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The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse

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THE TWENTY-SEVENTH AMENDMENT: A LATE BLOOMER OR A DEAD HORSE?

INTRODUCTION

With relatively little publicity or fanfare, the Twenty-seventh Amendment to the United States Constitution was ratified on May 7, 1992, over 200 years after its original proposal.[1] The "new" amendment states that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."[2] James Madison proposed the amendment in 1789 as part of the original Bill of Rights package.[3] Initially, through 1800, it won the approval of a mere six states.[4] Only one additional state approved it during the 19th century.[5] Since 1978, however, an additional thirty-two states have approved the proposed amendment.[6] The final two states, Michigan and New Jersey, both ratified the amendment on May 7, 1992.[7]

The dilatory ratification of the Twenty-seventh Amendment raises the important issue of whether a proposed amendment, having taken so long to be ratified, is actually a valid amendment to the U.S. Constitution. This is a disturbing proposition considering there are presently four proposed amendments in limbo, which have been passed by a number of states but not by the three-fourths necessary for ratification.[8]

Interestingly, the oldest of these "not-yet-ratified" amendments also was proposed by James Madison in his original formulation of the Bill of Rights.[9] If ratified, this amendment would set up a

1. Don J. DeBenedictis, *27th Amendment Ratified*, A.B.A. J., Aug. 1992, at 26.
2. U.S. CONST. amend. XXVII.
3. DeBenedictis, *supra* note 1, at 26.
4. Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A18.
5. *Id.*
6. *Id.*
7. David C. Huckabee & Thomas M. Durbin, *The Congressional Pay Constitutional Amendment: Issues Pertaining to Ratification*, CRS (Congressional Research Service) Report for Congress, May 7, 1992, at 9.
8. Marcia Coyle, *No Set Procedure for Amendments*, NAT'L L.J., June 1, 1992, at 10.
9. *See* David C. Huckabee, *The Constitutional Amendment to Regulate*

very confusing and complex system of apportioning members of the House of Representatives, allowing the present size of the House to balloon to approximately ten times its present size.[10] A second outstanding proposal is the Titles of Nobility Amendment,[11] which would strip U.S. citizenship from anyone accepting a title of nobility from a foreign country.[12]

Still another suggested amendment, proposed prior to the Civil War in an effort to alleviate tension, would have granted slavery rights to the states.[13] This proposal is now arguably invalid due to subsequent amendments abolishing slavery.[14]

The fourth unratified amendment is the Child Labor Amendment.[15] Two cases served as the impetus for this proposal.[16] The first case was *Hammer v. Daggenhart*,[17] where

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Congressional Salary Increases: Slumbering Proposal's New Popularity, CRS Report for Congress, Sept. 16, 1986, at 1. The Apportionment Amendment was proposed in 1789 and ratified by only ten states. *Id.* at 2 n.3.

10. Coyle, *supra* note 8, at 10. This pending amendment to the Bill of Rights reads:

> After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

WINTON U. SOLBERG, THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION 376 (2d ed. 1990).

11. Huckabee & Durbin, *supra* note 7, at 1 n.2. This amendment was proposed in 1810 and ratified by twelve states. *Id.*

12. Coyle, *supra* note 8, at 10.

13. *Id.* The States' Rights (Slavery) Amendment was proposed in 1861 but was only ratified by two states. *Id.* This proposed amendment was known as the Corwin Amendment and it stated that "[n]o amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." 55 CONG. REC. 5558 (1917). When Congress debated the issue of inserting a time limit clause into the proposed Prohibition Amendment, Senator Ashurst brought up the (then) three timeless amendments still pending before the states, commenting that "[these amendments keep] historians, publishers, and annalists, as well as the general public, constantly in doubt." *Id.* at 5557.

14. Coyle, *supra* note 8, at 10.

15. *Id.* This amendment was proposed in 1924 and was ratified by twenty-eight states. Huckabee & Durbin, *supra* note 7, at 1 n.2.

16. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the*

the Supreme Court invalidated an act of Congress regulating child labor laws through the use of the Interstate Commerce Clause. Four years later, in the *Child Labor Tax Case*,[18] when Congress attempted to use its taxing power to regulate child labor, the Supreme Court again struck down Congress' efforts at regulation. Congress' response was a proposed amendment reserving to itself the power to regulate child labor.[19]

This Note will focus on two issues concerning the ratification process attributable to the newly ratified Twenty-seventh Amendment. First, may ratification be open-ended in the length of time needed for ratification? Second, which branch of government is empowered to decide whether there should be durational limits on the ratification process?

Part I of this Note will present a brief history of the ratification of the Twenty-seventh Amendment. Part II will discuss whether an amendment that has taken this long to be ratified should be adopted. Part III will consider which body or office has the power to decide whether a proposed amendment has been legitimately ratified.

I. HISTORICAL BACKGROUND

Congressional compensation is not addressed by the Constitution and was left for Congress to regulate by federal law.[20] In three state conventions, amendments were proposed to prevent Congress from increasing its existing pay and to allow its members only to increase the pay of future congressional sessions.[21]

Amendment Process, 97 HARV. L. REV. 386, 389 (1983).

17. 247 U.S. 251 (1918).

18. 259 U.S. 20 (1922).

19. Coyle, *supra* note 8, at 10. The proposed amendment stated that "Congress shall have the power to limit, regulate, and prohibit the labor of persons under eighteen years of age." Dellinger, *supra* note 16, at 389.

20. HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 34 (2d ed. 1970).

21. *Id.* The three states that proposed this amendment at their state conventions were Virginia, New York, and North Carolina. *Id.* at 34 n.1. In the Virginia state convention (June 27, 1788), the amendment read as follows: "[t]hat the laws ascertaining the compensation to Senators and Representatives for their services be postponed in their operation, until after the election of Representatives immediately succeeding the passing thereof; that excepted, which shall first be passed on the Subject." EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 188 (1st ed. 1957). Similarly, the New York amendment stated "[t]hat the Compensation for the Senators and Representatives be ascertained by standing Laws; and that no alteration of the existing rate of Compensation shall operate for the Benefit of the

In 1789, James Madison proposed a similar bill which passed both houses of the First Congress and was included in the original Bill of Rights.[22] However, this amendment was not ratified by the required three-fourths of the state legislatures;[23] indeed, only six states chose to ratify it immediately.[24] The First Congress had accorded itself such a modest stipend that the states undoubtedly did not feel compelled to safeguard future increases in the compensation of congressional representatives.[25] Moreover, state legislators may have worried that if this amendment was incorporated into the U.S. Constitution, their own constituents might request that a similar provision be included in their particular state constitutions.[26]

Historians speculate that another reason Madison's amendment was not ratified by the requisite number of states was that "the issue of regulating congressional salaries was not perceived by the States as a fundamental right which should be included in a 'Bill of Rights.' "[27]

When introducing the amendment to Congress, Madison stated his belief that such a power would not be one that would be abused.[28] However, he realized that there existed an appearance of impropriety and indecorum in allowing a body of men to increase their own salaries from the public pocket.[29]

Representatives, until after a subsequent Election shall have been had." *Id.* at 195. In the North Carolina convention (Aug. 1, 1788), the amendment was proposed in the following fashion: "[t]hat the laws ascertaining the compensation of senators and representatives for their services be posponed [*sic*] in their operation, until after the election of representatives immediately succeeding the passing thereof, that excepted, which shall first be passed on the subject." *Id.* at 204-05.

