Written Statement
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Hearing on the Equal Rights Amendment

Committee on the Judiciary
United States Senate

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Chairman Durbin, Ranking Member Graham, and members of the Committee, thank you for the opportunity to discuss the ratification process for the Equal Rights Amendment ("ERA"). I am a tenured, full Professor of Law at Florida International University College of Law, a public law school located in Miami, where I teach constitutional law. I also serve Of Counsel with the Washington, D.C. office of BakerHostetler, LLP, where I practice constitutional and appellate law.

I. Background on Ratification of the Equal Rights Amendment

An Equal Rights Amendment was first proposed in 1923.[1] However, the proposal did not receive approval of the required two-thirds supermajority of the House and Senate until March 22, 1972. The text of the proposal reads as follows:

> JOINT RESOLUTION
>
> Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States,* ***which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress****:*
>
> "ARTICLE —
>
> **Section 1.** Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> **Section 2.** The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> **Section 3.** This amendment shall take effect two years after the date of ratification."[2]

The ERA's lead sponsor, Representative Martha Griffiths, explained that the seven-year deadline was included to assuage "one of the objections" that had raised against the proposed amendment—namely, that it "should not be hanging over our head forever."[3] The Senate Judiciary Committee's report echoed this explanation: "The seven year time limitation assures that ratification reflects the contemporaneous views of the people."[4] The seven-year ratification

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[1] S.J. Res. 21, 68th Cong. (1923); H.J. Res. 75, 68th Cong. (1923).

[2] H.J. Res. 208, 86 Stat. 1523 (1972) (bold added).

[3] 117 Cong. Rec. at 35814–15.

[4] S. Rep. No. 92-689, at 20.

deadline was thus a "compromise" that enabled the proposed amendment to achieve the two-thirds supermajority required by Article V.[5]

The seven-year ratification period expired on March 22, 1979. When that deadline arrived, only thirty-five of the required thirty-eight States (three-fourths of the fifty States) had ratified the ERA.

In 1978, sensing that the ERA would not meet the three-fourths threshold within the original ratification deadline, the 95th Congress purported to "extend" the ERA's ratification deadline by approximately three years (to June 30, 1982), passing a joint resolution by simple majorities, signed by then-President Carter.[6] No additional States ratified the ERA during this purported extension period.

Prior to the expiration of the ERA's original 1979 ratification deadline, four States "rescinded" their ratification: Idaho, Kentucky, Nebraska, and Tennessee. A fifth State, South Dakota, voted on March 1, 1979—21 days before the original ratification deadline—to "sunset" its earlier 1973 ratification, declaring it "null and void" in protest of Congress's unilateral three-year extension of the ratification deadline via a majoritarian joint resolution. The South Dakota legislature declared, "Congress *ex post facto* has sought unilaterally to alter the terms and conditions in such a way as to materially affect the congressionally established time period for ratification . . . ."[7] It protested that allowing Congress unilaterally to alter a previously-imposed ratification deadline created a "perpetual possibility of a sudden change in the Constitution of the United States due to a shift of opinion in a small number of states."[8]

Since 2017, three additional States have purported to "ratify" the ERA after both the original 1979 ratification deadline and the purported three-year extension: Nevada (2017), Illinois (2018) and Virginia (2020). Some now claim that "ratification" by these three States means that the ERA has crossed the three-fourths threshold (thirty-eight States) and should be recognized as part of the Constitution. Indeed, in the 118th Congress, a joint resolution has been introduced in the Senate, S.J. Res. 4,[9] which purports to formally recognize the ERA as the Twenty-Eighth Amendment:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That notwithstanding any time limit contained in House Joint Resolution 208, 92nd Congress, as agreed to in the Senate on March 22, 1972, the article of amendment proposed to the States in that joint resolution is valid to all intents and purposes as part of the Constitution, having been ratified by the legislatures of three-fourths of the several States.

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[5] *Accord Virginia v. Ferriero*, 525 F. Supp. 3d 36, 42 (D.D.C. 2021).

[6] H.J. Res. 638, 95th Cong., 2d Sess. (1978).

[7] 125 Cong. Rec. 4862 (Mar. 13, 1979).

[8] *Id*.

[9] *See also* H.J. Res. 25 (same) (Rep. Pressley).

As elaborated below, however, this joint resolution, even if enacted, would have no legal effect.

II. The Role of Congress in Constitutional Amendments

Congress's role under Article V of the Constitution is to "propose" Amendments by a two-thirds supermajority of both houses or, alternatively, to "call a Convention for proposing Amendments" if two-thirds of the States' legislatures make an "Application" to Congress for such a convention.[10] "[I]n either case"—i.e., whether an amendment is proposed by Congress or by convention—a proposed amendment "shall be valid . . . when ratified" by three-fourths of States' legislatures or States' constitutional conventions, "as the one or the other Mode of Ratification may be proposed by the Congress."[11] Thus, as part of its Article V power to "propose" constitutional amendments, Congress may propose a "Mode of Ratification."

Once Congress has proposed a constitutional amendment via Article V, its power under that Article ends. The fate of a proposed amendment thereafter rests with the States, which have the sole power to ratify it via the "Mode of Ratification" specified by Congress.

