup>5</sup> In the first formal proposal considered by the convention, two-thirds of the states could directly call a convention to propose amendments; Congress had no role at all.<sup>6</sup> Not until another iteration, a compromise proposed by James Madison that became Article V, did Congress have the authority to propose amendments.

**Proposal by Congress.** Every constitutional amendment proposed since the Constitution was ratified in 1788 has come from Congress. More than 12,000 resolutions have been introduced in the House or Senate to propose constitutional amendments on a host of subjects.<sup>7</sup> Of the 33 that Congress has proposed, the states have ratified 27 and four that Congress proposed without a ratification deadline remain pending before the states. The remaining two, the Equal Rights Amendment proposed in 1972 and the District of Columbia Voting Rights Amendment proposed in 1978, expired when their ratification deadlines passed with insufficient state support.

Congress proposes a constitutional amendment by a joint resolution that has two parts: a proposing clause with procedural rules<sup>8</sup> and the text of the proposed amendment. Procedural rules that may appear in the proposing clause include the designated mode of ratification and a ratification deadline. When Congress proposed a group of 12 amendments in 1789, the joint resolution's proposing clause said that the states could ratify "any or all" of them. The states opted for some, ratifying 10 of them together in what we today call the Bill of Rights.

Both proposal and ratification are what is sometimes called self-executing upon completion. Passage of the same joint resolution by two-thirds of both houses of Congress<sup>9</sup> "ha[s] the effect of formally proposing the amendment to the states for ratification."<sup>10</sup> Similarly, as Article V provides, a proposed amendment becomes part of the Constitution, and the amendment process ends, when it is ratified by three-fourths of the states by the mode Congress has specified, and before any deadline Congress has imposed. No further action is required, including presentation to the president, who has no role in the amendment process.<sup>11</sup> The Archivist of the United States then transmits the resolution to the governor of each state.

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<sup>5</sup> See Thomas M. Durbin, *Amending the U.S. Constitution: by Congress or by Constitutional Convention*, CRS Report for Congress 95-589 A, May 10, 1995, at 1.

<sup>6</sup> *Id.* See also Wayne B. Wheeler, *Is a Constitutional Convention Impending?*, 21 Ill. L. Rev. 782, 782-83 (1927).

<sup>7</sup> According to the U.S. Senate's website, 11,848 resolutions were introduced in either the Senate or House of Representatives through January 3, 2019. See U.S. Senate, *Measures Proposed to Amend the Constitution*,

<https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>. According to Congress.gov, 195 additional resolutions were introduced between January 3, 2019, and July 3, 2023, for a total of 12,043. The National Archives and Records Administration maintains a dataset listing resolutions introduced through 2014. Nat'l Archives, *Amending America: Proposed Amendments to the United States Constitution, 1787 to 2014*, <https://www.archives.gov/open/dataset-amendments.html>.

<sup>8</sup> See U.S. DEP'T OF JUST., OFC. OF LEGAL COUNS., *RATIFICATION OF THE EQUAL RIGHTS AMENDMENT*, Jan. 6, 2020, slip op. at 12 (joint resolution's proposing clause contains "the procedural rules for ratification.") (hereinafter 2020 OLC Opinion).

<sup>9</sup> The Supreme Court has held that "[t]he two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present – assuming the presence of a quorum – and not a vote of two-thirds of the entire membership, present and absent." *State of Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920).

<sup>10</sup> Thomas H. Neale, Cong. Rsch. Serv., *R42979, The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 13 (2019).

<sup>11</sup> See *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

**Ratification Deadlines.** As noted above, the Supreme Court has held that Congress’ power to specify a proposed amendment’s mode of ratification includes setting a ratification deadline. Congress has proposed 10 amendments with a deadline, placing it in the text of five and in the resolution’s proposing clause of the others. The states, in turn, have ratified four in each category. Members of Congress continue including a ratification deadline in joint resolutions to propose constitutional amendments. A majority of those introduced in the current Congress to require a balanced federal budget, for example, and each of those to impose term limits on members of Congress includes a seven-year ratification deadline in the joint resolution’s proposing clause.

The validity of a ratification deadline depends on Congress’ authority to set one, not on where Congress chooses to put it.<sup>12</sup> The Justice Department, during administrations of both parties, has agreed with Congress’ obvious belief that a ratification deadline’s location is irrelevant to its validity. The Office of Legal Counsel, for example, concluded in a 1977 opinion that the 1972 ERA had to be ratified within the seven-year deadline that Congress placed in the resolution’s proposing clause.<sup>13</sup> The OLC came to the same conclusion in a 2020 opinion.<sup>14</sup>

Last year, the Biden Administration’s Justice Department defended the Archivist against a lawsuit by Illinois and Nevada trying to force him to certify the 1972 ERA as the 28<sup>th</sup> Amendment of the Constitution. The Justice Department’s brief in *Illinois v. Ferriero* noted that “Members of Congress did not ascribe any substantive difference to the two types of deadlines” and that “substantial historical practice...supports Congress’s authority” to decide where to place a ratification deadline.<sup>15</sup>

**Proposal by Convention.** The fact that Congress has never called an Article V convention to propose constitutional amendments does not mean that no guidance exists about the nature, purpose, and operation of a convention. Remember that the Articles of Confederation gave Congress control of the amendment process, and the early proposals at the 1787 convention would shut Congress out of the process altogether. The final compromise that became article V was not simply a pendulum swing back to exclusive congressional control. Rather, it retained the states’ power, through the vehicle of a convention, to initiate constitutional amendments and added the comparable power of Congress to propose them.

This is a very important point. If states could merely initiate an amendment *process* but had no control over its *result*, that is, over the substance of any proposed amendment, Congress would have nearly the same control as it did under the Articles of Confederation. Rather, as the Justice Department’s Office of Legal Counsel (OLC) has explained, an Article V convention for proposing amendments is “an interstate convention”<sup>16</sup> that is a “servant of the legislatures”<sup>17</sup> rather than an independent national assembly. As a creation of the states, an Article V convention’s powers are defined by the states. In a 1979 opinion, the OLC concluded that an Article V convention’s function “is to respond to the extraordinary consensus that was the predicate for the call.”<sup>18</sup>

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<sup>12</sup> See Thomas Jipping, Liberal Scholars’ Flawed Arguments Cannot Revive the Equal Rights Amendment, Legal Memorandum No. 340, Sept. 15, 2023.

<sup>13</sup> U.S. DEP’T OF JUST., OFC. OF LEGAL COUNS., POWER OF A STATE LEGISLATURE TO RESCIND ITS RATIFICATION OF A CONSTITUTIONAL AMENDMENT, Feb. 15, 1977, at 14.

<sup>14</sup> U.S. DEP’T OF JUST., OFC. OF LEGAL COUNS., RATIFICATION OF THE EQUAL RIGHTS AMENDMENT, Jan. 6, 2020, slip op. at 3 (hereinafter 2020 OLC Opinion).

<sup>15</sup> Brief for the Archivist of the United States in *State of Illinois v. Ferriero*, No. 21–5096, March 4, 2022, at 27.

<sup>16</sup> John M. Harmon, Constitutional Convention – Limitation of Power to Propose Amendments to the Constitution, 3 Op. Off. Legal Counsel, 390, 399 (October 10, 1979) (hereinafter 1979 OLC Opinion)

<sup>17</sup> *Id.* at 409.

<sup>18</sup> *Id.*

This means that the states can pursue constitutional change even, and perhaps especially, when “Congress proved incapable of, or unwilling to, initiate amendments on its own.”<sup>19</sup> The states’ power in this regard is at least “equal to that of Congress.”<sup>20</sup> The fact that Article V gives Congress the power to actually propose specific substantive amendments suggests that there should be some connection between what the states seek, as evidenced by their applications, and what the convention called by Congress in response to those applications produces. In this view, an Article V convention is an extension of the states’ applications so that, just as Congress can, the states can determine which amendments they would propose.

**The “Prodding Effect”.** While there has yet to be an Article V convention called, campaigns seeking one have had a “prodding effect”<sup>21</sup> on Congress. The first state applications, by Virginia in 1788 and New York in 1789, for example, “help[ed] spur Congress to propose its own Bill of Rights.”<sup>22</sup> Similarly, around the turn of the 20<sup>th</sup> century, the Senate blocked several House-passed resolutions to propose an amendment for direct election of Senators.<sup>23</sup> By 1912, 27 states – four short of the two-thirds threshold – had applied for an Article V convention to do so.<sup>24</sup> Congress gave in, proposing such an amendment that the states ratified within less than a year. After 32 states (out of 34 required) applied for an Article V convention to propose a balanced budget amendment, the Senate voted 69-31 in August 1982 for Senate Joint Resolution 58.

While the text of Article V confirms that Congress “shall” call a convention when two-thirds of the states apply for one, Congress must exercise some judgment to determine when its duty is triggered. Most of the debate about the Article V convention process concerns how Congress should exercise that judgment in determining when its duty is triggered. Doing it in a rigid or arbitrary manner could easily neutralize the states’ power to initiate constitutional amendments. The balance that the Framers struck in Article V, and the fact that the states’ power in this regard is at least “equal to that of Congress,”<sup>25</sup> counsels a more generous approach.

States that ratify a proposed constitutional amendment by the mode Congress has specified, and prior to any deadline Congress has imposed, send to the Archivist a certified copy of their ratification resolutions. The Office of the Federal Register, which is part of the National Archives and Records Administration, “examines ratification documents for facial legal sufficiency and an authenticating signature” and “transfers the record to the National Archives for preservation.”<sup>26</sup> This might be said to be a fairly modest standard, but it seeks to prevent imposition of subjective judgment or to create arbitrary obstacles to the process. Similarly, as the OLC explained in its 1979 opinion, “the Framers did not want the national legislature to interfere with the convention process. They did not want Congress to make substantive judgments or channel the development of constitutional proposals via the convention route.”<sup>27</sup>

The House Judiciary Subcommittee on Civil and Constitutional Rights held hearings in 1985 on the Article V convention process. These hearings were prompted by applications from 32 states for an Article V convention to propose a balanced budget amendment and focused on both the authority of Congress and the states to limit

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<sup>19</sup> Thomas H. Neale, *The article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress*, R4245899 (March 29, 2016), at 29-30. See also *Is There a Constitution Convention in America’s Future?*, House Comm. on the Judiciary, 103<sup>rd</sup> Congress, 1<sup>st</sup> Sess. (Feb. 1993), at 5 (“the Convention method was designed to enable the states to circumvent a Congress unwilling to act on its own”).

<sup>20</sup> 1979 OLC Opinion, *supra* note 16, at 407.

<sup>21</sup> Durbin, *supra* note 5, at 12.

<sup>22</sup> Robert G. Natelson, *Learning from Experience: How the States Used Article V Applications in America’s First Century*, Policy Brief No.10-06 (Nov. 4, 2010), at 6. See also Durbin, *supra* note 5, at 11.

<sup>23</sup> Wheeler, *supra* note 5, at 786.