22. AMES, *supra* note 20, at 34.

23. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1137 (1991).

24. *Id.* at 1145.

25. *See* AMES, *supra* note 20, at 34.

26. Amar, *supra* note 23, at 1146. Amar observes:

> How could state legislators vote for Congress' Second Amendment without also triggering public demand for similar amendments to their respective state constitutions regulating their own salaries? Thus, the lukewarm reaction of state legislatures to the original Second Amendment is itself mildly suggestive of a possible "agency cost" gap between the interests of constituents and legislators.

Id.

27. Huckabee, *supra* note 9, at 10.

28. 1 ANNALS OF CONG. 440 (Gales & Seaton eds., 1789).

29. *Id.* Madison stated:

> I do not believe this is a power which, in the ordinary course of Government, is likely to be abused. Perhaps of all the powers granted, it

The proposed amendment was debated in Congress along with the other proposals later incorporated into the Bill of Rights.[30] In the House of Representatives, there were four main participants in the debate over the Congressional Salary Amendment: Congressmen Elbridge Gerry and Theodore Sedgewick of Massachusetts, John Vinings of Delaware, and John Madison, who represented Virginia.[31]

When this proposed amendment was brought up for discussion, Mr. Sedgewick thought that much inconvenience, but very little good, would result from this amendment because it could be used as a tool of the rich to maintain a low salary, thereby preventing "men of shining and disinterested abilities, but of indigent circumstances". from holding a seat in Congress.[32] Representative Gerry agreed with Mr. Sedgewick in opposing the amendment.[33]

Mr. Vinings, on the other hand, "thought every future Legislature would feel a degree of gratitude to the preceding one," for it is "a disagreeable sensation" for any man to have to "set a value on his own work."[34] The next speaker was Madison, whose opinion was that "as it was desired by a great number of the people of America he would consent to it, though he was not convinced that it was absolutely necessary."[35]

Mr. Sedgewick, the last to speak, concluded that he saw no conflicts for congressmen setting their own salaries, since "gentlemen were generally more inclined to make them moderate than excessive."[36] The Congressional Salary Amendment was approved in the Committee of the Whole House by a vote of

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> is least likely to abuse; but there is a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets; there is a seeming indecorum in such power, which leads me to propose a change. We have a guide to this alteration in several of the amendments which the different conventions have proposed. I have gone, therefore, so far as to fix it, that no law varying compensation, shall operate until there is a change in the Legislature; in which case it cannot be for the particular benefit of those who are concerned in determining the value of the service.

Id.

30. *See id.*
31. *See generally id.* at 728-29.
32. *Id.*
33. *Id.* at 729.
34. *Id.*
35. *Id.*
36. *Id.*

twenty-seven to twenty.[37] By a voice vote, the House approved the amendment nine days later, on August 24, 1789.[38]

In the Senate, records of debates were not kept at the time because the sessions were kept secret; hence, little information is available regarding the course of discussion.[39] However, records from the Senate Journal of August-September 1789 indicate that the salary compensation amendment was approved by a voice vote in amended form.[40]

It took 203 years for the required thirty-eight states to ratify the Congressional Salary Amendment.[41] The recent renewed interest in the proposed amendment can be attributed primarily to the efforts of one individual, Gregory Watson, an aide to Texas State Representative Richard Williamson.[42] Watson became aware of the amendment in 1982 while writing a paper at the University of Texas on the amendment deadline for ratification of the Equal Rights Amendment (ERA).[43] In his spare time, Watson sent letters to state legislators, lobbying for ratification of the timeless amendment.[44]

In addition to Watson's efforts, the renewed interest for ratification of the Congressional Salary Amendment can be attributed to recent public dissatisfaction with Congress' methods

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37. *Id.*

38. Huckabee, *supra* note 9, at 13.

39. *Id.* at 13-14.

40. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1148 (1971). "The second article, commencing, 'No law, varying the compensation to the members of Congress,' &c., was amended, by striking out the words 'to the members of Congress,' and inserting the words, 'for the service of the Senate and House of Representatives of the United States.'" *Id.*

41. *See* Huckabee & Durbin, *supra* note 7, at 8-9. The following thirty-nine states have ratified the proposed Congressional Salary Amendment on the dates shown: Maryland, Dec. 19, 1789; North Carolina, Dec. 22, 1789; South Carolina, Jan. 19, 1790; Delaware, Jan. 28, 1790; Vermont, Nov. 3, 1791; Virginia, Dec. 15, 1791; Ohio, May 6, 1873; Wyoming, Mar. 3, 1978; Maine, Apr. 27, 1983; Colorado, Apr. 18, 1984; South Dakota, Feb. 21, 1985; New Hampshire, Mar. 7, 1985; Arizona, Apr. 3, 1985; Tennessee, May 23, 1985; Oklahoma, July 10, 1985; New Mexico, Feb. 14, 1986; Indiana, Feb. 24, 1986; Utah, Feb. 26, 1986; Arkansas, Mar. 5, 1987; Montana, Mar. 17, 1987; Connecticut, May 13, 1987; Wisconsin, June 30, 1987; Georgia, Feb. 2, 1988; West Virginia, Mar. 10, 1988; Louisiana, July 6, 1988; Iowa, Feb. 7, 1989; Idaho, Mar. 23, 1989; Nevada, Apr. 26, 1989; Alaska, May 5, 1989; Oregon, May 19, 1989; Minnesota, May 22, 1989; Texas, May 25, 1989; Kansas, Apr. 4, 1990; Florida, May 31, 1990; North Dakota, Mar. 25, 1991; Missouri, May 5, 1992; Alabama, May 5, 1992; Michigan, May 7, 1992; New Jersey, May 7, 1992. *Id.*

42. Alan A. Parker, *What Goes Around Comes Around*, TRIAL, May 1989, at 10.

43. *Id.*

44. *Id.*

of increasing their compensation both directly by increased salary levels and indirectly by increasing their outside earned income limits.[45] Many states chose to ratify the amendment because of similar provisions in their state constitutions.[46] Approximately sixty percent of the states have provided for such control.[47]

In addition to the renewed interest of state legislators, there is evidence of increased congressional interest in recent years.[48] Public disapproval of congressional impropriety may have been a strong force in the renewed congressional interest in this amendment.[49] There have been thirteen joint resolutions similar to the original proposal since the 93rd Congress; none has made it past the committee referral stage.[50]

In the final analysis, nevertheless, it was the states through individual state legislators and a concerned citizenry which took the needed steps to get this amendment ratified.