A. The History of Ratification Deadlines

Eight of last nine amendments proposed by Congress have contained a ratification deadline. Specifically, the Eighteenth through Twenty-Sixth Amendments—with the exception of the Nineteenth Amendment (women's suffrage)—have contained a seven-year ratification deadline, either in their text or preamble. Of these eight modern amendments, four contain the seven-year deadline in their text;[12] the other four (the most recent proposals) are found within the proposal's preamble.[13] According to the Congressional Research Service, Congress determined that "inclusion of the time limit within [the amendment's] body 'cluttered up' the proposal" and consequently Congress "placed the limit in the preamble or authorizing resolution, rather than in the body of the amendment itself" which was "seemingly uncontroversial at the time . . . ."[14]

The only constitutional amendment ratified since the Nineteenth Amendment that lacked a seven-year deadline is the Twenty-Seventh Amendment (requiring an intervening election before a congressional pay raise can take effect). The Twenty-Seventh Amendment is often called the "Madison Amendment" because it was one of the original twelve amendments James Madison proposed to Congress for its consideration in 1789, ten of which were quickly ratified and dubbed the "Bill of Rights." As was typical with early amendment proposals, none of these twelve proposed amendments contained a ratification deadline. The Madison Amendment was quickly ratified by seven States within three years and ratified by Ohio over eighty years later, in

[10] U.S. Const. art. V.

[11] *Id*.

[12] Amendments Eighteen, Twenty, Twenty-One and Twenty-Two have the seven-year ratification deadlines in their text.

[13] Amendments Twenty-Three, Twenty-Four, Twenty-Five and Twenty-Six have the seven-year deadline in their preamble.

[14] Thomas H. Neale, Cong. Research Serv., R42979, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues* 13-14, (July 18, 2018). *Accord. Ferriero*, 35 F. Supp.3d at 58.

1873. It then laid moribund for another century, until ratified by Wyoming in 1978, after which it slowly gained momentum again. In May 1992, the Twenty-Seventh Amendment was ratified by the thirty-eighth State, becoming part of the Constitution.

Like the Madison Amendment, there are four additional "older" proposed amendments that contain no ratification deadline and thus are still technically pending for ratification: (1) another "Madison Amendment," regulating House apportionment;[15] (2) an amendment that would strip U.S. citizenship from anyone accepting a title of nobility or emolument from a foreign power;[16] (3) the "Corwin Amendment," which would prohibit Congress from banning or interfering with slavery;[17] and (4) the Child Labor Amendment, which would give Congress the power to regulate child labor.[18]

In addition, there is one modern constitutional amendment—the D.C. Voting Rights Amendment[19]—proposed by Congress in 1978 which, like the ERA, contained a seven-year ratification deadline[20] but was not ratified by the requisite three-quarters of States within that period.[21] Presumably, if Congress lacks authority to impose a judicially-enforceable ratification deadline, the DC Voting Rights Amendment, like the ERA, could be ratified ten, fifty, or a hundred years from now.

B. Legal Precedent Regarding Ratification Deadlines

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[15] This second "Madison Amendment" has been ratified by eleven States. With eleven state ratifications, the Apportionment Amendment was one State shy of the three-quarters threshold needed for ratification in 1791. With the addition of more States, however, the threshold climbed to thirty-eight States, and it is now twenty-seven States shy of the threshold. If this second "Madison Amendment" ever reaches the three-quarters threshold for ratification, there would be more than 6,000 representatives in the House, compared to the 435 that exist today.

[16] This amendment was proposed in 1810 (on the cusp of the war of 1812) and has been ratified by twelve States. At the time it was proposed, ratification by thirteen states was required to meet the three-quarters threshold; it fell one State short. Consequently, there was some confusion and some versions of the Constitution—including the one contained in the Statutes at Large and distributed to members of Congress—contained the amendment as the "Thirteenth Amendment." *See* Nat'l Archives, *Unratified Amendments: Titles of Nobility*, *available at* https://prologue.blogs.archives.gov/2020/01/30/unratified-amendments-titles-of-nobility/.

[17] The Corwin Amendment was proposed in 1861 and has been ratified by five States. Given ratification of the Thirteenth Amendment prohibiting slavery, any future ratifications of the Corwin Amendment—even if it crossed the three-fourths threshold—would presumably have no significant legal effect.

[18] The Child Labor Amendment was proposed in 1924 and has been ratified by twenty-eight States. It is presumably no longer necessary since the post-1937 Supreme Court has capaciously construed the Commerce Clause to regulate labor conditions.

[19] The D.C. Voting Rights Amendment would not have officially made D.C. a "State," but it would have given D.C. residents full voting representation in Congress, full Electoral College representation, and a role in approving proposed constitutional amendments. It would have also repealed the Twenty-Third Amendment, which grants the District representation in the Electoral College not to exceed that of the "least populous state."

[20] H.J. Res. 554, 95th Cong. (1978). The D.C. Voting Rights Amendment's seven-year deadline appeared in the text of the proposal.

[21] The seven-year ratification for the proposed amendment granting D.C. Statehood expired August 21, 1985, by which time only sixteen States had ratified it.