<sup>24</sup> See Thomas H. Neale, *The Article V Convention for Proposing Constitutional Amendments: Historical Perspectives for Congress*, CRS Report for Congress R42592 (Oct. 22, 2012), at 9-10.

<sup>25</sup> 1979 OLC Opinion, *supra* note 16, at 407.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 408.

the scope of an Article V convention. In February 1993, the House Judiciary Committee released a report titled “Is There a Constitutional Convention in America’s Future?”<sup>28</sup> that presented “an overview of opinion and precedent on some of the most critical questions.”<sup>29</sup>

**General vs. Limited Applications.** The 18<sup>th</sup> century applications, noted above, by Virginia and New York for an Article V convention did not specify any particular subject matter, but only “such amendments...as [the] delegates shall find best suited to promote our common interests.”<sup>30</sup> While states may submit either kind of application,<sup>31</sup> questions remain<sup>32</sup> such as:

- May applications that do not specify an issue be counted with those that do?
- If not, may applications specifying different issues be counted together?
- If not, must applications specifying the same issue be worded identically?<sup>33</sup>

**Contemporaneity.** Must applications specifying the same issue be relatively contemporaneous to be counted together?<sup>34</sup> When Congress proposes a constitutional amendment, the individual and institutional decision-makers act contemporaneously. All members of the House or Senate, for example, vote at the same time on a joint resolution to propose an amendment. An average of 35 days elapsed between the House and Senate votes on the 33 constitutional amendments Congress has proposed; in fact, both chambers voted the same day on 22 of those amendments. Maintaining the parallel between congressional and convention methods of proposing amendments suggests at least some degree of contemporaneity.<sup>35</sup>

**Rescission.** After Congress proposed the Equal Rights Amendment in 1972, five of the 35 states that ratified it rescinded, or withdrew, their ratification before the measure’s deadline. Supporters argued that states may never change their mind, while opponents argued that, at least until the necessary three-fourths threshold is reached, states may come to a final decision their own way. The same question arises in the context of the Article V convention process. The 1993 House Judiciary Committee report concluded on this point that “most commentators argue that withdrawal of applications should be allowed, at least before the necessary 34 States have applied.”<sup>36</sup>

**Convention Operation.** There remain a host of questions about, once Congress has concluded that it has a duty to call an Article V convention, how that call should be implemented and how a convention should operate. Congress has taken at least some initial steps toward legislatively answering these questions. In 1953, for example, the House Judiciary Committee released a report looking at the campaign to call an Article V

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<sup>28</sup> Is There a Constitution Convention in America’s Future?, House Comm. on the Judiciary, 103<sup>rd</sup> Congress, 1<sup>st</sup> Sess. (February 1993) (hereinafter 1993 House Report).

<sup>29</sup> *Id.* at 2.

<sup>30</sup> See Natelson, *supra* note 22, at 6.

<sup>31</sup> See 1993 House Report, *supra* note 28, at 5.

<sup>32</sup> See also John G. Malcolm, Consideration of a Convention to Propose Amendments Under Article V of the U.S. Constitution, Legal Memorandum No. 174, February 19, 2016, at 5-6 (listing additional questions such as whether a state can limit how long its Article V convention application remains effective, place enforceable limits on the authority of its delegates to an Article V convention, and whether Congress can refuse to forward to the states for ratification an amendment proposed by an Article V convention deemed beyond the convention’s scope).

<sup>33</sup> *Id.* at 6-8.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> The 1993 House Judiciary Committee report notes that commentators recommend from four to seven years for “an application’s lifespan.” *Id.* at 10. Legislation introduced to regulate the Article V convention process would set a similar standard.

<sup>36</sup> *Id.* at 9.

convention for limiting the federal government's taxing power.<sup>37</sup> It included a draft bill to establish procedures for "transmitting, receiving, or recording applications from the several States."<sup>38</sup>

Between 1963 and 1969, 33 states applied for an Article V convention in response to the Supreme Court's decision in *Reynolds v. Sims*<sup>39</sup> that state legislative districts must be generally equal in population. While that total, just one short of the threshold, did not result in Congress proposing its own amendment, Senate Judiciary Committee chairman Sam Ervin (D-NC) did introduce legislation to regulate the Article V convention process.

**Current Article V Convention Efforts.** The Convention of States is an example of a recent grassroots effort to seek an Article V convention, launching its campaign in 2013.<sup>40</sup> The group has clearly studied the history, scholarship, and commentary related to the Article V convention process and is attempting to address, or at last minimize uncertainty over, the kind of issues and questions noted above. They advocate each state passing the identical application for "the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal, and limit the terms of office for its officials and for members of Congress."<sup>41</sup>

This strategy addresses the issues discussed above in several ways. Identical resolutions raise no issues about consistency of language. Referring to this as a "convention of the states" maintains the link between the states making the application and what the convention will do. And this model resolution identifies the scope of the convention with enough specificity to identify the convention's boundaries without requiring elements that might invite disagreements that could prevent a reasonable outcome.

## **Ratifying Constitutional Amendments**

As noted above, states send their ratification resolutions to the Office of the Federal Register. A federal statute<sup>42</sup> provides that, when an "amendment...has been adopted, according to the provisions of the Constitution," the Archivist is required to publish the amendment, "with his certificate, specifying the States by which the same may have been adopted, and that the same has become...a part of the Constitution of the United States."

As the Justice Department explains, the constitutional amendment process is "self-executing upon completion."<sup>43</sup> An amendment is proposed upon passage of the appropriate joint resolution by the necessary two-thirds margin. A proposed constitutional amendment becomes part of the Constitution, and the amendment process comes to an end, when a proposed amendment is ratified by three-fourths of the states (today, 38 of 50 States).<sup>44</sup> The Archivist's certification and publication, while required by statute, merely provide "official notice" that the amendment process has been completed.

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<sup>37</sup> Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates, H., Comm. on the Judic. 82<sup>nd</sup> Cong., 2<sup>nd</sup> Sess. (1953).

<sup>38</sup> *Id.* at 19.

<sup>39</sup> 377 U.S. 533 (1964).

<sup>40</sup> See also Malcolm, *supra* note 32, at 4-5 (describing other contemporary campaigns for an Article V convention).

<sup>41</sup> <https://conventionofstates.com/>

<sup>42</sup> 1 U.S.C. § 106b.

<sup>43</sup> Brief for the Archivist of the United States in *State of Illinois v. Ferriero*, No. 21-5096, March 4, 2022, at 27, citing *United States v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988).

<sup>44</sup> See Jon O. SHIMABUKURO, The Equal Rights Amendment: Recent Developments, Cong. Rsrch. Serv. Legal Sidebar, April 15, 2022, at 1 ("A proposed amendment becomes part of the Constitution when ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states."); *Dillon v. Gloss*, 256 U.S. 368, 376 (1921) (Ratification of the Eighteenth Amendment was "consummated January 16, 1919," the date the three-fourths threshold was reached.).

## **Conclusion**

The American people alone have the power to revoke or amend the Constitution because they constitute the authority that made it. They do so through the process outlined in Article V, which provides two comparable or parallel methods of proposing amendments: two-thirds of Congress or a convention called by Congress on application by two-thirds of the states. In either case, a proposed amendment becomes part of the Constitution upon ratification by three-fourths of the states.

The Article V convention method of proposing constitutional amendments has yet to be employed directly, though it has pushed Congress to propose amendments. Addressing the questions that remain about state applications, Congress' authority, and convention operation must be informed by both the nature of an Article V convention as a creation of the states and the Framers' objective to minimize or prevent congressional interference.



## LEGAL MEMORANDUM

No. 340 | SEPTEMBER 15, 2023

EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

# Liberal Scholars' Flawed Arguments Cannot Revive the Equal Rights Amendment

*Thomas Jipping*

### KEY TAKEAWAYS

Congress' Article V powers are limited to proposing constitutional amendments, choosing the mode of state ratification, and setting a ratification deadline.

ERA advocates claim that the 1972 ERA's seven-year ratification deadline was invalid so that additional states may ratify it or Congress may change it.

Liberal scholars' arguments that the 1972 ERA is still alive are deeply flawed and unpersuasive.

Fresh from the 1920 ratification of the Nineteenth Amendment, which prohibits sex discrimination in voting, the National Woman's Party (NWP) called for a constitutional amendment to more broadly guarantee equality between men and women. During the next 50 years, Members of Congress introduced hundreds of resolutions to propose what has become known as the Equal Rights Amendment (ERA).<sup>1</sup> Committees in both the Senate and House of Representatives held dozens of hearings on the meaning of legal equality between men and women, whether that goal could best be reached by legislation or a constitutional amendment, and, if the latter, what it should say and how it might apply.

Representative Martha Griffiths (D-MI), who became the ERA's leading advocate in Congress, introduced House Joint Resolution 208 on January 26, 1971, to propose this language: "Equality of rights

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under the law shall not be denied or abridged by the United States or any State on account of sex.”<sup>2</sup> She agreed to add a seven-year ratification deadline, which she placed in Resolution 208’s proposing clause, to help “gain united support for the amendment,”<sup>3</sup> a decision supported by women’s groups that backed the ERA.<sup>4</sup> Congress proposed the 1972 ERA on March 22, 1972, when, as the House had done, the Senate overwhelmingly approved Resolution 208.

## The Ratification Deadline

Everyone understood that the 1972 ERA’s ratification deadline was binding. The Justice Department’s Office of Legal Counsel (OLC), for example, concluded in a February 1977 opinion that the 1972 ERA “must be approved within 7 years after its submission to the States.”<sup>5</sup> Two months later, the U.S. Commission on Civil Rights released a report, co-authored by then-Professor Ruth Bader Ginsburg, agreeing that ratification “must occur within 7 years...by 1979.”<sup>6</sup> And President Jimmy Carter’s Advisory Committee for Women observed that three-fourths of the states “must ratify the ERA by [the deadline] if it is to become an amendment to the Constitution.”<sup>7</sup>

Adding a ratification deadline may have bolstered congressional support, but Griffiths’ prediction that states would ratify it “in less than 2 years”<sup>8</sup> really missed the mark. With the March 1979 deadline looming, 35 states had passed ratification resolutions, three short of the necessary three-fourths threshold, and five of those states had rescinded their approval. Knowing that the deadline was binding, Congress passed a resolution, later found to be unconstitutional,<sup>9</sup> to extend the deadline by 39 months, but it did not help; the last state to ratify the 1972 ERA, Indiana, had done so in January 1977. As a result, the Congressional Research Service (CRS) has observed, the 1972 ERA “formally died on June 30, 1982.”<sup>10</sup>

No one disputed this conclusion. The National Organization for Women (NOW) “concede[d] defeat” and “officially ended its...battle to win ratification of the Equal Rights Amendment.”<sup>11</sup> Less than a year after the 1972 ERA’s demise, Senator Paul Tsongas (D–MA) introduced the same language, and the same ratification deadline, as Senate Joint Resolution 10. In the first of several Judiciary Committee hearings on this proposal, Senator Dennis DeConcini (D–AZ) noted that a new resolution to propose the ERA was necessary because “the proposed [1972 ERA] died on June 30, 1982.”<sup>12</sup> When asked about the ERA’s status on *The Oprah Winfrey Show* in January 1986, feminist leader Gloria Steinem explained that “because it was not ratified in the nine years allotted to it, it now has to start the process over again,

and...be passed by the House and the Senate and go through all of the states' ratification process.... It does have to go through the process over again.”<sup>13</sup>

Steinem was right, but the prospect of Congress again proposing the ERA looked grim. When the 98th Congress opened in January 1983, for example, Representative Peter Rodino (D–NJ) introduced House Joint Resolution 1 to propose the same language—including the ratification deadline in the proposing clause—as the failed 1972 ERA. The original 352–24 vote in 1972, however, became a 278–147 tally that fell far short of the two-thirds threshold required for proposing amendments. Neither the Senate nor House has voted on a resolution to propose the ERA since then.