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45. Huckabee, *supra* note 9, at 5.

46. *Id.* at 5-8. Huckabee conducted telephone interviews with a number of state representatives from states that had recently ratified the proposed Congressional Salary Amendment. *See id.* In a telephone conversation on Aug. 22, 1986, the state representative who sponsored the ratification resolution in Utah, Kaye F. Browning, stated that "getting it through was a piece of cake" since the State of Utah had a similar provision for its legislators. *Id.* at 5-6. The proposed amendment was ratified by South Dakota the year before and Representative Scott Heidepriem indicated that "his legislature approved H.J. Res. 1001, on February 21, 1985 because 'in South Dakota we have an identical [statutory] requirement,' and it would be a 'smart practice for the country for it to apply to the Congress.'" *Id.* at 6. Similarly, in another telephone interview, Indiana State Representative Dellinger gave the two most important reasons for the ratification of the Congressional Salary Amendment in Indiana. *Id.* The first was the similar Indiana constitutional requirement, and the second was a "'negative reaction to the Commission method [of obtaining pay raises] to avoid political heat.'" *Id.*

47. Thirty states in all have constitutional provisions while one has a statutory limitation. *Id.* at 7-8, tbl. 2. The 31 states are: Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah (the state with the statutory provision), Virginia, Washington, Wisconsin, Wyoming. *Id.*

48. *Id.* at 9.

49. Public approval of Congress had plummeted due to banking scandals, the check-bouncing cover-up in the House, and shady ties of five senators to the savings and loan banker, Charles Keating. John R. Vile, *Just Say No to "Stealth" Amendment,* NAT'L L.J., June 22, 1992, at 15.

50. Huckabee, *supra* note 9, at 9 tbl. 3.

II. RATIFICATION TIME LIMITS ON PROPOSED AMENDMENTS

Nowhere does the Constitution provide for time limits for the ratification of proposed amendments. Article V of the United States Constitution provides the only guidelines for ratification of amendments.[51] It states that after an amendment is proposed, either by two-thirds vote of Congress or by a convention of the states, all proposed amendments must be ratified by three-fourths of the state legislatures.[52] The Supreme Court faced the issue of amendment time in *Dillon v. Gloss*,[53] holding that amendments must be ratified within a reasonable time.[54] This decision has resulted in conflicting views regarding the process for amendment ratification.

A. Dillon v. Gloss

Though the Constitution does not provide a time limit on proposed amendments, the Supreme Court in *Dillon* held that ratification of amendments must occur within a "reasonable" time.[55] In *Dillon*, the Court was faced with the challenge of whether the Eighteenth Amendment to the United States Constitution (alcohol prohibition) was invalid because it contained a provision declaring it inoperative unless ratified within seven years.[56]

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51. U.S. CONST. art. V.

52. Article V of the U.S. Constitution reads as follows:

> 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 of three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. CONST. art. V.

53. 256 U.S. 368 (1921).

54. *Id.*

55. *Id.* at 375.

56. *Id.* at 370-71. Congress chose seven years as a reasonable time through a compromise between the "wet" and "dry" states. 55 CONG. REC. 424 (1917). In the House of Representatives, Representative Webb of North Carolina explained:

> I will say to my friend that there was a compromise in the Senate between our dry friends and our wet friends . . . personally I wanted 10 years as the limitation, but, not being able to get that, I was willing to accept 6. But, being able to get 7, we thought that more agreeable and

The Court upheld the seven year limit as a reasonable time and reasoned that the fact that "the Constitution contains no express provisions on the subject is not in itself controlling: for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed."[57] Therefore, the Court found that the Constitution provides Congress with the power to place reasonable time limits on proposed amendments.[58]

Moreover, the Court noted that once an amendment is proposed with no time constraint, it is not necessarily open for ratification forever.[59] "[P]roposed [amendments] are to be considered and disposed of presently . . . [in order] to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do."[60] The Court went on to enumerate the five pending proposed amendments, including the salary amendment, and added that the suggestion that these amendments could be successfully ratified, "is quite untenable."[61]

Prior to the *Dillon* decision, the first seventeen amendments were ratified without time limit provisions.[62] However, all seventeen were ratified within four years.[63] Following *Dillon*, the Nineteenth Amendment passed without a time limit, and the Twentieth through the Twenty-second Amendments passed with seven year time limitations in the body of the amendments.[64] In the Twenty-third through the Twenty-sixth Amendments, Congress proposed seven year limits for ratification in the

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satisfactory to the "drys" and acceptable to the "wets," and therefore we made it 7 years.

Id.

57. *Dillon,* 256 U.S. at 373.
58. *Id.*
59. *Id.* at 374.
60. *Id.* at 375. In furthering this point, the Court quoted John Jameson:

> [A]n alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today, and that, if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress.

Id. (quoting JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 634 (4th ed. 1972)).

61. *Dillon,* 256 U.S. at 375.
62. *Id.* at 372.
63. *Id.*
64. Parker, *supra* note 42, at 10.

resolution clauses accompanying the amendments rather than in the body of the amendments themselves.[65]

In contrast, the recently ratified Congressional Salary Amendment had no time constraint placed on it, and it took over 200 years to gain approval from the requisite number of states.[66] This leaves the status of the other three pending amendments unclear. The Supreme Court has stated that "the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal," and that the amendments which were proposed so long ago should be waived.[67] However, one of those proposed amendments expressly denounced by the Court is now the Twenty-seventh Amendment to the U.S. Constitution.[68]

B. Four Views on Ratification Deadlines

In order to assure contemporaneous consensus and to provide a regular procedure of ratification, a clear and definitive approach to amendment ratification deadlines must be set.[69] There are four views about what should be done to clarify the status of proposed amendments. The first view is the belief that there should be no time limits for ratification of amendments.[70] The second view calls for Congress to determine whether an amendment has been ratified within a reasonable time.[71] The third view calls for Congress to insert a deadline in the proposed amendment itself.[72] Finally, a fourth view requires a constitutional amendment to provide for deadlines for proposed amendments.[73]

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65. *Id.*

66. DeBenedictis, *supra* note 1.

67. *Dillon,* 256 U.S. at 375.

