KEEP 'EM SEPARATED: ARTICLE I, ARTICLE V, AND CONGRESS'S LIMITED AND DEFINED ROLE IN THE PROCESS OF AMENDING THE CONSTITUTION

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In August 2011, President Barack Obama signed the Budget Control Act, allowing the United States to continue borrowing money to fulfill its legal obligations. The Act includes a provision that raises the debt ceiling by an additional $1.5 trillion if both houses of Congress pass a Balanced Budget Amendment.

This Note argues that the use of the Article V amendment process to achieve a legislative result is constitutionally suspect, and that legislation enabling the achievement of an Article I result via the Article V process is similarly problematic. More broadly, the Note argues that the text, history, and doctrine surrounding Article V indicate that it was meant to be wholly separate from Article I, and that permitting the conflation of Article I and Article V would be harmful to our constitutional design.

This Note analyzes two failed attempts to amend the Constitution, positing that failure would have been less likely had Congress been free to use its Article I power to influence the Article V amendment process. It discusses the ratification of the Fourteenth Amendment as an exception that proves the rule, arguing that the uncertain status of the Southern states in the wake of the Civil War justified otherwise questionable congressional behavior. This Note concludes that the centuries-old practice of separating Article I from Article V ought to be preserved.

INTRODUCTION

On August 2, 2011, President Barack Obama signed the Budget Control Act of 2011 (BCA),[1] resolving a long-running impasse over the United States' ability to borrow money and, according to some commentators, averting a worldwide financial meltdown.[2] The BCA allowed the United States to borrow an additional $400 billion immediately and provided for a number of other ways to increase the country's debt limit,

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1. Pub. L. No. 112-25, 125 Stat. 240 (2011) (to be codified in scattered sections of 2 U.S.C.).

2. See, e.g., Lori Montgomery, President Signs Debt-Limit Bill into Law, Wash. Post, Aug. 2, 2011, http://www.washingtonpost.com/politics/senate-passes-debt-limit-bill/2011/08/02/gIQAIp2kpI_story.html (on file with the *Columbia Law Review*) ("The Senate on Tuesday overwhelmingly approved a plan to raise the federal debt limit and cut government spending, ending a bitter partisan stalemate that had threatened to plunge the nation into default and destabilize the world economy.").

including most prominently the creation of a bipartisan "Supercommittee" tasked with developing an agreement to reduce the deficit that would be voted on immediately by both houses of Congress.[3] The Supercommittee's ultimate failure to produce recommendations by its November 23, 2011 deadline—coupled with subsequent legislative failures to provide a fix—produced, through a mechanism known as a trigger,[4] steep cuts to defense, Medicare, and discretionary spending, beginning in 2013.[5] More important for the purposes of this Note, the BCA also provided that the debt ceiling could be raised by an additional $1.5 trillion upon passage, by both houses of Congress, of a joint resolution sending a Balanced Budget Amendment to the states.[6]

By conditioning a legislative appropriation on the result of a congressional vote on a constitutional amendment, the Budget Control Act violates longstanding but little-discussed norms regarding the separation of Congress's legislative power under Article I of the Constitution from its amendment power under Article V.[7] Whether by accident or design, Congress has almost[8] always behaved as though its power to amend the Constitution is separate from its power to pass ordinary legislation. The Budget Control Act upends these longstanding norms, raising the possibility—however remote—that a vote in Congress to send a Balanced Budget Amendment to the states will involve not a decision about the wisdom of the proposed amendment[9] but instead a virtual Sophie's

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3. Id.

4. Legislative triggers allow Congress to bind itself by conditioning a future event on the passage of legislation in the interim. See Trigger Mechanism of the Gramm-Rudman-Hollings Act: Hearing Before the H. Comm. on Gov't Operations, 99th Cong. 10 (1986) (statement of Hon. William H. Gray III) (describing legislative triggers and their purpose in context of Gramm-Rudman-Hollings Act).

5. John Nolen, A Summary of the Debt Ceiling Compromise, CBS News, Aug. 1, 2011, http://www.cbsnews.com/8301-503544_162-20086655-503544.html (on file with the *Columbia Law Review*)*;* see also Dylan Matthews, The Sequester: Absolutely Everything You Could Possibly Need to Know, in One FAQ, Wash. Post Wonkblog (Mar. 1, 2013, 3:00 PM), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/20/the-sequester-absolutely-everything-you-could-possibly-need-to-know-in-one-faq/ (on file with the *Columbia Law Review*) (describing automatic cuts created by sequester).