Also hampering the ERA's future prospects was that, in addition to the issues that led to the 1972 ERA's failure,<sup>14</sup> it was becoming even more controversial. Advocates had already been arguing, for example, that the ERA would strengthen abortion rights,<sup>15</sup> and began claiming that it was needed to address problems that originate in private, rather than government, action. These include “economic inequality,”<sup>16</sup> the “feminization of poverty,”<sup>17</sup> “differential occupational distributions” of men and women,<sup>18</sup> “pay equity,”<sup>19</sup> sexual harassment and assault,<sup>20</sup> “intimate partner violence,”<sup>21</sup> “gender-based violence,”<sup>22</sup> “pregnancy discrimination,”<sup>23</sup> “gender-driven injustices,”<sup>24</sup> “victim-blaming,”<sup>25</sup> “maternal mortality,”<sup>26</sup> equality for “marginalized genders,”<sup>27</sup> and healing “intergenerational wounds.”<sup>28</sup>

## Mostly Dead or All Dead?

ERA advocates turned their attention to making an argument that the 1972 ERA, the only one Congress would likely ever propose, might still be alive, that the rumors of its death had been greatly exaggerated. After all, as Miracle Max put it in *The Princess Bride*, “[t]here's a big difference between mostly dead and all dead.”<sup>29</sup> A 1997 article<sup>30</sup> laid out the argument that would inform efforts going forward. That argument goes like this:

While a ratification deadline placed in a proposed amendment's text is binding, a “non-textual” deadline placed in a resolution's proposing clause is only “advisory...rather than binding on the States”;<sup>31</sup>

A state that passes a resolution to ratify a proposed amendment may never rescind it, even while the amendment is still pending before the states;

Because the 1972 ERA had no binding ratification deadline, it remained pending and could be ratified by additional states; and

Congress has broad power over the entire constitutional amendment process, including retroactively changing or repealing the 1972 ERA's ratification deadline and making it part of the Constitution by declaring it to be finally ratified.

**Three-State Strategy.** ERA advocates used this argument to launch what they called a “three-state strategy”<sup>32</sup> that had two objectives.

1. ERA advocates sought to persuade three additional states to pass resolutions ratifying the 1972 ERA; and
2. They wanted Congress to retroactively remove the 1972 ERA's ratification deadline and, upon three more state ratifications, to declare that the 1972 ERA had become the Twenty-Eighth Amendment.

The first step was achieved when three states—Nevada in 2017, Illinois in 2018, and Virginia in 2020—passed ratification resolutions. The second step, however, has stalled. The House of Representatives twice passed a resolution asserting that the 1972 ERA will be part of the Constitution “whenever ratified by the legislatures of three-fourths of the states.”<sup>33</sup> On April 27, 2023, a Senate filibuster blocked consideration of a resolution asserting that the 1972 ERA had, in fact, already become part of the Constitution, “having been ratified by the legislatures of three-fourths of the several States.”<sup>34</sup>

After some background on the constitutional amendment process, this *Legal Memorandum* will first address the two pillars of the three-state strategy: (1) that a ratification deadline's location determines its validity; and (2) that Congress can affect the status of a proposed constitutional amendment. It will then examine specific arguments by liberal constitutional scholars intended to advance that strategy.

## The Constitutional Amendment Process

“The Founders established a process for amending the Constitution that requires substantial agreement within the Nation to alter its fundamental law.”<sup>35</sup> Article V outlines the process by which constitutional amendments can be proposed and ratified. An amendment can be proposed by two-thirds of the Senate and House or by a convention called by Congress after application by two-thirds of state legislatures. Either way, to become part of the Constitution, a proposed amendment must be ratified by three-fourths of the states in the mode, by legislatures or conventions, that Congress chooses.

Congress proposes a constitutional amendment in the form of a joint resolution<sup>36</sup> with two parts: a proposing clause with procedural rules,<sup>37</sup> including the mode of ratification and any ratification deadline, and the text of the proposed amendment. When the Senate and House have passed the same resolution by a two-thirds margin, which “ha[s] the effect of formally proposing the amendment to the states for ratification,”<sup>38</sup> the Archivist of the United States transmits the resolution to the governor of each state.<sup>39</sup>

States that ratify a proposed amendment by the mode Congress has specified prior to any deadline Congress has imposed send to the Archivist a certified copy of their ratification resolutions. The Office of the Federal Register, which is part of the National Archives and Records Administration, “examines ratification documents for facial legal sufficiency and an authenticating signature” and “transfers the record to the National Archives for preservation.”<sup>40</sup> A federal statute<sup>41</sup> provides that, when an “amendment...has been adopted, according to the provisions of the Constitution,” the Archivist is required to publish the amendment, “with his certificate, specifying the States by which the same may have been adopted, and that the same has become...a part of the Constitution of the United States.”

As the Justice Department explains, the constitutional amendment process is “self-executing upon completion.”<sup>42</sup> A proposed constitutional amendment becomes part of the Constitution, and the amendment process comes to an end, when a proposed amendment is ratified by three-fourths of the states (today, 38 of 50 States).<sup>43</sup> The Archivist’s certification and publication, while required by statute, merely provide “official notice” that the amendment process “has been completed.”<sup>44</sup>

More than 12,000 resolutions to propose constitutional amendments on a host of subjects have been introduced since the Constitution was ratified in June 1788.<sup>45</sup> The states have ratified 27 of the 33 amendments that Congress has proposed,<sup>46</sup> and four amendments, proposed without a ratification deadline, have yet to be ratified by three-fourths of the states. The remaining two proposed amendments—including the 1972 ERA—expired when their deadline passed with insufficient state support.

## Ratification Deadlines: Location, Location, Location

To succeed, the three-state strategy requires either that Congress has no authority to set a ratification deadline when proposing constitutional amendments, or that the deadline it set for the 1972 ERA was somehow invalid. The Supreme Court took the first option off the table by holding, in *Dillon v. Gloss*,<sup>47</sup> that Congress’ authority to set the mode of state ratification includes setting a ratification deadline.

A path to ratification success, therefore, exists only if the 1972 ERA's ratification deadline was not binding. ERA advocates claim that a deadline's validity depends on its location; a deadline placed in the proposed amendment's text is binding, but one placed in the resolution's proposing clause is not. By placing the ratification deadline in Resolution 208's proposing clause, they contend, Congress effectively proposed the 1972 ERA with no ratification deadline at all.

All of the relevant evidence, however, supports the understanding by everyone associated with the 1972 ERA that its ratification deadline, placed in the resolution's proposing clause, was binding. Congress, for example, believes that it has authority not only to set a ratification deadline, but to place it in either location. Congress has proposed 10 constitutional amendments with a ratification deadline, placing five in the text and five in the proposing clause, and the states have ratified four in each category.

The Justice Department, including under the current Administration, rejects the argument that a ratification deadline's validity depends on its location. In 2022, the Justice Department defended the Archivist against a lawsuit by Illinois and Nevada<sup>48</sup> trying to force his certification and publication of the 1972 ERA as the Twenty-Eighth Amendment. Its appellate brief in *Illinois v. Ferriero* argued that "Members of Congress did not ascribe any substantive difference to the two types of deadlines" and that "substantial historical practice...supports Congress's authority" to decide where to place a ratification deadline.<sup>49</sup>

The proper location for a ratification deadline did come up in a 1932 hearing on what would become the Twentieth Amendment. The only question, however, was the suitability, not the validity, of placing a ratification deadline in the amendment's text or the resolution's proposing clause. Since final ratification renders a deadline irrelevant, placing it in the proposing clause would, some said, avoid "cluttering up" the Constitution with inoperative provisions.<sup>50</sup> This idea caught on, and Congress placed a ratification deadline for Amendments Twenty-Three to Twenty-Six in their respective resolutions' proposing clause. Similarly, the first ratification deadline in an ERA resolution, introduced in 1943, appeared in its proposing clause,<sup>51</sup> as have 93 percent of the ERA ratification deadlines since then.

This shift from placing a ratification deadline in a proposed constitutional amendment's text to its resolution's proposing clause went virtually unnoticed. "The House report [on the proposed Twenty-Third Amendment] did not note that for the first time Congress had shifted the seven-year limit from the text of the amendment to the [proposing clause]. Similarly, neither the House nor Senate debates on the [Twenty-Third through Twenty-Sixth] amendments observed the fact that the seven-year limitation had shifted."<sup>52</sup>

***Illinois v. Ferriero***. As noted above, the Justice Department rejected the location-determines-validity argument in its brief defending the Archivist in *Illinois v. Ferriero*. The brief also observed that, while the Supreme Court has not directly addressed this question, it has “offered three ‘clues’ that the validity of a ratification deadline does not turn on its precise location within the joint resolution.”<sup>53</sup>

1. In recognizing Congress’ power to set a deadline, the Court “did not specify where in the resolution the deadline was placed...perhaps because it did not attach any significance to that particular detail.”<sup>54</sup>
2. In *Coleman v. Miller*,<sup>55</sup> the Supreme Court noted that, unlike the Eighteenth Amendment at issue in *Dillon*, the pending Child Labor Amendment had “[n]o limitation of time for ratification...either in the proposed amendment or in the resolution of submission.”<sup>56</sup> The Justice Department noted that there would have been “no need to confirm the absence of a deadline in the proposing clause if such a deadline could not have been effective.”<sup>57</sup>
3. “Third, and most telling, is the Court’s decision in 1982 that the controversy regarding Congress’s extension of the ERA’s deadline became moot when the extended deadline expired.”<sup>58</sup>

The third clue deserves additional emphasis. The 1972 ERA’s extended deadline expired while the U.S. District Court’s decision in *Idaho v. Freeman* that this deadline was unconstitutional was pending before the Supreme Court. A few days later, Acting Solicitor General Lawrence G. Wallace prepared a memorandum for the Administrator of General Services, the defendant in the states’ lawsuit, arguing that the case should be dismissed as moot.<sup>59</sup> “Even if all the ratifications remain valid, the rescissions are disregarded, and Congress is conceded the power to extend the ratification period as it did here,” Lawrence wrote, only 35 of the necessary states can be regarded as having ratified the Amendment.”