68. Recently, in *Boehner v. Anderson,* a challenge was brought against certain provisions of the Ethics Reform Act of 1989 that the provisions violated the Twenty-seventh Amendment. Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992). The district court refused to determine the validity of the amendment's ratification since none of the defendants in the case raised the issue. *Id.* Instead, it was raised by common cases as amicus curiae. *Id.* at 139.

69. Patricia A. Brannan et al., Note, *Critical Details: Amending the United States Constitution,* 16 HARV. J. ON LEGIS. 763, 769 (1979).

70. *See, e.g.,* 55 CONG. REC. 436 (1917).

71. Brannan et al., *supra* note 69.

72. *Id.* at 771.

73. *Id.* at 772.

1. No Deadlines

The first view calls for no deadlines to be set for any proposed amendments and parallels the views of strict constructionists in interpreting the Constitution through exclusive reliance on the express words of the text.[74] This view was advocated in the legislative debates over the time deadline of the then proposed Eighteenth Amendment.[75]

In the House debates, Representative Langley from Kentucky stated that he was opposed to time limitations because he viewed them as a method to impede the ratification of the proposed amendment.[76] He viewed such deadlines as unwise and stated that when Congress submits proposed constitutional amendments to the separate state legislatures, the amendments should remain in the form prescribed by the Constitution with no further congressional control.[77]

Congressman Reavis of Nebraska concurred. He contended that it would not matter whether the proposed amendment was ratified by three-fourths of the states as late as seven years and six months after submission.[78] The proposed amendment would still be valid since it would meet the constitutional requirement of ratification by the three-fourths of the states, which has no time deadlines.[79]

2. Congressional Determination of Reasonable Ratification

A variation of the above view is that while no express deadline should be posited for ratification of a proposed amendment, after the proposed amendment has been ratified by three-fourths of the states, Congress should be required to determine whether the amendment had been ratified within a reasonable time.[80] Using

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74. *See, e.g.*, 55 CONG. REC. 436 (1917).
75. *See id.*
76. *Id.* Mr. Langley stated:
> Such a limitation can act only as an incentive to start at once a bitter fight in every State of this Union. . . . I think that the limitation contained in this resolution is a sop to the liquor interests, and that they figure that they can prevent the approval of the resolution passed by the legislatures of 36 States within seven years.

Id.
77. *Id.*
78. *Id.* at 444.
79. *Id.*
80. Brannan et al., *supra* note 69. This approach is in line with the decision in

this approach, Congress can assess reasonableness on a case by case basis, rather than setting an arbitrary time limit for an amendment to be "reasonably ratified."[81]

Congress used this kind of flexibility with the proposed Equal Rights Amendment which had an imposed seven year limitation. When it was not ratified by three-fourths of the states within seven years, Congress extended the time limit.[82] This scenario demonstrates how Congress may not always be able to accurately gauge public response to proposed amendments.[83]

The advantage to this more flexible approach is that Congress need not impose time limits prior to ratification.[84] Only subsequent to ratification, with all the facts before it, does Congress make an inquiry into the reasonableness of the ratification time.[85]

However, a great disadvantage to this approach is that it would not provide a predictable and regular procedure for ratification of amendments.[86] The states would be faced with a virtual guessing game in assessing what amount of time Congress would deem to be reasonable. States would face the decision of whether to expend the time and money debating an amendment that Congress might subsequently strike down as not ratified within a reasonable time.[87] In close cases, Congress

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Dillon where the Court ruled that the time limit on the Eighteenth Amendment was constitutional and that Congress did have the authority to set a reasonable time. *Dillon*, 256 U.S. at 375.

81. Brannan et al., *supra* note 69, at 769.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 770.

86. *Id.* The issue of second guessing what constitutes a "reasonable" time was discussed when the time limitation for the Twentieth Amendment was proposed. 75 CONG. REC. 3856 (1932). New York Representative Celler stated:

> If we do not put some limitation in this proposed amendment, we might have a situation develop where one State would ratify this year, another State would ratify next year, and the procedure might continue along for 20 years. The question would then arise whether or not 20 years is a due and proper period of ratification within the spirit and letter of the Constitution.

Id.

87. Brannan et al., *supra* note 69, at 770. Furthermore, another problem presented by the ERA issue was that the attention of the legislators was "deflected" from the text of the amendment itself and focused on the deadline issue. *Id.* This led to wasted time and expense by ERA supporters that could have been better spent lobbying for ratification by the last three states it needed for adoption. *Id.*

could arbitrarily decide to refuse to adopt an amendment because of the predominant political make-up of the individuals in Congress.[88]

3. *Congressional Determination in the Proposal Stage*

One proposed solution to the problem of uncertainty and possible arbitrary action after the fact is for Congress to include a deadline in the actual text of the amendment.[89] The authority for this third view of amendment deadlines can be found in the express language of Article V of the Constitution, which allows Congress to propose the text of amendments.[90] Congress has used this method ever since it was approved by the *Dillon* Court in reference to the seven-year limit incorporated in the Eighteenth Amendment.[91]

In Congress' debates over the Eighteenth Amendment, much argument centered on the power of Congress to include a time limit in the text of the proposed amendment.[92] Congressman Steele from Pennsylvania based the power of Congress to set such a deadline not only on the express words of Article V of the Constitution, but also on the Necessary and Proper Clause, which

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88. *See id.* at 770-71.

89. Dellinger, *supra* note 16, at 406.

90. *Id.* However, Dellinger points out that:

> Congress has apparently never fully considered how a textual time limit works, or how it differs from a time limit merely included in the resolution proposing an amendment. An examination of the theoretical basis of congressional power to place time limits in an amendment's text suggests that a textual time limit may stand on a firmer foundation than one merely included in the proposing resolution.

Id. On the other hand, Ruth Bader Ginsberg contends that:

> The change from text to proposing clause was effected largely to avoid "cluttering up" the Constitution with vestigial provisions serving no function once an amendment was ratified. But the very judgment that the limitation should be transferred from text to preamble may reflect an underlying recognition that setting a time for ratification entails a determination qualitatively different from agreement on the substantive content of an amendment.

Ruth Bader Ginsberg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 923 (1979).