The salient legal questions are: (1) whether Congress has the authority to impose a ratification deadline; (2) if it does, whether such ratification deadline is judicially enforceable; and (3) if it is enforceable, whether a ratification deadline contained in the proposed amendment's preamble (rather than its text) also judicially enforceable. As elaborated below, the answer to all three questions is most likely "yes" based on two decisions by the Supreme Court and two additional district court decisions applying those Supreme Court precedents. Thus, Congress may impose a ratification deadline pursuant to its Article V power and may do so either in the proposed amendment's text or preamble. Once such a deadline is established by Congress, the deadline is judicially enforceable and cannot be altered by future Congresses. If Congress wishes to extend the time for ratification, therefore, it must begin the Article V process anew, proposing a new constitutional amendment, with or without a ratification deadline.

With its ERA proposal, Congress included a seven-year ratification deadline that was not met; consequently, the only legal way to ratify the ERA now is to start over, proposing a new ERA with the support of at least two-thirds of both houses of Congress. A new ERA proposal (either with or without a ratification deadline) could then be submitted to the States for ratification.

1. *Dillon v. Gloss* (U.S. 1921)

The first relevant Supreme Court precedent is *Dillon v. Gloss*,[22] in which a criminal defendant challenged his conviction under federal prohibition law on the basis that the Eighteenth Amendment (authorizing prohibition) was invalid because it contained a seven-year ratification deadline. Specifically, the defendant argued that constitutional amendments, to be valid, had to be "open-ended," time-wise, for ratification. The Supreme Court, in a *unanimous opinion*, rejected Mr. Dillon's argument stating, "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification *we entertain no doubt.*"[23]

The Court acknowledged that Article V does not expressly mention the power to impose a ratification deadline, but this "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."[24] It then concluded, "An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in *proposing amendments*."[25] Article V's express grant of power to Congress to "propose Amendments" and its accompanying express power to propose a "Mode of Ratification" thus implies a power to impose a "wide range" of ratification conditions, including ratification deadlines.

Dillon acknowledged that Congress is not *required* to specify a ratification deadline when it proposes amendments, only that it may constitutionally do so, and that the seven-year deadline Congress imposed for ratification of the Eighteenth Amendment was judicially enforceable

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[22] 256 U.S. 358 (1921).

[23] *Id*. at 375-76 (emphasis added).

[24] *Id.* at 373.

[25] *Id*. (emphasis added).

because it was "reasonable." "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which *Congress may determine as an incident of its power to designate the mode of ratification*."[26]

The *Dillon* Court further reasoned that the "fair implication" of Article V is that ratification "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections [of the country] at relatively the same period, which of course ratification scattered through a long series of years would not do."[27] It accordingly held " that the fair inference or implication from article 5 is that the ratification must be within some *reasonable time* after the proposal."[28]
Dillon's logic is that Congress's Article V power to *propose amendments* includes the power to specify a "reasonable time" for ratification. When Congress specifies a ratification deadline, it prevents "speculation on what is a reasonable time" (and thus litigation over that phrase),[29] and solves the Court's concern about ratification by generations long-removed from events prompting the amendment's proposal.

Dillon thus established two clear legal rules and implied one additional rule. First, because Congress's power to specify a ratification deadline emanates from its power to *propose amendments* under Article V, not Article I, any proposal relating to a constitutional amendment—including ratification deadlines—must be passed via Article V's super-majoritarian process, not the simple-majority process for ordinary legislation. Pursuant to this rule, Congress's three-year extension of the ERA's original ratification deadline (via simple majoritarian process) was constitutionally improper. Second, any ratification deadline established by Congress pursuant to its Article V power is *judicially enforceable*. This is rather obvious because the *Dillon* Court expressly rejected Dillon's argument that the Eighteenth Amendment was "invalid, because the congressional resolution proposing the amendment declared that it should be inoperative unless ratified within seven years . . . ."[30] If the seven-year deadline for the Eighteenth Amendment was judicially unenforceable, Dillon's conviction would not have stood.

Third, *Dillon* implies (though it did not decide) that there is no meaningful distinction between a ratification deadline contained in the text of a proposed amendment versus its preamble. This is so because Congress's power to establish a ratification deadline is derived from its Article V power to *propose amendments*. Logically, therefore, any ratification deadline must be contained in the *proposal* sent to the States for ratification, ensuring that States have clear notice of the "Mode of Ratification" selected by Congress. An amendment's *proposal* contains both the amendment's text and its preamble. Whether a ratification deadline appears in the text or preamble, therefore, either way it will appear in the *proposal* sent to the States for ratification,

[26] *Id*. at 376 (emphasis added).

[27] *Id*. at 375.

[28] *Id*. (emphasis added).

[29] *Id*.

[30] *Id*. at 370-71.

thereby serving the key function of notifying States about the mode of ratification selected by Congress. That should be all that is necessary.

2. *Coleman v. Miller* (U.S. 1939)

In *Coleman v. Miller*,[31] the Supreme Court did not question *Dillon*'s holding that Congress has power, under Article V, to specify a ratification deadline. In *Coleman*, a group of Kansas legislators sought to halt their State's ratification of the Child Labor Amendment, an amendment proposed by Congress in 1924 which contained *no ratification deadline*. In 1925, the Kansas legislature rejected the Amendment but almost thirteen years later, in 1937, it narrowly ratified it, with twenty (out of forty) State Senators supporting it and the tie vote broken by the Lieutenant Governor. The state legislator-plaintiffs challenged the amendment's ratification, *inter alia*, on grounds that the amendment's ratification, almost thirteen years after its proposal by Congress, was not within a "reasonable time" as required by *Dillon*.