The Supreme Court agreed, vacating the case on October 4, 1982, “[u]pon consideration of the memorandum for the Administrator of General Services suggesting mootness.”<sup>60</sup> The only way to understand this decision is that the 1972 ERA was no longer pending before the states. If the deadline had been invalid, as ERA advocates claim today, the case would not have been moot and the Supreme Court would not have dismissed it. Because the 1972 ERA’s ratification deadline was valid, it died when that deadline passed with insufficient state support.



## Congressional Promulgation

The three-state strategy also asserts that Congress has robust control over the entire constitutional amendment process. ERA advocates, for example, claim that Congress has authority to resolve conflicts over a proposed amendment's ratification, can retroactively change a joint resolution proposing an amendment that it passed decades ago, and even affect the ratification status of a proposed constitutional amendment. This theory, sometimes referred to as *congressional promulgation*, is incompatible with the text of Article V, which gives Congress three specific powers in the constitutional amendment process.

1. "[W]henever two thirds of both Houses shall deem it necessary, [it] shall propose Amendments to this Constitution."<sup>61</sup>
2. "[O]n the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments."
3. Whether an amendment is proposed by Congress or a convention, Congress establishes its "Mode of Ratification," that is, whether ratifying states must act through their legislatures or in conventions.<sup>62</sup> The Supreme Court has unanimously held that the power to set the mode of ratification includes "fix[ing] a definite period for the ratification."<sup>63</sup>

Applying long-established interpretive canons<sup>64</sup> makes it clear that, by giving Congress specific enumerated powers in the constitutional amendment process, Article V cannot be read as giving Congress additional unenumerated ones. Congress, in other words, has only the specific powers explicitly granted by Article V, powers that end with the proposal of a constitutional amendment. ERA advocates claim that Congress has more power than Article V provides by misconstruing and misapplying two Supreme Court precedents.

***Dillon v. Gloss.***<sup>65</sup> Congress proposed the Eighteenth Amendment, which initiated Prohibition, on December 18, 1919. Ratification was complete in 13 months, long before the seven-year ratification deadline that appears in the amendment's text. In *Dillon v. Gloss*, an individual arrested for violating the Volstead Act, which Congress enacted to enforce Prohibition, challenged the Eighteenth Amendment's validity, arguing that Congress had no authority to set any ratification deadline. The Supreme Court unanimously rejected this argument, holding that the authority to set a proposed amendment's mode of ratification includes setting a ratification deadline.<sup>66</sup>



*Dillon's* actual holding, which concerned the ratification deadline that Congress placed in the Eighteenth Amendment, stopped there. For whatever reason, however, the Court went on to examine constitutional amendments “proposed long ago...[that] are still pending”<sup>67</sup> because they did not have a ratification deadline. The Court thought it “quite untenable” that such a long-pending amendment could still be ratified because of the “inference or implication from article 5...that ratification must be within some reasonable period of time after the proposal.”<sup>68</sup> *Dillon's* holding that Congress has authority to set a ratification deadline is relevant to the 1972 ERA; its dicta<sup>69</sup> about Congress's authority regarding amendments proposed without a deadline is not.

***Coleman v. Miller.*** *Coleman v. Miller*<sup>70</sup> involved one of the long-pending amendments that the Court had referenced in *Dillon*. Congress proposed the Child Labor Amendment in June 1924 without a ratification deadline, and 28 states passed ratification resolutions over the next 13 years. In January 1937, a dozen years after rejecting the proposed amendment, the Kansas Senate split 20–20 on a new ratification resolution. The Lieutenant Governor, the Senate's presiding officer, broke the tie to pass the resolution, and the House then passed it. Members of the legislature, including the 20 senators who opposed the ratification resolution, sued to declare passage of this resolution invalid, arguing that “the proposed amendment had lost its vitality” because of “the failure of ratification within a reasonable period of time.”<sup>71</sup>

The Supreme Court found that the dicta in *Dillon* carried the “fair implication” that “ratification must be within some reasonable time after the proposal”<sup>72</sup> but concluded that Congress rather than the courts may decide “what constitutes a reasonable time and determine accordingly the validity of ratification.”<sup>73</sup> This requirement must be implicit in Article V itself because the Court repeatedly emphasized that it is an issue only when “the limit has not been fixed in advance.”<sup>74</sup> *Coleman*, therefore, is irrelevant to the 1972 ERA.

The theory of congressional promulgation, in general, and the decisions in *Dillon* and *Coleman*, in particular, have been widely criticized. In its 1992 opinion on ratification of the Twenty-Seventh Amendment, for example, the OLC concluded that “the notion of congressional promulgation is inconsistent with both the text of Article V and with the bulk of past practice.”<sup>75</sup> Similarly, in its 2020 opinion on ratification of the 1972 ERA, the OLC stated that “[n]othing in Article V suggests that Congress has any role in promulgating an amendment after it has been ratified by the requisite number of state legislatures or conventions.”<sup>76</sup>

Both liberal and conservative scholars have also rejected this theory. The late professor, and former Acting Solicitor General, Walter Dellinger, for example, wrote that Article V “requires no additional action by Congress or by anyone else after ratification by the final state. The creation of a ‘third step’—promulgation by Congress—has no foundation in the text of the Constitution.”<sup>77</sup> Similarly, Professor Grover Rees has written that this theory “is no more defensible than to find a third house of Congress hidden cleverly in the interstices of the constitutional language vesting all legislative power in a House and a Senate.”<sup>78</sup>

Significantly, many liberal scholars who support the first pillar of the three-state strategy nonetheless reject congressional promulgation. In their *amicus curiae* brief in *Illinois v. Ferriero*, for example, 16 of the liberal scholars whose arguments are examined below asserted that nothing in Article V “suggests the primacy of Congress over the States in making an amendment a valid part of the Constitution. In particular...*promulgation by Congress has no foundation in the text of the Constitution and has been widely discredited.*”<sup>79</sup>

## The Scholars’ Arguments

In different combinations, 25 liberal constitutional scholars have made arguments supporting one or both pillars of the three-state strategy by signing two letters dated January 8, 2022,<sup>80</sup> and March 22,<sup>81</sup> 2022, to House Oversight Committee chairwoman Carolyn Maloney (D-NY); two *amicus curiae* briefs dated January 10, 2022,<sup>82</sup> filed with the U.S. Court of Appeals for the D.C. Circuit in *Illinois v. Ferriero*; and a memorandum dated February 28, 2023,<sup>83</sup> submitted to the Senate Judiciary Committee for its hearing on Senate Joint Resolution 4, purporting to declare the 1972 ERA part of the Constitution. The following analysis will address some of the claims and arguments in these documents, taking them in chronological order.

### The January 8, 2022, Letter

Ten scholars signed this letter to Maloney, who had asked for their analysis of the 2020 OLC opinion. These scholars assert that, in *Coleman*, the Supreme Court “stated that Congress has authority to ‘promulgate’ or ‘proclaim’ an amendment *after its ratification.*” As discussed above, ratification by three-fourths of the states, by itself, makes a proposed constitutional amendment part of the Constitution and terminates the amendment process. The terms “promulgate” or “proclaim,” therefore, cannot refer

to any action by Congress that has any effect on the ratification status of a proposed constitutional amendment.

Even if these scholars correctly characterized *Coleman*, that decision is relevant only when “Congress did not fix a time limitation for ratification.”<sup>84</sup> Whatever *Coleman* said and however it might apply in that context, it is irrelevant to the 1972 ERA. Strangely, three legal scholars—Laurence Tribe and Martha Minow of Harvard University and Geoffrey Stone of the University of Chicago—signed both this letter citing *Coleman* as the basis for congressional promulgation and the *amicus curiae* brief in *Illinois v. Ferriero*, mentioned above, insisting that *Coleman* is relevant “only in the **absence** of any congressional ratification deadline.”<sup>85</sup>

These scholars next claim that Congress has “effectively resolved...conflicts over prior ratification processes.” Similarly, in one of the *amicus* briefs filed in *Illinois v. Ferriero*, discussed below, four scholars assert: “History demonstrates that Congress has authority to resolve disagreements on ratification.”<sup>86</sup> Even if history, rather than the Constitution, established Congress’ authority in the constitutional amendment process, however, the examples offered by both sets of scholars do not support their position.

**The Fourteenth Amendment.** When Congress proposed the Fourteenth Amendment on June 13, 1866, ratification by 28 states was required to meet the Constitution’s three-fourths threshold. By July 9, 1868, 28 states had passed ratification resolutions and two of them, Ohio and New Jersey, had rescinded their approval. Alabama ratified on July 13, 1868, and, one week later, Secretary of State William Seward issued a “conditional certification” stating that the amendment had become part of the Constitution if the Ohio and New Jersey ratification rescissions were invalid.<sup>87</sup>

The next day, as Congress was passing a concurrent resolution declaring the Fourteenth Amendment to be part of the Constitution, word arrived that Georgia had also ratified it. With 28 unrescinded ratifications, the Fourteenth Amendment had unquestionably reached the three-fourths threshold and become part of the Constitution. After receiving the official ratification certification from Georgia, Seward issued a new certification on July 28 that included Ohio, New Jersey, Alabama, and Georgia on the list of ratifying states.<sup>88</sup>

The scholars’ suggestion that Congress’ resolution helped make the Fourteenth Amendment become part of the Constitution is problematic for several reasons. First, it is incompatible with the text of Article V, which gives Congress no role in the process after proposing an amendment. Second, if the scholars’ contemporary argument that states may not rescind ratification of a proposed constitutional amendment is valid, then the Fourteenth Amendment was already part of the Constitution when

Congress passed its resolution. The OLC concluded in its 1992 opinion that this resolution, “adopted with no substantive debate, was unnecessary and an aberration.”<sup>89</sup> Third, Georgia’s ratification meant that the Fourteenth Amendment had been finally ratified even if Ohio and New Jersey’s ratification rescissions were valid.

**The Twenty-Seventh Amendment.** The scholars claim that “ratification of the 27th Amendment similarly illustrates Congress’s leading *authority* to resolve ambiguities or conflicts incident to the ratification process.” They assert that “Congress in fact affirmed the amendment’s ratification in 1992,” implying that Congress did something that helped complete the 27th Amendment’s ratification or somehow affected its status. This suggestion, however, is false.

The House and Senate did pass resolutions “recognizing the [27th] Amendment,”<sup>90</sup> but they had no legal effect whatsoever. House Concurrent Resolution 320, for example, simply declared that the proposed amendment “*has been ratified* by a sufficient number of the States and has become a part of the Constitution.”<sup>91</sup> Just as the Archivist’s certification is nothing more than a public notice that a constitutional amendment has been proposed, these resolutions simply recognized an event—final ratification—that had already taken place. If this was an example of a power of Congress, it was the power of the Senate or House to express its opinion, nothing more.