91. Dellinger, *supra* note 16, at 407.

92. *See, e.g.*, 55 CONG. REC. 445 (1917). In the end, Congress did incorporate a time limit in the actual text of the amendment. *Id.* The Eighteenth Amendment states that "[t]his article shall be inoperative unless it shall have been ratified as an amendment to the Constitution . . . within seven years from the date of the submission hereof to the States by the Congress." U.S. CONST. amend. XVIII, § 3.

provides Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[93] Steele viewed the power to set amendment deadlines as a broad and general power and compared it to the establishment of the first U.S. bank in 1791.[94] He correctly stated that the Constitution does not expressly grant Congress the power to establish a bank.[95] However, it was held to be one of the implied powers conferred upon Congress.[96] Moreover, since the Constitution expressly granted Congress the power to pass all legislation necessary and proper, it also "conferred upon Congress the discretion in the first instance of deciding what was necessary and proper."[97]

Senator Brandegee from Connecticut held the opposing view.[98] He predicted that when the issue would be heard before the Supreme Court, the Court might strike down as unconstitutional an amendment that had been ratified by three-fourths of the states.[99] He reasoned that Congress exceeded its authority by attaching an unconstitutional condition to the procedural mechanism by which the amendment must be approved.[100]

Though Senator Brandegee was correct in predicting that this issue would be heard by the Supreme Court, the Supreme Court held in *Dillon* that Congress did in fact have the power to set "reasonable" time limits on proposed amendments, and that the seven year time period incorporated in the Eighteenth Amendment was a "reasonable" time.[101]

This approach solves the problem of contemporaneous consensus, because the states must ratify the amendment within

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93. U.S. CONST. art. I, § 18.
94. 55 CONG. REC. 445 (1917).
95. *Id.*
96. *Id.* The *Dillon* Court made this comparison in citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) for the proposition that "in matters concerning article V as well as article I legislative functions, Congress has 'necessary and proper' power to use appropriate means to achieve legitimate objectives." Brannan et al., *supra* note 69, at 773 (discussing Dillon v. Gloss, 256 U.S. 368 (1921)).
97. 55 CONG. REC. 445 (1917).
98. *Id.* at 5650 (statement of Senator Brandegee).
99. *Id.*
100. *Id.*
101. *Dillon*, 256 U.S. at 375.

a fixed period, and if they do not, the amendment dies on its own accord. Furthermore, if the time limit is included in the text of the amendment, the time factor is not at issue, and the states can focus on the substantive issues at hand rather than squandering time and money debating an issue which Congress may later deem expired.[102] Under this alternative, if a proposed amendment has not been ratified by the states within the expressly stated time period, Congress may try again by proposing the amendment a second time and starting the ratification process anew.[103]

However, there are several drawbacks to this method of ratification. First, the ratification process may be arbitrary because Congress must venture a guess at what may be a reasonable time for the states to properly debate and deliberate the substantive issues at hand.[104] Also, congressional opponents to the amendment may be prompted to employ delaying tactics in order to defeat the ratification of such amendments,[105] as was done in a number of states in the deliberations over the Equal Rights Amendment.[106]

Finally, setting deadlines within the text of the amendment or in the resolution proposing the amendment would not have any effect on the timeless amendments whose final ratification is still pending.

4. Amending the Constitution

A fourth option might be to amend Article V and incorporate a time deadline into the Constitution itself.[107] This method would provide a uniform and set procedure for ratification of all amendments, even outstanding ones if the method expressly calls for retroactivity.[108]

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102. Brannan et al., *supra* note 69, at 771.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 771 n.27. A third problem is that when a fixed time is set at seven years, as it was for the ERA, the states may actually have considerably less time for debate if the time frame is not coordinated with the legislature's calendar in each individual state. *Id.* at 772.
107. *Id.*
108. *Id.* at 773.

Congress considered this proposal during its debates over the Eighteenth Amendment.[109] Senator Brandegee from Connecticut had proposed an amendment that provided a deadline for proposed amendments.[110] This proposal, however, was based on the belief that Congress did not have the authority to include such deadlines in the text of proposed amendments under the present text of the Constitution.[111]

Senator Ashurst of Arizona introduced the discussion of the timeless amendments.[112] He referred to the Congressional Salary Amendment[113] and provided another reason why an amendment to the amendment process is in order:

> When the 12 amendments were submitted in 1789, when there were only 13 States, Vermont had not yet been admitted. . . . Should three-fourths of the States then in the Union, or three-fourths of those now in the Union, be the test as to what shall be the number required for ratification?[114]

Judge Jameson considered the same issue in 1887.[115] His

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109. 55 CONG. REC. 478 (1917).

110. *Id.* (statement of Senator Borah).

111. Senator Borah from Idaho contended that "as the Constitution of the United States now stands the States have a right to ratify it within any time they may see fit." *Id.* at 5649. Furthermore, Borah stated that:

> I would vote for an amendment to change the Constitution of the United States in regard to the machinery provided for the ratification of proposed amendments, because I think there is much merit in the proposition that there ought to be a time within which constitutional amendments should be ratified; but we can not change the Constitution of the United States as to the machinery by which ratification takes place by the manner in which we submit a particular . . . proposal when there is another existing rule in the Constitution.

Id.

112. *Id.* at 5557.

113. *Id.* "I have pointed out two amendments, floating around about us for 128 years, and have stated that one of them, after having reposed for 84 years . . . was picked up by the State of Ohio, through its State senate, and passed through the Ohio Senate." *Id.*

114. *Id.*

115. JAMESON, *supra* note 60, at 635. Jameson stated:

> If proposed in 1789, when the States numbered but thirteen, and when a majority of ten States might have ratified the amendment, how many would have been requisite in 1873, when there were thirty-eight States which would have been called upon to vote? If the answer should be, that twenty-nine States must have voted to ratify, since that number was three-fourths of all the States in 1873, however reasonable such an answer might seem, it would be founded upon no statute or custom of

solution was a "constitutional statute of limitation, prescribing the time within which proposed amendments shall be adopted or be treated as waived. . . ."[116]

Objections to this method are that deadlines would be inflexible, and that Congress would not be able to specify a deadline based on the substance of a particular amendment or to tailor a time limit in accordance with state legislative calendars.[117] Furthermore, such a procedure would severely curtail congressional power.[118]

While it is true that a constitutional amendment of the type suggested above may not be as sensitive to each situation as an ad hoc, case-by-case approach, it would have the advantage of providing a set and regular procedure on which states may rely.[119] Such a uniform ratifying procedure would also prevent representatives and senators from imposing arbitrary time limits reflecting their own personal political views of the proposed amendment.[120]

Moreover, a constitutionally specified time limit would be more cost efficient, since state legislators would not need to expend time and money debating whether a reasonable time has elapsed or whether they should wait to see if the amendment is proposed again before they ratify it.[121] The state legislators would know that ratification of the proposed amendment must be accomplished within a certain time frame with no subsequent chance for ratification.[122] Furthermore, though this method may not accommodate each state legislature's calendar, each state would know when it will be in session, allowing advocates of the proposed amendment to plan their strategies accordingly.[123]

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the country, and therefore, different opinions as to its reasonableness might well be entertained.

Id.