Like *Dillon*, the *Coleman* Court reaffirmed that Congress may specify a ratification deadline, stating in dicta that it may do so "e*ither in the proposed amendment or in the resolution of submission*."[32] It also stated that *Dillon* had articulated "cogent reasons for the decision . . . that the Congress had the power to fix a reasonable time for ratification."[33] The Court observed, however, that "it does not follow that, whenever Congress has *not exercised that power* [of imposing a ratification deadline], the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications."[34] Thus, in proposing the Child Labor Amendment—unlike the Eighteenth Amendment at issue in *Dillon*—Congress had provided "[n]o limitation of time for ratification" in either the text or preamble,[35] and the *Coleman* Court refused to police the "reasonableness" of Kansas's ratification thirteen years after the amendment's proposal by Congress. Coleman, in other words, disagreed with *Dillon*'s dicta that in the absence of a ratification deadline, the judiciary can invalidate a State's ratification of a constitutional amendment on grounds that it is untimely.

Under the reasoning of both *Dillon* and *Coleman*, therefore, it is clear that Congress has the Article V power to specify a ratification deadline that is judicially enforceable. If it fails to do so (as with the proposed Child Labor Amendment), the *courts* will not impose one via a free-floating "reasonableness" rule.[36] Stated another way, whatever Congress decides about ratification deadliness—imposing them or not imposing them—the Court will enforce.

Those who claim that recent ratifications of the ERA by Nevada, Illinois and Virginia are effective rely heavily on Justice Black's plurality concurrence in *Coleman*, presumably because it

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[31] 307 U.S. 433 (1939).

[32] *Id*. at 452.

[33] *Id*.

[34] *Id*. at 452-53 (emphasis added).

[35] *Id*. at 452.

[36] This presumably explains why ratification of the "Madison Amendment" (Twenty-Seventh Amendment) has not been challenged as untimely.

states, "Proclamation under authority of Congress that an amendment has been ratified will carry with it a solemn insurance by the Congress that ratification has taken place as the Constitution commands."[37] Thus, the argument goes, all questions relating to ratification are *non-justiciable* under the political question doctrine. Accordingly, a mere "proclamation" by Congress that "an amendment has been ratified" will be determinative and courts are powerless to say otherwise. Presumably, under this logic, the converse would be true as well: i.e., if Congress issued a proclamation that an existing amendment was *not* properly ratified—even one as important as, say, the Fourteenth Amendment—any challenge to the legitimacy of such proclamation would be non-justiciable. But of course this is nonsense, and for good reason.

Justice Black's concurrence in *Coleman* is has no precedential value. It is merely a *plurality* concurrence, garnering support of only four Justices.[38] The other *five Justices*[39] —a majority of the *Coleman* Court—reaffirmed *Dillon*'s central holding that Congress may impose an enforceable ratification deadline pursuant to its Article V authority to propose amendments. The five-Justice *Coleman* majority consisted of Chief Justice Hughes (who authored the *Coleman* opinion) and Justices Stone and Reed, plus two dissenting Justices, Justices Butler and McReynolds. The two dissenters agreed that per *Dillon*, Congress can establish a ratification deadline, but unlike Hughes, Stone and Reed, they wanted to reaffirm *Dillon*'s conclusion that if Congress does *not* specify a ratification deadline, courts can invalidate a ratification that occurs beyond a "reasonable" time. Indeed, the two dissenters concluded that "more than a reasonable time had elapsed"—almost thirteen years—between the time Congress proposed the Child Labor Amendment and Kansas had ratified it, rendering Kansas's ratification invalid. *Id*. at 473-74 (Butler, J., dissenting).

As *Dillon* and *Coleman* demonstrate, Congress's constitutional role relating to amendments emanates from Article V, not its ordinary legislative power. Congress's Article V power, moreover, is only one to *propose* amendments, which are then sent to the States for possible ratification. Put succinctly. Congress's Article V power to propose amendments is necessarily *antecedent* to ratification. Consequently, once Congress *proposes* a constitutional amendment, its constitutional power *ends* and the power of the States (to ratify) *begins*. If Congress wishes to impose a ratification deadline, it may do so, but it must place the ratification deadline in the *proposal* it sends to the States. As *Coleman*'s dicta acknowledged, a ratification deadline may be

[37] *Id*. at 457 (Black, J., concurring).

[38] Justice Black's *Coleman* concurrence was joined by Justices Roberts, Frankfurter and Douglas. S*ee also Ferriero*, 525 F. Supp.3d at 50 (""*Coleman* does not establish that *all* questions related to the amendment process are political ones. Even though four concurring members took that broad view, they failed to convince a majority.") (emphasis in original).