The scholars next claim that “[i]n *Coleman*, the Supreme Court held that questions regarding the ratification process of a proposed amendment and the ‘period within which ratification may be had’ are political questions for Congress to resolve.” *Coleman*, however, addressed only one ratification process question, that is, the length of time between Congress proposing a constitutional amendment and a state ratifying it. And even if the scholars had not mischaracterized its scope, *Coleman* did not, as the OLC has noted, explain “the constitutional basis for the assertion that Congress had authority to ‘promulgate’ an amendment.”<sup>92</sup> And, once again, the Supreme Court explicitly limited *Coleman* to amendments proposed without a ratification deadline. *Coleman*, therefore, is irrelevant to the 1972 ERA.

ERA advocates attempt to equate Congress retroactively repealing a ratification deadline long *after* that deadline has expired, as they want Congress to do today, with extending a ratification deadline *before* it has expired, as Congress did in 1978. These scholars, for example, claim that the 2020 OLC opinion that Congress cannot change an expired deadline “contradicts” the 1977 OLC opinion that Congress could change the 1972 ERA’s ratification deadline that had not yet expired. On its face, however, the 1977 OLC opinion makes that position untenable.

Certainly *if a time limit had expired before an intervening Congress had taken action to extend that limit*, a strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by two-thirds vote of each House and thereby begin the ratification process anew.<sup>93</sup>

### The *Illinois v. Ferriero* Briefs

**The Justice Department’s Brief.** The Justice Department’s brief defending the Archivist on appeal makes four significant arguments that, individually and especially in combination, contradict arguments by liberal scholars in two *amicus curiae* briefs filed in this litigation.

1. Because the ratification process is “self-executing upon completion,”<sup>94</sup> the Archivist’s actions have “no effect on [a proposed amendment’s] legal status or validity.”<sup>95</sup> Without suffering any injury caused by the Archivist declining to certify and publish the 1972 ERA as the Twenty-Eighth Amendment, therefore, the states had no standing to sue.
2. “Although the plaintiff States argue that the ERA has been validly adopted notwithstanding the congressional deadline, they have not identified *any relevant legal authority* establishing that this is so.”<sup>96</sup>
3. “Members of Congress did not ascribe any substantive difference” between “a ratification deadline placed in the resolution’s proposing clause and one placed in the proposed amendment’s text.”<sup>97</sup> In fact, “substantial historical practice...supports Congress’s authority to place a ratification deadline in either location.”<sup>98</sup>
4. “Congress has repeatedly acted on the assumption that the [1972 ERA’s ratification] deadline is valid (including by voting to extend it).”<sup>99</sup>

**The Scholars’ *Amicus Curiae* Briefs.** Two groups of scholars filed *amicus curiae* briefs in this case. In one brief, mentioned above, 16 scholars focused on the first pillar of the three-state strategy, that a ratification deadline in the resolution’s proposing clause is not binding. They claim, for example, that *Dillon* recognized Congress’ power to set a ratification deadline “only where the time limit was set forth in the **text** of the proposed amendment that was itself sent to the States for ratification.”<sup>100</sup>

Simply reading *Dillon* shows that this is pure fiction. While the Court discussed “[w]hether a definite period for ratification shall be fixed”<sup>101</sup> at all, the Court said nothing about a deadline’s location. “Notably,” wrote the Justice Department in its appellate brief, “the Court *did not specify* where in the resolution the deadline was placed.”<sup>102</sup> The Justice Department was right, the scholars are wrong.

This error is especially significant because the legitimacy of the three-state strategy depends on whether a ratification deadline’s location affects its validity. On that point, the proper reading of both *Dillon* and *Coleman* contradicts these scholars’ argument. The fact that the Court in *Dillon* said nothing about the ratification deadline’s location, the Justice Department argued, suggests that it “did not attach any significance to that particular detail.” Similarly, the Court observed in *Coleman* that the Child Labor Amendment had no ratification deadline “either in the proposed amendment or in the resolution of submission,”<sup>103</sup> implying that either placement would have been equally valid.

These scholars next claim that there is “no evidence” that Congress intended a ratification deadline placed in the resolution’s proposing clause “to bind the States in the same manner as a deadline the States themselves could vote upon.” Representative Griffiths, however, repeatedly spoke to the validity of the ratification deadline that she placed in Resolution 208’s proposing clause. That deadline could only have served her objective of promoting “united support for the amendment” if it were binding. And, as noted elsewhere, everyone believed that the 1972 ERA’s ratification deadline was valid. The scholars neither suggest a reason why Congress would set a binding ratification deadline in some proposed amendments, but a non-binding deadline in others, nor offer any evidence that Congress ever took this unusual step.

The basis for the scholars’ further suggestion that a ratification deadline is binding only if “the States [can] vote upon” it is a mystery. Procedural rules for the ratification process are not negotiated with the states or require the states’ approval but are set by Congress when it proposes a constitutional amendment. Congress, for example, designated the mode of ratification for all 33 amendments it has proposed in each resolution’s proposing clause; under the scholars’ theory, the states would have been free to ignore Congress’ instruction and express their position on ratification in any manner they chose.

Even if that notion had any merit, the scholars are, once again, wrong on the historical facts. In at least 25 of the 35 ratifying states, the legislature adopted a ratification resolution that “quoted [Resolution] 208 in its entirety,



including the language [in the proposing clause] referring to the seven year ratification period.”<sup>104</sup> Five other states passed resolutions that “did not quote [Resolution] 208 in its entirety, but during the ratification process included reference to the seven year time limit for ratification.”<sup>105</sup> Even under the scholars’ own theory, the 1972 ERA died no later than June 30, 1982.

The three scholars—Tribe, Minow, and Stone—who signed both the January 8, 2022, letter and this *amicus curiae* brief argue in the letter that “Congress has the authority to ‘promulgate’...an amendment” and cite *Coleman* for the idea that “questions regarding the ratification process... are political questions for Congress to resolve.” But in the brief, they argue that congressional promulgation “has been widely discredited” and that *Coleman* is “inapplicable” to the 1972 ERA. Needless to say, they cannot have it both ways.

In a second brief “on behalf of neither party,” four legal scholars focused on the second part of the three-state strategy, that Congress has authority over the entire constitutional amendment process and can take steps to affect a proposed amendment’s ratification status. They argue, for example, that the “text of Article V...suggest[s]” that whether a proposed constitutional amendment has become part of the Constitution “is a political question for Congress.”<sup>106</sup> Anyone reading Article V, however, will look in vain for that suggestion. Rather, it says that a proposed constitutional amendment becomes part of the Constitution upon ratification by three-fourths of the states, not when Congress says so.

These scholars rely on *Coleman* for the proposition that “the issue of a time period for ratification was a non-justiciable political question.”<sup>107</sup> But, to repeat, *Coleman* involved a constitutional amendment proposed without a ratification deadline and the Supreme Court repeatedly disclaimed that its decision extended beyond that context. It is, as the 16 scholars argued in their separate brief, “inapplicable” to the 1972 ERA.

These four scholars argue that because Congress has “a textually prescribed role in amending the Constitution...Congress should have the opportunity to decide whether the ERA has been effectively ratified.”<sup>108</sup> Article V, however, already determines when a proposed constitutional amendment has been effectively ratified: “when ratified by...three fourths of the several States.” The scholars, therefore, appear to argue that Congress’ explicit power to propose constitutional amendments comes with the implicit power to set aside Article V’s objective ratification criterion in favor of a standard it prefers.

That assertion is absurd on its face. The fact that Congress’ role in the constitutional amendment process is “textually prescribed” means the opposite

of what these scholars claim. It forecloses Congress from having any unenumerated powers, such as promulgating a proposed amendment or taking any other action that might affect a proposed amendment's ratification status.

### Professor Tribe's March 22, 2022, Letter

Professor Tribe wrote Representative Maloney on March 22, 2022, to provide his "opinion as a legal scholar on the current status of the Equal Rights Amendment." He signed the January 8, 2022, letter asserting that Congress can promulgate a proposed constitutional amendment *and* the 16-scholar brief in *Illinois v. Ferriero* emphatically rejecting congressional promulgation. In his letter, Tribe returned to the position that Congress can make the 1972 ERA part of the Constitution "by taking concurrent action to recognize [its] status as part of the Constitution."

Tribe argued that whether a proposed amendment becomes part of the Constitution will not be decided "by any formal criterion or procedure to be found in the Constitution itself." That argument renders inexplicable Article V's directive that "Amendments...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."

Tribe argued that because Congress extended the 1972 ERA's original deadline *before* that deadline expired, it may retroactively change or repeal that deadline decades *after* it expired. Whether Congress has the power to extend a ratification deadline it has already set, and on which the states have voted, was so controversial that the Senate Judiciary Committee held a week-long hearing on that question in 1978 before Congress voted on the extension resolution. Congress passed that resolution by only a simple majority rather than the two-thirds majority required to propose a constitutional amendment.

ERA advocates pushed for an extension before the March 1979 deadline expired precisely because they knew they could not do so after. When that deadline expired with insufficient state support, however, Resolution 208 no longer existed. Legislative measures, including resolutions to propose constitutional amendments, expire if not approved within the two-year Congress in which they were introduced. A new resolution must be introduced after the next Congress convenes because the previous one no longer exists. No Member of Congress would try to continue work on a resolution introduced in the previous Congress, but rather, he or she would introduce a new resolution, even if identically worded, and start the legislative process again.



Similarly, a constitutional amendment proposed with a ratification deadline no longer exists when that deadline passes with insufficient state support. When its ratification deadline passed, Resolution 208 was no longer pending before the states. It was neither available to the states to be further ratified nor to Congress to be amended. This is why the Supreme Court dismissed *Idaho v. Freeman* as moot and what Gloria Steinem explained on *Oprah* in 1986.

Steinem was right, Tribe is wrong.

Tribe also observed that “[t]here is no historical example of enforcing preamble deadlines like the one contained in the proposing resolution for the [1972] ERA.” This is an observation, not an argument, and means only that, like those with textual ratifications deadline, previous amendments proposed with a preamble deadline—Amendments Twenty-Three to Twenty-Six—were ratified well before their deadline expired. Tribe does not even suggest how that observation about ratification history is relevant to the 1972 ERA.

Tribe repeats the factual error in the brief he signed in *Illinois v. Ferriero*: “Because these deadline concerns are unrelated to the text of the ERA on which state legislatures have based their ratification votes, the deadline’s expiration does not impact post-deadline ratifications.” Neither Congress nor the states, when proposing or ratifying a constitutional amendment, however, vote solely on its text; they act upon a resolution that includes both that text and procedural rules for its consideration by the states.

This has been Congress’ practice from the start. Its 1789 resolution proposing 12 amendments, for example, placed in the proposing clause the instruction that “any or all” of them would become part of the Constitution “when ratified by three fourths of the [state] Legislatures.”<sup>109</sup> This proposing clause “was debated by the House and the Senate and considered of a piece with the substantive proposed amendments.”<sup>110</sup> The states obviously considered this procedural rule to be valid, despite its placement in the proposing clause, by ratifying some, but not all, of the proposed amendments.