116. *Id.* at 635-36.
117. Brannan et al., *supra* note 69, at 772.
118. *Id.*
119. *Id.*
120. *See id.*
121. *See id.* at 775-77 (noting how resources were directed toward extension of the ERA's ratification deadline, rather than its ratification or defeat).
122. *Id.* at 774.
123. *Id.*

Finally, a reasonable deadline would assure contemporaneous consensus, and if retroactive, would solve the timeless amendment dilemma.

III. THE COURT'S ROLE IN AMENDMENT RATIFICATION

Article V of the U.S. Constitution makes no mention of which branch of government is to adjudicate ratification issues. Under the doctrine of judicial review, first introduced in *Marbury v. Madison,*[124] when a case involves constitutional interpretation, the Court has a duty to decide the controversy.[125] However, the Supreme Court, in *Coleman v. Miller,*[126] has indicated that it would not decide issues of procedural amendment ratification and labeled such issues nonjusticiable.[127] Many constitutional scholars contend that if *Coleman* were decided today, it would be decided differently.[128] Furthermore, *Coleman* seems to be an aberration from the trend of amendment issue cases both before and after *Coleman* was decided: most cases which address this issue support the proposition that amendment process issues are reviewable by the courts.[129] However, there is still much confusion over whether such procedural ratification issues are justiciable.[130] The confusion leads to the even more pressing question of which branch of government is best equipped to deal with such issues.

A. *Justiciability of Amendment Ratification Issues*

Constitutional scholars disagree over whether the courts should involve themselves in the only direct mechanism that Congress and the states have to overturn judicial interpretation of the Constitution.[131] The Supreme Court has not been consistent in its decisions. Instead, the Court's opinions have gone through three phases with amendment ratification issues:

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124. 5 U.S. (1 Cranch) 137, 177-78 (1803).

125. *Id.* Chief Justice John Marshall stated: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

126. 307 U.S. 433 (1939).

127. *Id.*

128. Grover Rees, III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension,* 58 TEX. L. REV. 875, 887 (1980).

129. *Id.*

130. *See id.*

131. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 140 (1989).

(1) such issues are justiciable, however, the Court grants Congress a virtual rubber stamp in dealing with amendment ratification; (2) such issues are political questions and, therefore, are nonjusticiable; and (3) such issues are justiciable and require judicial interpretation.[132]

1. Justiciable: Rubber Stamp Congress

Prior to *Coleman*, it appeared that the Court viewed amendment ratification issues as justiciable but chose to defer to Congress. The first case dealing with such an issue was *Hollingsworth v. Virginia,*[133] which was decided in 1798. In that case, the plaintiff argued that the Eleventh Amendment was invalid because the President never received the proposed amendment either to sign or veto it.[134] The Court held that the Eleventh Amendment had been constitutionally adopted and did not require presidential consideration.[135] In conclusion, the Court adopted the view that the veto power found in Article I, Section 7 of the U.S. Constitution was confined to federal statutes only and could not be expanded to include constitutional amendments.[136] It is implicit in *Hollingsworth* that issues concerning the amendment process are justiciable; otherwise the Court would not have rendered a decision.

However, *Luther v. Borden*[137] followed the *Hollingsworth* decision, and is more significant for its dicta rather than the actual holding of the case.[138] In *Luther,* the Supreme Court was faced with deciding which of two factions was the legitimate government of Rhode Island.[139] The Court bowed out by stating that it is for Congress to determine the established government of a state.[140] The Court reasoned that the issue was political in nature, thus nonjusticiable, because if the state's government was declared unconstitutional, then all its actions would be

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132. *See* Grover Rees, III, Comment, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Courts,* 37 LA. L. REV. 896 (1977) [hereinafter *Rescinding Ratification*].
133. 3 U.S. (3 Dall.) 378 (1798).
134. *Id.* at 379.
135. *Id.* at 382.
136. *Id.* at 381.
137. 48 U.S. (7 How.) 1 (1849).
138. *Rescinding Ratification, supra* note 132, at 905.
139. *Luther,* 48 U.S. (7 How.) at 1.
140. *Id.* at 42.

invalidated, creating chaos within the state of Rhode Island.[141] More importantly, in dicta, the Court stated that "[i]n forming the constitutions of the different States . . . the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision."[142] The *Luther* decision has been interpreted to mean that courts should defer to Congress on issues of whether states have ratified amendments to the U.S. Constitution and should grant Congress a virtual rubber stamp for such issues.[143]

2. Nonjusticiable: Coleman v. Miller

In *Coleman v. Miller,*[144] the Supreme Court held that certain procedural amendment ratification questions were non-justiciable, political questions.[145] Without reversing *Dillon v. Gloss,*[146] in this landmark case the Court held that the question of whether a reasonable time had lapsed for an amendment to be adopted was a political question.[147] *Coleman* involved a proposed amendment which empowered Congress to regulate and to prohibit child labor.[148] In 1924, the proposal was sent to the states to ratify without the imposition of a time limit on the amendment.[149] In Kansas, the vote was tied at twenty senators in favor of ratification and twenty senators opposed to ratification.[150] The presiding officer of the Senate, the Lieutenant Governor, voted in favor of ratification. The amendment was later ratified by the second house of the legislature.[151]

The plaintiffs in this case were the twenty senators who voted to reject ratification.[152] They contended that a reasonable

141. *Id.* at 43-44.
142. *Id.* at 39.
143. *Rescinding Ratification, supra* note 132, at 905; *see also* LESTER B. ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 8 (1942).
144. 307 U.S. 433 (1939).
145. *Id.* at 454.
146. 256 U.S. 368 (1921). For a discussion of Dillon v. Gloss, see *supra* notes 53-67 and accompanying text.
147. 307 U.S. at 433.
148. *Id.*
149. *Id.* at 435.
150. *Id.* at 436.
151. *Id.*
152. *Id.* The opposing senators were joined by a twenty-first senator, as well as

amount of time had elapsed (thirteen years had passed since the amendment's proposal), that the amendment had already been rejected once by Kansas, thus barring the state from re-ratifying it, and that the Lieutenant Governor's tie-breaking vote was unconstitutional.[153]

On the issue of the participation of the Lieutenant Governor, the Court was divided on whether this was a political question and expressed no opinion.[154] The Court then addressed the two remaining contentions—that a reasonable time had elapsed, and that Kansas had already rejected the amendment and could not re-ratify it.[155] The Court held that these issues were political questions, and therefore not subject to judicial review.[156] The Court reasoned that many of the facts that must be determined involve complicated economic, social, and political analyses that would be more appropriate for Congress to consider.[157]

An examination of the surrounding circumstances of the time clarifies the *Coleman* opinion. The amendment at issue in *Coleman* was an attempt to overrule prior judicial decisions which had struck down congressional legislation to regulate child labor on substantive due process grounds.[158] The Court was caught in a difficult position. A decision to invalidate the amendment could raise questions regarding the integrity of the Court and "confirm the worst suspicions of those who accuse the Court of being a 'super legislature.'"[159]

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three members of the Kansas House of Representatives. *Id.*

153. *Id.*

154. *Id.* at 446-47.