[39] The five Justices in *Coleman* are Chief Justice Hughes, and Justices Reed, Stone, Butler and McReynolds. Chief Justice Hughes, Stone and Reed joined the Court's majority opinion. Justices Butler and McReynolds dissented, asserting that because Congress had not established a ratification deadline, the Court remained empowered to determine whether a nearly thirteen-year lapse between the Child Labor Amendment's proposal and Kansas's ratification was a "reasonable" time consistent with Article V. *See Coleman*, 307 U.S. at 470-74 (Butler, J., dissenting). The two *Coleman* dissenters thus agreed with the majority that Congress could set a deadline for ratification but believed that when it did *not* establish a deadline, the Court retained power to declare a ratification unconstitutional if it occurred after a "reasonable" time.

placed "either in the proposed amendment or the resolution of submission."[40] In reliance on this, Congress has placed seven-year ratification deadlines in the *preambles* of the last four amendments it has proposed (Amendments Twenty-Three through Twenty-Six).

Any action by Congress *after* an amendment is proposed to the States is therefore of no legal effect. Thus, because the ERA as proposed by Congress under its Article V power contained a seven-year ratification deadline, *Dillon* and *Coleman* confirm that this deadline is judicially enforceable and cannot be altered or affected by post-proposal, ordinary legislative process. As elaborated below, the two lower federal courts to that have addressed these issues have agreed with this construction of *Dillon* and *Coleman*.

3. *Idaho v. Freeman* (D. Idaho 1981)

In *Idaho v. Freeman*,[41] ERA supporters argued that because the ERA's seven-year ratification deadline was contained in the *preamble* rather than its text, Congress was free to alter the ratification deadline at will, since doing so would "not change the essential nature of the amendment" itself but was merely a "matter of detail" over which Congress has authority pursuant to *Dillon*.[42]

The *Freeman* court rejected this argument, reasoning that *Dillon* endorsed congressional authority to establish a ratification deadline as part of its Article V power because it would "infuse certainty into an area which is inherently vague," [43]It concluded that "the congressional determination of a reasonable period *once made and proposed to the states cannot be altered*." *Id*. (emphasis added). Specifically, "If Congress determines that a particular amendment requires ongoing assessment as to its viability or monitoring of the time period, it can do so, not by defeating the certainty implied by the *Dillon* case, but by *not setting a time period* at the outset . . . ." *Id*. (emphasis added). The court held that Congress could not change its initially-specified ratification date "any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa. *Once the proposal is made, Congress is not at liberty to change it*."[44]

In 1982, after the second (extended) ERA ratification deadline had expired, the Supreme Court, "[u]pon consideration of the memorandum for the Administrator of General Services suggesting mootness," agreed that the dispute was permanently mooted.[45] The GSA's memo, upon which the Supreme Court relied, stated, "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, only 35 of the necessary states can be regarded as having ratified the Amendment. If appellee-

[40] *Coleman*, 307 U.S. at 452.

[41] 529 F. Supp. 1107 (D. Idaho 1981).

[42] *Id*. at 1151.

[43] *Id.* at 1152.

[44] *Id*. at 1153 (emphasis added).

[45] *Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

respondents were to prevail on all issues, fewer than 35 states would be counted as having ratified the Amendment, and the Amendment would be regarded having failed of adoption . . . ."[46] In other words, even assuming *arguendo* that Congress's second, extended ERA ratification deadline was legally permissible, only thirty-five States had ratified the ERA by that deadline, rendering the ERA failed. If the ERA was *not* failed, the Supreme Court could not have deemed the *Freeman* controversy moot.[47] The necessary implication, therefore, is that the Supreme Court considered the ERA's preamble-based ratification deadline to be valid and judicially enforceable.

4. *Virginia v. Ferriero* (D.D.C. 2021).

In 2021, Judge Contreras of the Federal District Court for the District of Columbia, an Obama appointee, decided *Virginia v. Ferriero*,[48] a lawsuit filed by Nevada, Illinois and Virginia against the U.S. Archivist, seeking to force the Archivist to publish and certify the ERA as part of the Constitution following those States' ratifications in 2017-2020. The five States that had rescinded the ERA prior to its original 1979 ratification deadline intervened, arguing that the plaintiff-States' ratifications were invalid because they occurred after the original ratification deadline. Like the district court in *Freeman,* the *Ferriero* court held that the ERA's original seven-year ratification deadline, contained in the preamble, was judicially enforceable for four reasons.

First, the *Ferriero* court reasoned that under the holding of *Dillon*, Congress's Article V power to propose amendments includes the power to propose a "Mode of Ratification," which may include a ratification deadline.[49]

Second, the court observed that there is a longstanding tradition of specifying the "Mode of Ratification" in a proposed amendment's preamble: "Congress has routinely put ratification conditions in the preambles of proposing resolutions since the Founding."[50] For example, Judge Contreras noted that when proposing the first ten Amendments—the Bill of Rights—to the States, Congress included a preamble specifying that the "Mode of Ratification" must be via State legislatures, not conventions.[51] "With that, Congress began the practice of dictating an amendment's 'Mode of Ratification' through language in the proposing resolution's prefatory

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[46] Mem. for the Admin. of Gen. Servs. Suggesting Mootness, *Nat'l Org. for Women, Inc. v. Idaho* (July 1982), *available at* https://eagleforum.org/era/now-v-idaho-memo.html.

[47] Judge Contreras recently agreed with this analysis in *Ferriero*, 525 F. Supp.3d at 58-59.