Tribe concluded by asserting that “*Dillon* and *Coleman* leave to Congress the power to determine an amendment’s contemporaneity under the political question doctrine.” Since the sole issue in *Dillon* was whether Congress had authority to set *any* ratification deadline, its discussion of Congress’ authority over ratification of an amendment proposed without a deadline was irrelevant dicta. And the Supreme Court could not have been clearer in *Coleman* that its conclusion was limited to when Congress has not, as it did for the 1972 ERA, set any ratification deadline. As the 16-scholar brief in *Illinois v. Ferriero*—that Tribe signed—stated: “The political-question language in *Coleman* was...narrowly framed so as to be inapposite here.”

## The February 28, 2023, Memo

Five scholars signed onto this memo and submitted it to the Senate Judiciary Committee for its hearing on Senate Joint Resolution 8, introduced by Senator Ben Cardin (D–MD). Like previous resolutions of this kind that Cardin had introduced,<sup>111</sup> Resolution 8 purported to remove the 1972 ERA’s ratification deadline. Resolution 8, however, went further and declared that the 1972 ERA had, in fact, become the Twenty-Eighth Amendment. To support this resolution, these scholars argued that Congress has broad authority over the entire constitutional amendment process, including the resolution of any questions about whether a proposed amendment has been finally ratified.

These scholars’ first claim that “nearly all of the 27 amendments to the Constitution” were ratified despite “irregularities” and “uncertainties”<sup>112</sup> has two glaring flaws. First, their proffered “irregularities” and “uncertainties” turn out to be nothing of the kind. They observe, for example, that the 27th Amendment “was proposed by the First Congress and then took more than 200 years to be ratified by 38 state legislatures.”<sup>113</sup> The scholars offer no hint why this statement, while factually correct, identifies an irregularity or an uncertainty.

To be sure, more than two centuries is a long time for a proposed constitutional amendment to be pending; the states ratified the others in an average of about 20 months. Like any other amendment proposed without a ratification deadline, however, it remained pending until three-fourths of the states ratified it—exactly as Article V requires. Even if there were something about the Twenty-Seventh Amendment’s ratification that appears irregular or uncertain, however, Congress did nothing that had any effect on its status. And the scholars do not explain how ratification of an amendment proposed without a deadline is relevant to ratification of the 1972 ERA, which had one.

**The Twelfth Amendment.** The scholars’ next example is an even more misleading observation masquerading as an uncertainty or irregularity. The Twelfth Amendment, they say, “was approved in the Senate by 2/3 of a quorum and not the full body.” Wording it this way implies that, perhaps, the Senate was supposed to approve the Twelfth Amendment by “2/3 of... the full body.”

It is difficult to believe that these scholars do not know the default rule for the Senate or House to conduct legislative business. Article I provides that “a Majority of [the Senate or House]...shall constitute a Quorum to do Business.” Unless the Constitution, a chamber’s standing rules, or a unanimous consent

agreement says otherwise, an act by a majority of a chamber's quorum is an act of the chamber itself. Article V provides that proposing a constitutional amendment requires "two thirds of both Houses," which means that Congress proposes a constitutional amendment when two-thirds of each house's quorum passes the same joint resolution for that purpose.

The Senate, therefore, passed the resolution to propose the Twelfth Amendment in exactly the manner that the Constitution requires. The only uncertainty comes from the scholars' misleading suggestion to the contrary. If constitutional amendments required two-thirds of the entire Senate and House to be proposed, the validity of much of the Constitution would be in doubt. No less than 10 of the 27 amendments ratified by the states received less than two-thirds of the full Senate, House, or both when Congress proposed them.

The Thirteenth Amendment, for example, was approved by two-thirds of the House quorum, but not of the full House. The Fourteenth and Fifteenth Amendments failed to receive two-thirds of either the full Senate or House. So did the Eighteenth Amendment, which imposed Prohibition, and the Nineteenth Amendment, which prohibits sex discrimination in voting. No one would suggest that this legislative history indicates any uncertainty whatsoever because each amendment was proposed exactly as the Constitution requires.

**The Sixteenth Amendment.** The scholars next observe that the "text of the 16th Amendment...varied between state ratifications." Tax protesters have used this argument to claim that the Sixteenth Amendment was not lawfully ratified and, therefore, that Americans are not required to pay any federal income tax. *United States v. Thomas*<sup>114</sup> was one of those cases. Kenneth Thomas claimed that only four states, rather than the necessary 36 at the time, had properly ratified the Sixteenth Amendment word-for-word and punctuation mark-by-punctuation mark.

Congress proposed the following text for the Sixteenth Amendment on March 15, 1913:

ARTICLE XVI. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

In *Thomas*, the U.S. Court of Appeals for the Seventh Circuit noted that, in their ratification resolutions, many states "neglected to capitalize 'States,' and some capitalized other words instead."<sup>115</sup> The Illinois resolution used "remuneration" rather than "enumeration" and Washington used the singular "income" rather than the plural "incomes."<sup>116</sup> Similarly, the Ninth Circuit

has observed that 33 state ratification resolutions “contained punctuation, capitalization, or wording errors.”<sup>117</sup>

When a state passes a ratification resolution, it is ratifying the amendment that Congress has proposed, in the form that Congress proposed it. No one, including these scholars, has suggested that such “trivial inconsistencies”<sup>118</sup> can possibly cast any doubt on whether a particular proposed constitutional amendment has been ratified. As the Sixth Circuit has held, since no one claims that such “typographical errors [go] to the meaning of the amendment, we can only conclude that they did not affect the drafter’s purpose.”<sup>119</sup> And it is bizarre to suggest that failing to capitalize a word or using a singular rather than a plural is a puzzle comparable to whether Congress has the power, found nowhere in the Constitution, to make part of the Constitution a proposed amendment that failed Article V’s ratification standard more than 40 years ago.

The scholars next observe that ERA opponents “cite no authority” for their claim that, if Congress had any authority to change the 1972 ERA’s ratification deadline, it had to exercise that authority “while the measure was still pending; that is, before it expired with the passage of the ratification time limit.” The best response comes from the assertion itself. Passage of the ratification deadline meant that the 1972 ERA “expired.”

The legislative process provides further support, if any is needed, for this obvious fact. As the Law Library of Congress website explains in its “Frequently Asked Questions” section, which asks, “What happens to a bill that does not become law at the end of a Congress?,”<sup>120</sup> here is the answer:

If a bill...does not become law during the [two-year] congress in which it is introduced, it is considered “dead.” For a “dead” bill to be enacted in a new Congress, it would have to be reintroduced with a new number and begin anew its journey through the legislative process.<sup>121</sup>

This is why, like they would with any bill or resolution that had expired, Members of Congress introduced new “fresh-start”<sup>122</sup> resolutions to propose the ERA in nearly every Congress since 1923. It is also the path that the 1972 ERA itself followed. On January 16, 1969, as the 91st Congress got underway, Griffiths introduced House Joint Resolution 264 to propose the ERA without a ratification deadline. Resolution 264 expired, however, when the 91st Congress adjourned on January 2, 1971, because the House, but not the Senate, had passed it.

More specifically, once Congress passes a resolution proposing a constitutional amendment, it remains pending before the states—that is, it

exists—until ratified by three-fourths of the states or, if it has one, its ratification deadline passes with insufficient state support. After that time limit expires, no resolution exists for the states to ratify or for Congress to amend. Similarly, Resolution 208 has not existed for more than 40 years and is why the Supreme Court in *Freeman* dismissed the lawsuit over the 1972 ERA—the lawsuit was moot because the proposed amendment was no longer pending before the states. Does there really need to be “authority” for the idea that Congress cannot consider or amend a resolution that no longer exists?

**The CRS Opinion.** The scholars dismiss the CRS conclusion that the 1972 ERA “formally died on June 30, 1982,” because “the CRS’s interpretations of legal questions are advisory, not binding, on Congress.”<sup>123</sup> True enough, but only begs the real question whether the CRS’ conclusion was correct. And it certainly does nothing to support the scholars’ contention that Congress has authority, which Article V does not provide, to affect a proposed constitutional amendment’s ratification status. Instead, the scholars put themselves in a bind by dismissing as only “advisory” the 2020 OLC opinion that Congress lacks authority to eliminate a ratification deadline *after* it passed. That advisory status applies equally to the 1977 OLC opinion, which the scholars favor, that Congress had authority to extend the 1972 ERA’s deadline *before* it expired.

These scholars’ attempt to establish robust congressional control over the constitutional amendment process also creates a profound constitutional problem. If Congress today is not bound by a ratification deadline set by a previous Congress, then a future Congress would likewise not be bound by a congressional determination today that the 1972 ERA’s ratification deadline was invalid and is now the Twenty-Eighth Amendment. If Congress can retroactively repeal a ratification deadline that has already expired, in a resolution Congress passed decades ago, then presumably it could retroactively impose a deadline on an amendment it had earlier proposed without one. The constitutional amendment process that the Founders actually established and placed in Article V has no such problems.

## Conclusion

The idea of an Equal Rights Amendment was born when many state and federal laws discriminated against women and the Constitution had not been interpreted to require equality between the sexes. Both of those problems have been solved without the ERA; legislatures have eliminated discriminatory laws and the Supreme Court has applied the Fourteenth

Amendment to sex discrimination. Ongoing and contentious debate about whether, untethered from its original objective, the ERA is still needed and might be used to further radically different agendas eventually led to the 1972 ERA's defeat and make it highly unlikely that Congress will propose the ERA again, much to the disappointment of ERA supporters.

Although they initially acknowledged the 1972 ERA's defeat, advocates now argue that its ratification deadline was invalid, states may still ratify it, and Congress has the power to place it into the Constitution. As the Justice Department stated in its *Illinois v. Ferriero* brief, however, advocates "have not identified any relevant legal authority establishing that this is so." Nor have they "identified any relevant legal authority requiring the Archivist to certify the adoption of an amendment ratified after a deadline imposed by Congress."

Additional states can ratify the 1972 ERA only if its ratification deadline was not binding. Advocates' only argument for this notion has been that a deadline's location determines its validity, but all the evidence points in the opposite direction. In fact, the argument that a ratification deadline's location in one part of a proposing resolution but not another would affect that deadline's validity has serious implications. Among other things, it would mean that:

Representative Griffiths included, and women's groups supported, a deadline in the 1972 ERA that they either knew or should have known was invalid.

More than 60 Members of Congress, of both parties, who introduced resolutions to propose the ERA with a ratification deadline in the proposing clause, including feminist leaders such as Representative Bella Abzug (D-NY), were all wrong in assuming, or were duped into believing, that it was valid.

The 436 Senators and House Members who voted for Resolution 208 approved a ratification deadline that they either knew or should have known was invalid.

Congress went through the process of extending the 1972 ERA's ratification deadline, including extensive hearings, unnecessarily.

Ruth Bader Ginsburg was wrong when she said that ratification of the 1972 ERA "must occur within 7 years" of its proposal.

The President's Advisory Committee for Women was wrong when it stated that the 1972 ERA would be part of the Constitution only if enough states ratified it by the deadline.