155. *Id.* at 450, 456.

156. *Id.*

157. The Court stated:

> When a proposed amendment springs from a conception of economic needs, it would be necessary, in determining whether a reasonable time had elapsed since its submission, to consider the economic conditions prevailing in the country . . . . [T]he question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments of the Government. The questions they involve are essentially political and not justiciable.

Id. at 453-54.

158. *Rescinding Ratification, supra* note 132, at 914.

159. *Id.* Rees further states:

3. *Justiciable: Requiring Judicial Interpretation*

After *Coleman*, subsequent Supreme Court decisions seem to chip away at the political question doctrine. In a legislative reapportionment case, *Baker v. Carr*,[160] the Court called the political question doctrine "essentially a function of the separation of powers."[161] The Court went on to list the criteria necessary for a political question.[162] However, in that case, the Court held that the issue of reapportionment was justiciable since it did not fit any of the listed criteria for political questions.[163] *Baker* further narrowed the political question doctrine by stating that most issues involving state governments will not fall within the parameters of political questions because in reviewing Guaranty Clause cases and other political question cases "it is the relationship between the judiciary and the coordinating branches of Federal Government and not the federal judiciary's relationship to the states, which gives rise to the 'political question.'"[164]

Subsequent to the decision in *Baker*, the Supreme Court was faced with another political question issue in *Powell v. McCormack*.[165] Adam Clayton Powell was elected to the U.S.

> Some modern observers have suggested that this danger—not so much the actual risk that the Court will improperly invalidate amendments which seek to curb its power, but rather the risk that the people will think the Court is deciding on this basis—would justify the relegation of all issues affecting the amending process to the status of "prudential" political questions.

Id.

160. 369 U.S. 186 (1962).

161. *Id.* at 217.

162. *Id.* The Supreme Court listed the criteria for a political question:
> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

163. *Id.* at 228.

164. *Id.* at 210.

165. 395 U.S. 486 (1969).

House of Representatives.[166] He had previously been charged with misappropriating public funds.[167] Congress reacted by voting to exclude him from the House.[168] Powell argued that it was unconstitutional to bar him from his congressional seat since he met all the constitutional requirements (the Constitution requires qualifications of age, citizenship and residence of congressional representatives[169]) and was elected by his constituents.[170] The defendants, on the other hand, argued that the case posed a political question and could not be heard by the Court[171] since the text of the U.S. Constitution in Article I, Section 5 provides that each house of Congress shall "be the Judge of the . . . Qualification of its Members."[172]

In rejecting the defendants' argument that the case involved a political question, the Court allowed Powell to keep his seat and held that Congress possessed the discretion to determine only whether a member had the qualifications stated in Article I, Section 2 (those of age, citizenship, and residence).[173] The Court reasoned that the issue was a mere interpretation of the Constitution, which the Court is obligated to adjudicate.[174] "[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."[175] The Court seemed to

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166. *Id.*
167. *Id.*
168. *Id.*
169. U.S. CONST. art. I, § 2, cl. 2; § 3, cl. 3.
170. *Powell,* 395 U.S. at 493.
171. *Id.* at 519.
172. U.S. CONST. art. I, § 5 of the U.S. Constitution begins as follows:
> [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.
> [2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

U.S. CONST. art. I, § 5, cls. 1, 2.
173. *Powell,* 395 U.S. at 548.
174. *Id.* at 548-49.
175. *Id.* at 549. The Court contended:
> [A]s our interpretation of Art. I, § 5, discloses, a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law . . . . Our system of government requires that federal courts on occasion interpret the

indicate that even adjudicative powers provided to Congress must be exercised constitutionally and are reviewable by the courts.[176] The Court stated that Article I, Section 5 of the U.S. Constitution is at best a "textually demonstrable commitment" to Congress to determine whether its members meet the qualifications expressly provided for in the Constitution in Article I, Section 2.[177]

Finally, the defendants urged the Court to dismiss the case rather than interfere with one of the other branches of government. However, the Court replied that the risk of conflict with another branch should not influence its ruling to avoid its constitutional responsibility.[178]

More recently, in *Dyer v. Blair,*[179] before his accession to the Supreme Court, Justice Stevens wrote an opinion concerning the ratification of the ERA. In Illinois, the ERA passed by majority vote but not by the required three-fifths majority.[180] The plaintiffs were members of the legislature, who contended that the three-fifths rule was unconstitutional, and petitioned the court to enjoin state officials to make the ratification official.[181]

The defendants contended that this issue was under the complete control of Congress and was nonjusticiable by the courts.[182] The court rejected the defendants' contentions.[183] In the district court opinion, Judge Stevens distinguished the case from *Coleman,* stating that "[a]lthough the issue . . . is somewhat comparable to . . . *Coleman* in that the criteria for judicial determination are . . . equally hard to find, the answer does not depend on economic, social or political factors that vary from time to time and might well change during the interval between the proposal and ratification."[184] In other words, unlike the

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> Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Id. at 548-49.

176. *Rescinding Ratification, supra* note 132, at 920.
177. *Powell,* 395 U.S. at 548.
178. *Id.* at 549.
179. 390 F. Supp. 1291 (N.D. Ill. 1975).
180. *Id.*
181. *Id.* at 1297.
182. *Id.* at 1299.
183. *Id.* at 1303.
184. *Id.* at 1302.

reasonable time issue in *Coleman* which might vary, the meaning of the term "ratification" must be uniform for every amendment proposed by Congress.[185]

The court applied the holdings of *Baker* and *Powell* to conclude that if constitutional interpretation is at issue, the court must say what the law is.[186] The court also noted that the risk of a conflict with the intent of Congress does not justify declaring a controversy nonjusticiable.[187] It is clear that Judge Stevens, in *Dyer*, viewed Article V as subject to interpretation by the court.[188]

B. Judicial Review Versus Congressional Promulgation

Besides deferring most amendment ratification issues to Congress, the landmark *Coleman* case also introduced a curious new feature into the amendment process that has greatly puzzled scholars.[189] The Court relied on "historical precedent" for its conclusion that congressional promulgation was a necessary step in ratification of amendments.[190] In 1868, when twenty-nine states had ratified the Fourteenth Amendment (one more than necessary), the Secretary of State announced to Congress that the last state had legitimately ratified the amendment, and the very next day Congress passed a joint resolution declaring the Fourteenth Amendment as part of the Constitution.[191] Curiously, this is the only instance of congressional promulgation prior to *Coleman*.[192]

In *Coleman*, the Court took this one isolated act and relied on it for historical precedent.[193] The text of the Constitution provides that an amendment is valid "when ratified by the Legislatures of three-fourths of the several States"[194] and makes no mention of any further step that must be taken by

185. *Id.* at 1303.
186. *Rescinding Ratification, supra* note 132, at 922.
187. *Id.*
188. *Id.* at 922 n.164.
189. Dellinger, *supra* note 16, at 397.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. U.S. CONST. art. V.