[48] 525 F. Supp.3d 36 (D.D.C. 2021). An appeal is presently pending in the D.C. Circuit. On February 18, 2023, Virginia voluntarily withdrew from the case, leaving only Nevada and Illinois as plaintiffs. *See* Veronica Stracqualursi, *Virginia's AG Withdraws State From Legal Effort to Have Equal Rights Amendment Recognized*, CNN.com (Feb. 19, 2022), *available at* https://www.cnn.com/2022/02/19/politics/virginia-withdraws-era-appeals-case/index.html.

[49] *Id*. at 56.

[50] *Id*. at 57.

[51] *Id*.

clause."[52] Moreover, with the exception of the Nineteenth Amendment, every proposed amendment since the Eighteenth has contained a ratification deadline, and every proposed amendment since the Twenty-Second in 1960 has placed the ratification deadline *in the proposal's preamble*.[53] "[T]he practice has persisted for sixty years," said the court, and such practice was entitled to "due weight."[54] Thus, whatever mode of ratification Congress chooses, "[S]tates have always followed Congress's direction without question—even the one time Congress called for ratification by [State] convention" in the Twenty-First Amendment (repeal of prohibition).[55] Thus, the court concluded, "If Congress can dictate the mode of ratification in the prefatory language accompanying a proposed amendment, then it should be able to dictate a ratification deadline in the same fashion," since ratification deadlines are merely another "mode of ratification" that Congress has Article V power to impose.[56]

Third, the *Ferriero* court believed that both the Supreme Court's dicta in *Coleman* and its vacatur as moot of *Freeman* reasonably imply that the Supreme Court considers preamble-based ratification deadlines to be judicially enforceable. The dicta in *Coleman* "suggested that it did not matter where Congress put a ratification deadline."[57] And when the Supreme Court vacated *Freeman* as moot, "the Court must have assumed that the ERA's deadline barred further ratifications" because otherwise, "a live controversy would have remained because additional states ratifications could have still pushed the ERA over the three-fourths threshold."[58]

Fourth, *Ferriero* observed that the ERA's preamble-based deadline was an *operative* portion of the proposal, both in the eyes of the States and Congress itself. There is "little doubt that the states were aware of the ERA's deadline,"[59] which was a "compromise that helped Congress successfully proposed the ERA where previous attempts to pass a proposal had failed."[60] That the deadline appeared in the preamble did not render it inoperative, unlike the preamble of a statute or the Constitution. When Congress specifies a mode of ratification (including a deadline) in a proposed amendment, reasoned Judge Contreras, that mode is inherently operative, having "substantive effect."[61] The preamble of a statute or the Constitution, by contrast, "are statements of general purpose" that "do not lay out discernible rules or standards one would expect to have substantive effect."[62] Congress's selected mode of ratification "draw[s] unmistakable lines for

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[52] *Id*.

[53] *Id.* at 57-58.

[54] *Id.* at 58.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 58; *see also Coleman*, 307 U.S. at 452 (noting that unlike the Eighteenth Amendment at issue in *Dillon*, "[n]o limitation of a time for ratification is provided in the [Child Labor Amendment], either in the proposed amendment or in the resolution of submission.").

[58] *Ferriero*, 525 F. Supp.3d at 59.

[59] *Id*. at 60.

[60] *Id*.

[61] *Id*. at 60-61.

[62] *Id.*

states to follow and for the public to rely on. There is no doubt that Congress intended them to be binding. And few have questioned that they are."[63] Accordingly, the *Ferriero* court refused to "pull the rug out from under Congress's long-accepted practice" of placing ratification deadlines in the preamble.[64]

The *Ferriero* court also concluded that the State-Plaintiffs lacked standing because the Archivist's decision to publish and certify an amendment is "of no legal effect" and thus, "his refusal to publish and certify . . . does not cause [plaintiffs] a concrete injury that could be remedied by ordering him to act."[65] Judge Contreras acknowledged that "the Court could end its analysis after concluding that Plaintiffs lack standing," he nonetheless went on to decide (and confirm) the validity of the ERA's preamble-based deadline, which he expressly characterized "as an *alternative holding* to streamline appellate review."[66] He repeated this "alternative holding" characterization twice.[67]

Ferriero's conclusion that the ERA's preamble-based ratification deadline is valid and judicially enforceable is thus a *holding*, not mere *dicta* as some ERA proponents claim. It is well-settled blackletter law that where a decision rests on alternate grounds, none of them can be characterized as dicta.[68] As the D.C. Circuit stated in *Association of Battery Recyclers v. EPA*,[69] where a court rests its decision on two alternate grounds "and it adopts both, 'the ruling on neither is ober [dictum]. But each is the judgment of the court, and of equal validity with the other.'"[70] Accordingly, neither of Judge Contreras's "alternate holdings"—either that Plaintiffs lacked standing or that the ERA's preamble-based ratification deadline is valid and judicially enforceable—is dicta. Both are clearly holdings.

5. Summary of Existing Precedents

As demonstrated above, courts uniformly have agreed that Congress may establish a judicially-enforceable ratification deadline as part of its Article V power to specify a "Mode of Ratification" when proposing a constitutional amendment. When Congress specifies the mode of ratification, States justifiably rely on Congress's specification, including any ratification deadline, A ratification deadline—whether in the proposed amendment's text or preamble—signals to States that time is of the essence and they had better act within the specified period if they wish to assent. If a later Congress may simply "recognize" or "proclaim" that a State's ratification occurring *after* the deadline is valid, this would allow Congress to alter, for any

[63] *Id.* at 61.