The Supreme Court was wrong to dismiss the *Idaho v. Freeman* litigation as moot out of the mistaken belief that the 1972 ERA was no longer pending before the states.

Gloria Steinem was wrong when she explained that the 1972 ERA “was not ratified in the nine years allotted to it” and, therefore, “has to start the process over again.”

Even though Congress alone has the discretion to choose the mode of ratifying a proposed constitutional amendment,<sup>124</sup> its choice would be binding only if expressed in one part of the proposing resolution, but not in another. As a result, Congress' designation of ratification mode in all 33 constitutional amendments it has proposed were invalid because each appeared in the resolution's proposing clause.

The 1972 ERA “formally died on June 30, 1982,” not because the CRS says so, but because Article V does. Speaking at Georgetown University a few months before she passed away, Ginsburg echoed the view Steinem expressed 34 years earlier: “I would like to see a new beginning [for the ERA]. I'd like it to start over.”<sup>125</sup> That was not merely a preference, it is the only way the ERA will ever become part of the Constitution.

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## Endnotes

1. THOMAS H. NEALE, CONG. RSCH. SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 13 (2019), <https://fas.org/sgp/crs/misc/R42979.pdf>. Senator Charles Curtis and Representative Daniel Anthony, Kansas Republicans, introduced the first ERA resolutions with the following language: “Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation.” S.J. Res. 21, 68th Cong. (1923), 65 CONG. REC. 150 (1923); H.R.J. Res. 75, 68th Cong. (1923).
2. Most resolutions to propose the ERA since 1943 have used this language. Since 2013, Representative Caroline Maloney (D-NY) has introduced ERA resolutions with this language: “Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex.” This new formulation was based on a different concept of equality and would use a new enforcement mechanism. See Thomas Jipping, *Not Your Grandmother’s ERA: Why Current Equal Rights Amendment Strategies Will Fail*, HERITAGE FOUND. LEGAL MEMORANDUM No. 291, October 26, 2021, at 15–22.
3. *Equal Rights for Men and Women 1971, Hearing Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 92nd Cong., 41 (1971).
4. See Jipping, *supra* note 2, at 1–2.
5. U.S. DEP’T OF JUST., OFF. OF LEGAL COUNS., POWER OF A STATE LEGISLATURE TO RESCIND ITS RATIFICATION OF A CONSTITUTIONAL AMENDMENT, Feb. 15, 1977, at 14 (hereinafter 1977 OLC Opinion). See also *id.* at 13 (Congress shifted from placing a ratification deadline in the amendment text to the resolution’s proposing clause “without ever indicating any intent to change the substance of their actions.”).
6. U.S. COMM. ON CIV. RTS., SEX BIAS IN THE U.S. CODE: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS (Apr. 1977), at 6, <https://www2.law.umaryland.edu/marshall/usccr/documents/cr12se9.pdf>.
7. PRESIDENT’S ADVISORY COMM. FOR WOMEN, VOICES FOR WOMEN 16 (1980), <https://babel.hathitrust.org/cgi/pt?id=uiug.30112105193947&view=lup&seq=3> (emphasis added).
8. Hearing, *supra* note 3, at 41. See also *id.* at 44 (“[I]t is going to be passed through the States in far less than 7 years.”).
9. See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1982), *judgment vacated as moot*; Nat’l Org. for Women v. Idaho, 459 U.S. 809 (1982).
10. CONG. RSCH. SERV. ET AL., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: INTERPRETATION AND ANALYSIS, S. DOC. NO. 117–12, at 59 (2022), <https://www.govinfo.gov/content/pkg/GPO-CONAN-2022/pdf/GPO-CONAN-2022.pdf>; S. Doc. No. 112–9, at 50 (2017); S. Doc. No. 108–17, at 48 (2002); S. Doc. No. 103–6, at 48 (1992).
11. Joanne Omang, *NOW Concedes Defeat in ERA Battle, But Vows to Make Strong Comeback*, WASH. POST (June 25, 1982), <https://wapo.st/3hf34zg>.
12. *The Impact of the Equal Rights Amendment, Hearings before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 98th Cong., Pt. 1 at 2 (1983).
13. *Even Feminist Gloria Steinem Admits the Equal Rights Amendment Is Dead*, YOUTUBE (Jan. 14, 1986), [https://www.youtube.com/watch?v=E0li-AYUtcg&ab\\_channel=PhyllisSchlaflyEagles](https://www.youtube.com/watch?v=E0li-AYUtcg&ab_channel=PhyllisSchlaflyEagles).
14. These include the meaning of equality, whether a constitutional amendment or legislation is the best way to achieve equality, the meaning and application of the ERA’s language, whether its original objective has already been achieved, and whether the ERA would apply to private, as well as government, action. See Jipping, *supra* note 2, at 12–14.
15. *Id.*
16. See, e.g., *Equal Rights Amendment: Hearings before the Subcomm. on Civil & Const. Rights of the H. Comm. on the Judiciary*, 116th Cong., 27 (2019) (testimony of Mary Frances Berry).
17. *Id.* at 70 (testimony of Professor Diana Pearce).
18. *Id.* at 85 (testimony of Professor Christine Blau).
19. *Hearing Before the Subcomm. on the Const., Civil Rts. and Civil Liberties of the House Comm. on the Judiciary*, 116th Cong., April 30, 2019 (remarks by Senator Patricia (Pat) Spearman), <https://www.congress.gov/116/meeting/house/109330/witnesses/HHRG-116-JU10-Wstate-SpearmanP-20190430.pdf>.
20. *Id.* (testimony of Patricia Arquette), <https://www.youtube.com/watch?v=5n2v2yen-xl>.
21. *The Equal Rights Amendment: Achieving Constitutional Equality for All, Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. (2021) (statement of Carol Jenkins). Video of this hearing and written statements submitted by the witnesses may be found at <https://www.c-span.org/video/?515490-1/house-oversight-hearing-equal-rights-amendment>.
22. Hearing, *supra* note 19, at 2 (statement of Rep. Steve Cohen).
23. *The Equal Rights Amendment: Achieving Constitutional Equality for All, Hearing before the H. Comm. on Oversight and Reform*, 117th Cong. 4 (2021) (statement of Rep. Brenda Lawrence).
24. *Id.* (testimony of Alyssa Milano).
25. Spearman, *supra* note 19.
26. Arquette, *supra* note 20.



27. Press Release, Comm. on Oversight and Accountability, Maloney and Speier Unveil Resolution Recognizing the Equal Rights Amendment as the 28th Amendment (Jan. 27, 2022), <https://oversightdemocrats.house.gov/news/press-releases/maloney-and-speier-unveil-resolution-recognizing-the-equal-rights-amendment-as>.
28. Hearing, *supra* note 21 (testimony of Bamby Salcedo).
29. WILLIAM GOLDMAN, *THE PRINCESS BRIDE* (shooting draft, 1987), [https://www.dailyscript.com/scripts/princess\\_bride.html](https://www.dailyscript.com/scripts/princess_bride.html).
30. Allison L. Held, Sheryl L. Herndon, and Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly before the States*, 3 WM. & MARY J. OF RACE, GENDER, AND SOCIAL JUST. 117 (1997). See Jipping, *Not Your Grandmother's ERA*, at 4–6.
31. Commonwealth of Virginia, State of Illinois, and State of Nevada v. Ferriero, No. 21–5096, Brief for 16 Listed Scholars in Support of Plaintiffs-Appellants, January 10, 2022, at 4 (hereinafter 16 Scholars Brief).
32. See JON O. SHIMABUKURO, *THE EQUAL RIGHTS AMENDMENT: RECENT DEVELOPMENTS*, CONG. RSCH. SERV. Legal Sidebar, April 15, 2022, at 3.
33. See H.J. Res. 17, adopted by a vote of 222–208 on March 17, 2021; H.J. Res. 79, adopted by a vote of 232–183 on February 13, 2020.
34. Senate Standing Rule 22 requires 60 votes to end debate on any matter pending in the Senate. See U.S. Senate, *Standing Rules of the Senate*, <https://www.rules.senate.gov/rules-of-the-senate>. The Senate voted 51–47 on a motion to end debate on Resolution 4.
35. U.S. DEP'T OF JUST., OFC. OF LEGAL COUNS., *RATIFICATION OF THE EQUAL RIGHTS AMENDMENT*, Jan. 6, 2020, slip op. at 12 (hereinafter 2020 OLC Opinion).
36. See Nat'l Archives, Ofc. of the Fed. Reg., *Constitutional Amendment Process*, <https://www.archives.gov/federal-register/constitution#:~:text=The%20Constitution%20provides%20that%20an,thirds%20of%20the%20State%20legislatures> (hereinafter *Constitutional Amendment Process*).
37. See 2020 OLC Opinion, *supra* note 35, at 12 (Proposing clause contains “the procedural rules for ratification.”).
38. NEALE, *supra* note 1, at 13.
39. See *Constitutional Amendment Process*, *supra* note 36.
40. *Id.*
41. 1 U.S.C. § 106b.
42. Brief for the Archivist of the United States in *State of Illinois v. Ferriero*, No. 21–5096, March 4, 2022, at 27, citing *United States v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988).
43. See *Constitutional Amendment Process*, *supra* note 36; SHIMABUKURO, *supra* note 32, at 1 (“A proposed amendment becomes part of the Constitution when ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.”); *Dillon v. Gloss*, 256 U.S. 368, 376 (1921) (Ratification of the Eighteenth Amendment was “consummated January 16, 1919,” the date the three-fourths threshold was reached.).
44. *Constitutional Amendment Process*, *supra* note 36.
45. According to the U.S. Senate's website, 11,848 resolutions were introduced in either the Senate or House of Representatives through January 3, 2019. See U.S. Senate, *Measures Proposed to Amend the Constitution*, <https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm>. According to Congress.gov, 195 additional resolutions were introduced between January 3, 2019, and July 3, 2023, for a total of 12,043. The National Archives and Records Administration maintains a dataset listing resolutions introduced through 2014. Nat'l Archives, *Amending America: Proposed Amendments to the United States Constitution, 1787 to 2014*, <https://www.archives.gov/open/dataset-amendments.html>.
46. For images of the joint resolutions proposing each constitutional amendment, see Nat'l Archives, *Enrolled Acts and Resolutions of Congress, 1789–2013*, <https://catalog.archives.gov/id/299811>.
47. *Dillon*, 256 U.S. at 476.
48. Virginia was a plaintiff when this lawsuit was filed on March 5, 2021, but, following the 2021 election, a new administration withdrew Virginia. See Justin Louvenal, Laura Vozzella, and Katie Mettler, *Virginia's New AG Pulls State from Effort to Recognize ERA Ratification*, WASH. POST (Feb. 18, 2022), <https://www.washingtonpost.com/dc-md-va/2022/02/18/virginia-era-appeal-withdrawal/>.
49. Brief for the Archivist, *supra* note 42, at 53.
50. Jean Witter, *Extending Ratification Time for the Equal Rights Amendment: Constitutionality of Time Limitations in the Federal Amending Process*, WOMEN'S RTS. L. REP., Vol. 4, No. 4 (Summer 1978). See also DAVID C. HUCKABEE, CONG. RSCH. REP., 97–922, *RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 2* (1997) (“Congress began imposing the seven-year deadline in the joint resolutions...in order to avoid including extraneous language in the Constitution.”).
51. Senator Guy Gillette (D–IA) introduced Senate Joint Resolution 25 on January 21, 1943, with a nine-year ratification deadline in its proposing clause.
52. See Witter, *supra* note 50.
53. Brief for the Archivist, *supra* note 42, at 47–48.
54. *Id.* at 48.
55. 307 U.S. 433 (1939).
56. *Id.* at 452.
57. Brief for the Archivist, *supra* note 42, at 48.