Congress to validate this ratification. However, *Coleman* focused on this notion of promulgation by Congress.[195]

Congressional promulgation has proved to be a vague and unreliable procedure for resolving ratification disputes.[196] The substance of the amendment may unduly influence representatives to vote for promulgation or against it, based on their personal political beliefs.[197] Moreover, leaving ratification issues for Congress to decide through congressional promulgation or other available means seems to conflict with the opinion that the Court has the duty to use its power to interpret the Constitution when it has such authority.[198] "When the outcome of a case within the Court's jurisdiction must turn on a construction of the Constitution, the Court is bound to decide what the Constitution says about the case."[199]

Furthermore, when the Court holds that an issue is nonjusticiable, the Court in effect has interpreted the Constitution.[200] One interpretation is that the Constitution gives complete discretion to another branch of government and no action by that branch concerning that issue could be unconstitutional.[201] Another interpretation is that such actions could be unconstitutional, but the Court does not have the power to make that judgment because the Constitution reserved for the indicated branch of government the adjudication of the issue at hand.[202] Under the *Coleman* ruling, the issue of reasonable ratification would fall under the latter category, but nowhere does the Constitution make provisions for another branch of government to make such a determination.

Though *Coleman* supports congressional discretion over judicial review in amendment process issues, this may not be the best solution for such conflicts.[203] Congressional promulgation can be very uncertain and unpredictable.[204] Congressional attempts at quasi-adjudication (as opposed to its regular

195. Dellinger, *supra* note 16, at 399.
196. *Id.* at 413.
197. *Id.*
198. *Id.*
199. *Rescinding Ratification, supra* note 132, at 901.
200. *Id.*
201. *Id.*
202. *Id.*
203. Dellinger, *supra* note 16, at 392-93.
204. *Id.* at 392.

legislative tasks) have not fared well in practice.[205] In 1868, the Secretary of State announced to Congress that over three-fourths of the states had ratified the Fourteenth Amendment, but that two of the states (Ohio and New Jersey) had attempted to officially withdraw their ratification.[206] The next day, Congress passed a joint resolution promulgating the ratification of the Fourteenth Amendment, with hardly a word concerning the issue of states' rights to rescind.[207] Another example of a congressional adjudicative proceeding is the unconstitutional attempt to impeach President Andrew Johnson.[208] Though there was no valid legal ground for impeachment, "[w]hat made the trial 'disgraceful' was . . . that the proceeding reeked with unfairness, with palpable prejudgment of guilt."[209]

Furthermore, future Congresses would not be bound by the decisions of the present Congress in session at the time, whereas Court determinations bind future Courts.[210] This is a serious problem even if the present representatives rise above allowing their personal views regarding the substance of the amendment to influence their decision on procedural questions.[211] Many scholars see the courts as a more suitable forum for adjudicating such conflicts.[212] Though there is doubt as to how nonpolitical Justices really are, there are other safeguards that contribute to the reliability of the Court.[213] For one, the Court is required to submit a written opinion justifying its conclusions.[214] Second, stare decisis prevents the Court from veering too far away from previous decisions.[215] Finally, the appointed, not elected, nature of the office absolves the Justices from being slaves to public opinion.[216]

On the other hand, it has been argued that the Court should stay out of the issue of amendment ratification procedures since it may have a stake in the outcome of the ratification process,

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205. *Id.* at 392-93.
206. *Rescinding Ratification, supra* note 132, at 905-06.
207. *Id.* at 906.
208. RAUOL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 264 (1973).
209. *Id.*
210. *Rescinding Ratification, supra* note 132, at 916.
211. *Id.; see also* Dellinger, *supra* note 16, at 413.
212. Dellinger, *supra* note 16, at 411-17.
213. *Id.* at 413.
214. *Id.*
215. *Id.*
216. *Id.*

especially if the proposed amendment would overrule a Supreme Court decision.[217] However, Congress has an even greater stake in the adjudication of the amendment process because Congress initially proposed the amendment.[218] "It would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined."[219]

CONCLUSION

The recent ratification of the Twenty-seventh Amendment is a clear example of the gray areas of the amendment process. There are four views of what may be done to clarify the time limits on proposed amendments in order to assure contemporaneous consensus and to provide a regular procedure of ratification: (1) no time deadlines; (2) post-ratification congressional determination of proper time; (3) time deadlines in the actual text of the amendment; and (4) amendment of Article V to place a time deadline for proposed amendments in the text of the Constitution itself. Only the last option would solve the problem of the timeless amendment. Amending the Constitution by placing a fixed time limit within Article V will serve the policy of contemporaneous consensus, provide a uniform procedure of ratification, be most cost efficient, and deter Congress from imposing arbitrary time limits, perhaps influenced by their personal political views of proposed amendments.

Even if Article V were amended, the question of which branch of government may constitutionally adjudicate questions of ratification would remain unanswered. Though the Supreme Court has held that such issues are political questions for

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217. *Id.* at 414. Though most amendments were not adopted in order to overrule Supreme Court decisions, the *Coleman* decision is an example of such a circumstance. *Id.* Dellinger contends that:

> The Supreme Court's invalidation of the Child Labor Act in *Hammer v. Dagenhart* was widely regarded as a decision bordering on the lawless, the work of Justices driven by ideological opposition to regulation of labor conditions. Many observers would have questioned whether a Court that could hand down such a decision was capable of a disinterested assessment of the validity of an amendment restoring the federal government's power to regulate child labor.

Id.

218. *Rescinding Ratification, supra* note 132, at 917.

219. *Id.* at 917 (statement by Elihu Root).

Congress to adjudicate,[220] Congress may not be the most effective branch for deciding such matters. Congressional promulgation and attempts at quasi-adjudication have proven to be unreliable. Subsequent Supreme Court cases have indicated that perhaps the courts are a better forum for such issues, particularly since the courts are bound by stare decisis, must submit written opinions substantiating their decisions, and because judges are appointed, not elected, and therefore may remain more impervious to public opinion.[221]

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220. Coleman v. Miller, 307 U.S. 433 (1939).
221. Dellinger, *supra* note 16, at 413.