[64] *Id*.

[65] *Id.* at 45.

[66] *Id.* (emphasis added).

[67] *Id*.; *see also id*. at 49.

[68] *See, e.g.*, *United States v. Wallace*, 964 F.3d 386, 390 (5th Cir. 2020); *Boogard v. Nat'l Hockey League*, 891 F.3d 289, 295 (7th Cir. 2018); *Gestamp v. South Carolina*, 769 F.3d 254, 262 n.4 94th Cir. 20140; *Hitchcock v. Fla. Dep't of Corrs*., 745 F.3d 476, 484 n.3 (11th Cir. 2014).

[69] 716 F.3d 667 (D.C. Cir. 2013) (per curiam).

[70] *Id*. at 673 (quoting *United States v. Title Ins. & Trust Co*., 265 U.S. 472, 486 (1924)).

reason, any aspect of the initially-selected "Mode of Ratification," including not only the ratification deadline but also the choice of ratification by State legislatures versus State conventions.

Imagine for example that Congress proposes an amendment, with its preamble specifying a seven-year ratification deadline and ratification by State legislatures. Six years later, after over thirty State legislatures had ratified the proposed amendment, a Congress hostile to the proposed amendment enacts a joint resolution (by simple majoritarian process) purporting to "switch" the mode of ratification to state conventions. The seven-year ratification deadline then expires without reaching the three-fourths threshold. Seventy years later, a group rediscovers the amendment, thinking it useful for a purpose never contemplated when it was originally proposed. The group convinces Congress to pass a joint resolution (by simple majoritarian process) declaring that the amendment may once again be ratified only by State legislatures, not State conventions. Several State legislatures thereafter ratify the amendment, and the total number of ratifications—both via State legislatures and conventions—crosses the three-fourths threshold, seventy-five years after the amendment was initially proposed and sixty-eight years after the expiration of the seven-year ratification deadline. Proponents of the amendment then convince Congress to pass yet another joint resolution, declaring the amendment "ratified" despite the seven-year ratification deadline. Under the logic of current ERA proponents, the amendment is ratified because Congress has said so, and courts would lack power to adjudicate the propriety of any of the significant procedural alterations and irregularities that took place.

Such an outcome would be chaotic, fundamentally unfair, and undermine the rule of law. The rules for *ratification* of pending amendments could swing wildly from Congress-to-Congress, rendering ratification an ever-changing target, even though Congress has no authority under Article V to affect ratification other than *proposing* a "Mode of Ratification" as part of its *proposal* of an amendment. This would be tremendously disrespectful to the States, as States alone have the power under Article V to *ratify* an amendment pursuant to the "Mode of Ratification' contained in the proposal received from Congress. If those pushing the "three-State strategy" and S.J. Res. 4 are correct, Congress can tell States initially that ratification must occur according to one set of rules contained in the proposal, only to be told in another year (or decade or century) that those rules no longer apply. Allowing future Congresses to alter the mode of ratification *after an amendment has been proposed* for ratification by the States is thus the antithesis of due process of law. It would grant Congress the vast new power to be a "perpetual modifier" of *ratification process*, which is arguably the most important legal process of all. And even worse, this vast new power could be wielded by simple majorities, altering ratification process at the whim of every new Congress. This, in turn, would effectively gut Article V, which plainly states that Congress has the power only to "propose" constitutional amendments (including their "Mode of Ratification") by two-thirds supermajorities and once a proposal has been submitted to the States for ratification, Congress's power over amendments has ended.

S.J. Res. 4 thus arrogates to Congress vast power to undermine Article V, due process, and States' ability to trust Congress as a good faith, stable partner in the amendment process. Fortunately, courts have made clear that if enacted, S.J. Res. 4 will amount to nothing more than a senseless political gesture with no legal effect. Congress's power to propose a particular amendment (and its "Mode of Ratification") comes but once; the power to propose amendments

is not an open-ended power to oversee and continually alter the ratification process. Under existing legal precedent, Congress's imposition of a seven-year ratification deadline in the ERA's proposal is judicially enforceable and cannot be altered by a mere majoritarian joint resolution of Congress.

III. Can States Rescind an Earlier Ratification?

Coleman held that "the efficacy of ratifications by state legislatures, in the light of p*revious rejection or withdrawal*, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." *Coleman*, 307 U.S. at 450 (emphasis added). Thus, the Kansas legislature's ratification of the Child Labor Amendment, many years *after* its prior rejection thereof, was a non-justiciable political question. *Coleman* thus addressed the rejection-then-ratification scenario, not the opposite one of ratification-then-rescission. The "last word," so to speak, of the Kansas legislature was one of approval of the Child Labor Amendment, and the *Coleman* Court wisely refused to second-guess Kansas's most recent decision.

By contrast, when a State *first ratifies, then rescinds* its ratification of an amendment, the legal question is materially different, since the question is whether the later rescission should likewise be considered the non-justiciable "last word" of the State. Presumably (though there is no case law on this point), a rescission occurring *after* the requisite three-quarters threshold has been reached would be ineffective, as the amendment would already be "ratified" within the meaning of Article V. Similarly, a rescission occurring *after* a ratification deadline would presumably be ineffective, as it would not comport with the "Mode of Ratification" specified in Congress's proposal.