6. Budget Control Act § 3101A(a)(2)(A)(ii). That provision was itself a compromise from the "Cut, Cap, and Balance" provision promoted by House Republicans, which would have raised the debt limit for a short time in exchange for a requirement that both houses of Congress pass a Balanced Budget Amendment within months. H.R. 2560, 112th Cong. (2011); see also Editorial, It's Up to the Senate, N.Y. Times, July 30, 2011, at A22, available at http://www.nytimes.com/2011/07/30/opinion/its-up-to-the-senate.html (on file with the *Columbia Law Review*) (expressing disagreement with "Cut, Cap, and Balance"). It is worth noting that, despite numerous *policy* objections to "Cut, Cap, and Balance," it does not appear that a constitutional objection to the plan was ever raised.

7. See infra Part I.A (describing amendment power).

8. See infra Part II.C (discussing Fourteenth Amendment).

9. This Note takes no position on the wisdom of the Balanced Budget Amendment, though many commentators argue that it would be a bad idea for a number of reasons. See, e.g., John Cassidy, A Bad Idea Returns: The Balanced-Budget Amendment, New

Choice[10] between radical constitutional change and catastrophic fiscal ruin. That choice would be the result not of circumstance or crisis, but rather of a deliberate—and constitutionally suspect—decision by the legislature.

This Note argues that the Budget Control Act as it was passed unconstitutionally conflated Congress's legislative and amendment powers under Articles I and V of the Constitution. Congress's power to pass legislation is not the same—structurally, textually, historically, or practically—as its power to propose constitutional amendments for ratification by three-quarters of the states. The use of legislation to influence the Article V process threatens to eliminate essential differences between Article I and Article V in a way that could lead to profligate Congresses producing a flurry of amendments and undermining the truth of Chief Justice John Marshall's famous words: "[A Constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[11] This Note argues that Congress's amendment power, by virtue of being in a separate Article, operating without executive involvement, and requiring supermajorities in both chambers, should be considered not an extension of the legislative power but a different power that happens to be exercised by the same deliberative body.

This Note proceeds in three parts. Part I describes the text, history, and doctrine surrounding Articles I and V, arguing that the Constitution

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Yorker Rational Irrationality (Feb. 11, 2013), http://www.newyorker.com/online/blogs/johncassidy/2013/02/an-old-bad-idea-from-the-gop-a-balanced-budget-amendment.html (on file with the *Columbia Law Review*) ("While all balanced budget rules are suspect, some are less objectionable than others. . . . [T]his is a particularly bad one."); Doug Kendall & Dahlia Lithwick, Off Balance: The Balanced Budget Amendment Would Make the Framers Weep, Slate (July 15, 2011, 5:22 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/07/off_balance.single.html (on file with the *Columbia Law Review*) ("The Balanced Budget Amendment represents a betrayal not only of our future but of our past as well.").

10. See William Styron, Sophie's Choice (1979) (narrating choice between two impossible-to-contemplate outcomes); see also Sophie's Choice Definition no. 1, Urb. Dictionary, http://www.urbandictionary.com/define.php?term=sophie's%20choice (last visited Apr. 23, 2013) (on file with the *Columbia Law Review*) (defining Sophie's Choice as "an impossibly difficult choice, especially when forced onto someone"). But see id. no. 3 ("[Sophie's Choice] is NOT a difficult choice. It's a choice between two options that will result[] in the destruction of the option not chosen.").

11. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). This is not to suggest that either the Balanced Budget Amendment or the other amendments discussed in this Note are "minor ingredients." Indeed, both the Balanced Budget Amendment and the Equal Rights Amendment probably would have had substantial effects, though the same would probably not be said of the Flag-Burning Amendment. The point is that the Article V power, standing alone, makes the Constitution difficult to amend, but an Article V power that permitted legislative bootstrapping would make the Constitution substantially easier to amend. An easier amendment process would lead to more amendments, some of which might include "minor ingredients."

grants Congress broad legislative powers in Article I and a narrower, non-legislative power in Article V. Part II discusses two recent unsuccessful attempts by Congress to add an Equal Rights Amendment and a Flag-Burning Amendment to the Constitution. These near misses offer a model of a well-functioning Article V that requires strong, sustained, and diverse supermajorities to coalesce behind an issue before an amendment can be added to the Constitution. Part II also discusses the Fourteenth Amendment as an exception that proves the rule, arguing that the congressional machinations involved in its passage were the unique result of the uncertain status of the former Confederacy during the early years of Reconstruction. Part II proceeds to compare this model of a functional Article V to the potential dysfunction unleashed by the Budget Control Act and any progeny that follow its model of mixing Article I and Article V. Part III discusses possible legislative, executive, and judicial remedies in the context of standing issues making a court challenge difficult.