58. *Id.* Three states had challenged the constitutionality of the 1972 ERA's deadline extension and, in December 1981, the U.S. District Court in Idaho agreed that it was unconstitutional because the House and Senate passed it by simple majorities rather than the two-thirds margin required by Article V. See *Idaho v. Freeman*, 529 F.Supp. at 1153.
59. Memorandum for the Administration of General Services Suggesting Mootness in *Nat'l Org. for Women, Inc. v. State of Idaho* (July 1982), <https://eagleforum.org/era/now-v-idaho-memo.html>.
60. *Nat'l Org. for Women v. Idaho*, 459 U.S. 809 (1982). On February 8, 2016, the American Bar Association's House of Delegates adopted Resolution 10B, submitted by the New Jersey State Bar, generally supporting ratification of the ERA. The accompanying report described the 1972 ERA's ratification history, acknowledging that the Supreme Court dismissed the *Freeman* litigation "on the grounds that the ERA was dead for the reasons given by the administrator of general services." See Thomas Jipping, *The 1972 Equal Rights Amendment Can No Longer Be Ratified—Because It No Longer Exists*, HERITAGE FOUND. LEGAL MEMORANDUM No. 259, January 13, 2020, at 15.
61. U.S. CONST., art. V. The Founders also provided that, in case Congress proved intransigent, amendments could be proposed by a convention that Congress must call "on the Application of the Legislatures of two thirds of the several States." This process has yet to be utilized.
62. Of the Constitution's 27 amendments, 26 were ratified in state legislatures, and the Twenty-First Amendment, which repealed the Eighteenth, was ratified in a state convention.
63. *Dillon*, 256 U.S. at 476.
64. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xi–xvii (2011).
65. 256 U.S. 368 (1921).
66. *Id.* at 375–76.
67. *Id.* at 375.
68. *Id.* at 375.
69. U.S. DEP'T OF JUST., OFC. OF LEGAL COUNS., MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT, November 2, 1992, at 92 (hereinafter 1992 OLC Opinion).
70. 307 U.S. 433 (1939).
71. *Id.* at 436.
72. *Id.* at 452.
73. *Id.* at 452–53 (emphasis added).
74. *Id.* at 454. See also *id.* at 452 ("whenever Congress has not exercised that power [to set a ratification deadline]"); *id.* ("No limitation of time for ratification is provided in the instant case either in the proposed amendment or in the resolution of submission."). In its 2020 opinion on the 1972 ERA, the OLC observed that "[t]he opinion [in *Coleman*] repeatedly made clear that the Court was addressing the case where Congress did not include a deadline when proposing the amendment. Nothing in *Coleman* supports the view that when Congress proposed an amendment and included a time limit 'in the resolution of submission'...it would later be free to revise that judgment."). 2020 OLC Opinion, *supra* note 35, at 33.
75. 1992 OLC opinion, *supra* note 70, at 102.
76. 2020 OLC opinion, *supra* note 35, at 32 ("[T]he notion of a freestanding authority of Congress to determine the validity of a constitutional amendment after the states have submitted their ratification finds little support in the text of Article V, historical practice, or Supreme Court precedent.").
77. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983).
78. Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 59 TEXAS L. REV. 875, 899 (1980).
79. 16 Scholars Brief, *supra* note 31, at 14 (internal quotation marks omitted) (emphasis added).
80. This letter, signed by 10 scholars, may be found at Letter from Katherine Franke et al., to Carolyn B. Maloney, (Jan. 8, 2022), <https://gender-sexuality.law.columbia.edu/sites/default/files/content/OLC%20Letter%20January%202022.pdf>. These scholars are Katherine Francks and David Pozen of Columbia University; Laurence H. Tribe and Martha Minow of Harvard University; Erwin Chemerinsky of the University of California, Berkeley; Melissa Murray of New York University; Geoffrey R. Stone of the University of Chicago; Cary Franklin of the University of California, Los Angeles; Michael Dorf of Cornell University; and Victoria Nourse of Georgetown University.
81. This letter, signed by Professor Laurence Tribe of Harvard Law School, may be found at Letter of Laurence Tribe to Carolyn B. Maloney (Mar. 22, 2022), <https://feminist.org/wp-content/uploads/2022/03/ERA-50th-Anniversary-Prof-Tribe-Letter.pdf>.
82. 16 Scholars Brief, *supra* note 31. These scholars are Martha Field, Lawrence Lessig, Martha Minow, Diane Rosenfeld, and Laurence H. Tribe of Harvard University; Paul Brest and Jane S. Schecter of Stanford University; Catharine A. MacKinnon and Margaret Jane Radin of the University of Michigan; Rebecca Brown of the University of Southern California; Kimberle Crenshaw of the University of California, Los Angeles; Deborah Jones Merritt of Ohio State University; Dorothy Roberts of the University of Pennsylvania; Geoffrey R. Stone of the University of Chicago; and Gerald Torres of Yale University. The brief signed by four scholars may be found at [https://voteequality.us/wp-content/uploads/2022/01/Amicus-Brief\\_Constitutional-Law-Professors\\_Chemerinsky-et-al.pdf](https://voteequality.us/wp-content/uploads/2022/01/Amicus-Brief_Constitutional-Law-Professors_Chemerinsky-et-al.pdf) (hereinafter 4 Scholars Brief). These scholars are Erwin Chemerinsky of the University of California, Berkeley; Noah Feldman of Harvard University; David Pozen of Columbia University; and Julie C. Suk of Fordham University.

83. This memorandum, signed by five scholars, may be found at <https://bit.ly/40wfPB3> (hereinafter Senate Memorandum). These scholars are Katherine Franke and Laurence H. Tribe of Harvard University; Geoffrey R. Stone of the University of Chicago; Melissa Murray of New York University; and Michael Dorf of Cornell University.
84. *Coleman*, 307 U.S. at 451.
85. 16 Scholars Brief, *supra* note 31, at 10 (emphasis in original).
86. 4 Scholars Brief, *supra* note 83, at 15.
87. See 1977 OLC Opinion, *supra* note 5, at 20; 1992 OLC opinion, *supra* note 70, at 100–01.
88. See Proclamation No. 13, 15 Stat. 708 (July 28, 1868).
89. 1992 OLC Opinion, *supra* note 70, at 104.
90. THOMAS M. DURBIN, CONG. RSCH. SERV., AMENDING THE U.S. CONSTITUTION: BY CONGRESS OR BY CONSTITUTIONAL CONVENTION 10 (1995), <https://cusdi.org/wp-content/uploads/2015/09/crs1995durbin.pdf>.
91. House Concurrent Resolution 320, passed by the House on May 20, 1992, by a vote of 414–3. Two Senate resolutions similarly recognized what had already occurred. A Concurrent Resolution Declaring an Article of Amendment to be the Twenty-Seventh Amendment to the Constitution of the United States, S.Con. Res. 120, 102nd Cong. (1992), <https://www.congress.gov/bill/102nd-congress/senate-concurrent-resolution/120/text>, and Declaring an Article of Amendment to be the Twenty-Seventh Amendment to the Constitution of the United States, S. Res. 298, 102nd Cong. (1992), <https://www.congress.gov/bill/102nd-congress/senate-resolution/298/text?q=%7B%22search%22%3A%22amendment%22%7D&r=45&s=7>.
92. 1992 OLC Opinion, *supra* note 70, at 100.
93. 1977 OLC Opinion, *supra* note 5, at 9 (emphasis added).
94. Brief for the Archivist, *supra* note 42, at 27, citing *United States v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988).
95. *Id.* at 45.
96. *Id.* at 20 (emphasis added).
97. *Id.* at 52.
98. *Id.* at 53.
99. *Id.* at 54.
100. 16 Scholars Brief, *supra* note 31, at 14 (emphasis in original).
101. *Dillon*, 256 U.S. at 376.
102. Brief for the Archivist, *supra* note 42, at 48 (emphasis added).
103. *Coleman*, 307 U.S. at 452.
104. See Senate Hearing, *supra* note 12, at 739.
105. *Id.* at 739–40.
106. 4 Scholars Brief, *supra* note 83, at 3.
107. *Id.* at 10.
108. *Id.* at 14.
109. See Nat'l Archives, *The Bill of Rights: A Transcription*, <https://www.archives.gov/founding-docs/bill-of-rights-transcript#:~:text=The%20document%20on%20permanent%20display,10%2Damendments%20to%20the%20Constitution>.
110. 2020 OLC opinion *supra* note 35, at 15.
111. See, e.g., S.J. Res. 1, 117th Cong. (2021); S.J. Res. 6, 116th Cong. (2019); S.J. Res. 5, 115th Cong. (2017); S.J. Res. 5, 114th Cong. (2015); S.J. Res. 15, 113th Cong. (2013); S.J. Res. 39, 112th Cong. (2012).
112. Senate Memorandum, *supra* note 84.
113. *Id.* (emphasis in original).
114. 789 F.2d 1250 (7th Cir. 1986).
115. *Id.* at 1253.
116. See *United States v. Thomas*, 788 F.2d 1250, 12543 (7th Cir. 1986).
117. *United States v. Stahl*, 792 F.2d 1438, 1439 n.1 (9th Cir. 1986).
118. *United States v. Sitka*, 845 F.2d 43, 46 (2nd Cir. 1988).
119. *Sisk v. Commissioner of Internal Revenue*, 791 F.2d 58, 61 (6th Cir. 1986).

120. *Frequently Asked Questions: Law Library of Congress*, LIBR. OF CONG., (updated Dec. 14, 2020), <https://ask.loc.gov/law/faq/334496?locir=bloglaw>.
121. *Id.* See also RICHARD S. BETH AND JESSICA TOLLESTRUP, CONG. RSCH. SERV., R42977, SESSIONS, ADJOURNMENTS, AND RECESSES OF CONGRESS 15 (2013).
122. See NEALE, *supra* note 1, at 9.
123. Senate Memorandum, *supra* note 84.
124. *United States v. Sprague*, 282 U.S. 716, 732 (1931).
125. Am. Const. Society, *A New Beginning? Justice Ginsburg and the Equal Rights Amendment* (Mar. 25, 2021), <https://www.acslaw.org/expertforum/a-new-beginning-justice-ginsburg-and-the-equal-rights-amendment/#:-:text=In%20that%202020%20Georgetown%20interview,long%20after%20the%20deadline%20passed>.