The more difficult question, however, is ascertaining the effect of a rescission occurring *before* the three-fourths threshold has been met and *before* expiration of any ratification deadline. Unfortunately, there is no clear answer from case precedent but there are some historical precedents that may prove informative.

For example, the Fourteenth Amendment was proposed by Congress in 1866, after the Civil War. The Union States had all ratified the amendment by 1868 but the former Confederate States had not, except Tennessee. It was unclear, however, whether the former Confederate States "counted" in the denominator for calculating the three-fourths threshold. Senator Charles Sumner of Massachusetts believed they did not, introducing a joint resolution proclaiming that twenty-two states had ratified the Fourteenth Amendment and it was a valid part of the Constitution.[71] Shortly thereafter, however, Ohio (a Union State) rescinded its ratification, followed one month later by New Jersey.

Worried that the rescissions by Ohio and New Jersey may be legally effective, Congress passed a law conditioning former Confederate States representation in Congress on their ratification of the

[71] Cong. Globe, 40th Cong., 2d Sess. 453 (1868).

Fourteenth Amendment.[72] Several former Confederate States thereafter took quick action to ratify the Amendment, and Secretary of State William Seward then certified that the Fourteenth Amendment had been ratified, but nonetheless expressing reservation as to whether Ohio and New Jersey should be counted: "It is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual . . . ."[73] Seward cautiously stated that "if the resolutions of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect, notwithstanding the subsequent [rescission] resolutions of the legislature of those States . . . then the aforesaid Amendment has been ratified . . . ."[74] Within a week of Seward's tentative certification, however, Georgia ratified the Fourteenth Amendment and Seward issued another, now unequivocal certification of the Amendment's ratification.[75]

The history of the Fourteenth Amendment's ratification thus provides no clear precedent regarding the legal effect of a State's timely rescission. Secretary of State Seward was equivocal as to whether the rescission of Ohio and New Jersey was effective and shortly thereafter, enough former Confederate States ratified the Fourteenth Amendment to offset these rescissions, removing any doubt about satisfaction of the three-fourths threshold.

The history of the Fifteenth Amendment is similarly equivocal. Although New York timely rescinded its earlier ratification, the Secretary of State certified the Amendment as duly ratified, listing New York among the ratifying States. The certification expressly noted New York's rescission but more importantly, it was *not filed* until enough States had ratified that New York's ratification was no longer necessary. Cong. Globe, 41st Cong., 2d Sess. 2290 (1869). As with the Fourteenth Amendment, the Fifteenth Amendment's history suggests that there was substantial concern that a timely rescission was legally meaningful.

Despite the equivocal history and lack of judicial precedent, however, there are persuasive reasons for acknowledging the validity of a State's rescission, provided it occurs within any congressionally-specified ratification deadline. Ratification of constitutional amendments is, by definition, made intentionally difficult by Article V. Both the two-thirds and three-fourths requirements of Article V are designed to ensure that the Constitution is not amended except by broad societal consensus—in the words of Alexander Hamilton in *Federalist No. 85*, the States must be "united in the desire of a particular amendment" to achieve ratification. To ensure broad societal consensus, a State's timely rescission *should* matter, as it represents that sovereign's "last word" on acceptance of the proposed amendment. Particularly when Congress does *not* specify a ratification deadline, changes that occur after the passage of time—even centuries in the case of the Twenty-Seventh Amendment—may cause a State to change its mind about the desirability of a proposed amendment. If the three-fourths threshold has not been satisfied, a rescission should be considered legally effective, as the period for State decision-making—the ratification

[72] 14 Stat. 428, 429, 39th Cong., 2d Sess. (1867).

[73] 15 Stat. 706-07.

[74] *Id*.

[75] 15 Stat. 708-11 (1868).

period—is still "live." Under this logic, the ERA rescissions by the four (or five)[76] States that occurred *prior* to expiration of the original 1979 deadline would be effective.

It should be noted that as part of its Article V power to *propose* amendments and their mode of ratification, Congress could presumably specify, in addition to a ratification deadline, whether rescissions are possible within the ratification deadline (or perhaps even a narrower window of time). If Congress expressly allowed for rescissions, this could make achieving the requisite three-fourths threshold (and thus, ratification) more difficult. But the same is true of a ratification deadline. Of course Congress need not say anything at all about rescissions; indeed, Congress has never addressed rescissions in any prior amendment proposals. In the *absence* of any congressional specification about rescissions in a proposed amendment, therefore, it is unclear whether courts would consider timely rescissions effective. If Congress wishes to address rescissions, it would be well-advised to consider including a statement about them, in either the text or preamble of any future amendments it proposes. Under the logic of *Coleman*, a rescission rule contained in an amendment proposal would likely be upheld as an exercise of Congress's power to specify a "Mode of Ratification."

[76] The four States are Idaho, Kentucky, Nebraska, and Tennessee. A fifth State, South Dakota, ratified the ERA in 1973 but voted on March 1, 1979—21 days before the original ratification deadline—to "sunset" its ratification, declaring it "null and void." It is unclear whether a "sunset" vote would be considered equivalent to a rescission.