I. THE TEXT, HISTORY, AND DOCTRINE OF ARTICLE V AND ARTICLE I

Though typical understandings hold that Article I vests[12] power in Congress, the Constitution in fact grants power to Congress throughout the document, including in several places outside of Article I.[13] The two most important grants of power to Congress occur in Article I, which says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[14] and Article V, which reads, "The Congress, when-

12. Article I reads, "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Const. art. I, § 1. It is notable that only the Article I Vesting Clause includes the "herein" language; the vesting clauses of Articles II and III do not. See Michael A. Froomkin, The Imperial Presidency's New Vestments, 88 Nw. U. L. Rev. 1346, 1350–51 (discussing vesting clauses).

13. See, e.g., U.S. Const. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors . . . ."); id. § 2, cl. 2 ("Congress may by Law vest the Appointment of such inferior Officers . . . ."); id. art. III, § 1 (vesting power "in such inferior Courts as the Congress may from time to time ordain and establish," thus clearly referring to Congress's Article I power to create lower federal courts); id. § 2, cl. 3 ("Trial[s] shall be at such Place or Places as the Congress may by Law have directed."); id. § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason . . . ."); id. art. IV, § 1 ("[T]he Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); id. § 3 ("New States may be admitted by the Congress into this Union . . . . The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). Note, however, that many of these mentions either explicitly refer to a power within Article I or use language such as "Congress may . . . by law." Compare the above language with that of Article V, which specifically sets forth a supermajority requirement that does not cohere with Congress's role in passing laws. Id. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . .").

14. Id. art. I, § 1.

ever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution."[15] The Constitution separates these grants of power from each other structurally and requires simple majorities (plus presidential acquiescence) to invoke the legislative power and supermajorities (sans executive involvement) to invoke the amendment power. In short, Article I and Article V describe two different powers that happen to be exercised by the same body.[16] In order to understand the differences between Congress's powers under each Article, it is necessary first to describe the contours of each font of congressional authority. This Part first discusses the Article V power as the Framers, courts, and academics have understood it throughout history. It then proceeds to a similar discussion of Article I and Congress's authority to legislate in furtherance of its enumerated powers and the Necessary and Proper Clause,[17] the power of each house of Congress to "determine the Rules of its Proceedings,"[18] and the congressional role in the impeachment process.[19]

A. *The Article V Amendment Power: Text, History, Doctrine, and Commentary*

Unlike a number of other constitutional provisions, Article V has been the subject of little Supreme Court explication. A sufficient understanding of its provisions therefore requires a discussion of its text and practical history, the few authoritative Supreme Court opinions discussing it, and the academic commentary surrounding it.

1. *Text and Practical History.* — Article V reads, in full:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article;

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15. Id. art. V.

16. Cf. Idaho v. Freeman, 529 F. Supp. 1107, 1154 (D. Idaho 1981) ("Congress, when acting as an amending body under Article V, may, by two-thirds vote of both Houses, propose an amendment and the mode of ratification."), vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982).

17. U.S. Const. art. I, § 8, cl. 18 (empowering Congress "[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").

18. Id. § 5, cl. 2.

19. Id. § 3, cl. 6.

> and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[20]

Article V does three things. First, it describes two ways amendments may be proposed to the states: by Congress or by a national amendment-proposing convention. Second, it describes how states ratify amendments; once a duly proposed amendment has been ratified by three-quarters of the states, it becomes part of the Constitution "to all Intents and Purposes."[21] Finally, it exempts two provisions of the Constitution from the amendment process, prohibiting Congress from banning the importation of slaves before the year 1808 or altering a state's representation in the Senate without the state's consent.[22]

Since the founding, Congress and the states have acted together twenty-seven times to amend the Constitution, first by passing the Bill of Rights in 1789[23] and most recently by passing the Twenty-Seventh Amendment in 1992.[24] Article V provides for two ways to send amendments to the states for ratification[25]: via a vote by two-thirds of each house to propose an amendment or upon application by two-thirds of state legislatures to call a national amendment-proposing convention[26]

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20. Id. art. V.

21. Id.

22. Id.

23. The history of the Bill of Rights helps reveal some of the nuts and bolts of Article V. The Bill of Rights began as a proposal for fourteen amendments to the Constitution introduced by James Madison in the House of Representatives. Only twelve of those amendments achieved the requisite two-thirds vote in both houses of Congress, and of those only the first ten were ratified by three-quarters of the states. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8–9, 22 (1998) [hereinafter Amar, Bill of Rights] (describing history of proposal and ratification of Bill of Rights). The Twenty-Seventh Amendment was actually among the original Amendments proposed by Congress in 1789, but it was not ratified until 203 years later. See generally Akhil Reed Amar, America's Constitution: A Biography 453–58 (2005) [hereinafter Amar, America's Constitution] (describing Twenty-Seventh Amendment).

24. The Twenty-Seventh Amendment reads, "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. amend. XXVII. See generally Richard B. Bernstein, The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment, 61 Fordham L. Rev. 497 (1992) (examining history of Twenty-Seventh Amendment).

25. An amendment is ratified when it has been duly proposed by Congress and approved by three-quarters of the states, acting either through their legislatures or in special conventions. U.S. Const. art. V (describing how amendments become "valid to all Intents and Purposes").

26. The convention method of proposing amendments has never been invoked in the nation's history, and, despite recent academic commentary on the issue, it is unlikely to emerge as a possibility. The drafters of the Constitution appear to have added the convention provision in response to concerns that Congress would have the exclusive power to control the amendment of the Constitution—notice the mandatory language in Article V that "on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments." Id. States worry about the convention method because of the possibility of a "runaway convention" leading to

empowered to draft amendments and propose them directly to the states. Article V allows Congress to choose between two ways for the states to vote on an amendment, either in their legislatures or via special conventions. The paucity[27] of amendments in the history of the United States indicates to some extent the fulfillment of the Framers' intent that amending the Constitution be a difficult task.[28] The "traditional" track

amendments that the state itself not only did not seek but also in many cases actively opposes. See Kris W. Kobach, Note, Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments, 103 Yale L.J. 1971, 2001 (1994) (discussing "pervasive fears of 'runaway' convention"). There is evidence that Congress passed the Seventeenth Amendment in order to avert the possibility of a national convention. See id. (describing attempts by proponents of direct election of Senators to call national convention). A few commentators have suggested solutions to the possible problem of the "runaway convention," but despite occasional calls from the intelligentsia and academics, an amendment-proposing convention seems unlikely. See generally Walter E. Dellinger, The Recurring Question of the "Limited" Constitutional Convention, 88 Yale L.J. 1623 (1979) (suggesting state calls for "limited" constitutional conventions are invalid under Article V). For more discussion, see Randy E. Barnett, Op-Ed., The Case for a Federalism Amendment: How the Tea Partiers Can Make Washington Pay Attention, Wall St. J., Apr. 23, 2009, at A17 (indicating support for national convention to "restore a healthy balance between federal and state power"). For discussions of ratification conventions, see generally Thomas H. Neale, Cong. Research Serv., R42589, The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress 3–17 (2012), available at http://www.fas.org/sgp/crs/misc/R42589.pdf (on file with the *Columbia Law Review*) (describing Article V convention method); Michael B. Rappaport, Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them, 96 Va. L. Rev. 1509, 1514 (2010) (proposing allowing state legislatures to draft amendments).

27. Since the passage of the Bill of Rights, the Constitution has been amended seventeen times in 224 years—a pace of roughly one amendment per thirteen years.

28. In The Federalist Papers, Alexander Hamilton wrote,

> The zeal for attempts to amend, prior to the establishment of the Constitution, must abate in every man who is ready to accede to the truth of the following observations of a writer equally solid and ingenious: "To balance a large state or society . . . , whether monarchial or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments."

The Federalist No. 85, at 526–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases added by Hamilton) (quoting David Hume, Of the Rise and Progress of the Arts and Sciences, reprinted in Essays and Treatises on Several Subjects 112, 125 (London, A. Millar et al., new ed. 1777)); see also David R. Dow, When Words Mean What We Believe They Say: The Case of Article V, 76 Iowa L. Rev. 1, 41–44 (1990) ("Thus it seems obvious from the discussion of the amendment process in the Federalist Papers, if not from the constitutional text itself, that a desideratum of the amendment process is that it proceed slowly and deliberately, and that it insist upon widespread geographic support."). *The Federalist Papers*, particularly No. 43 and No. 85, indicate that the Framers wanted the Constitution to be difficult to amend. See The Federalist No. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961) ("It guards equally against that extreme facility, which would render the Constitution too mutable . . . ."); The Federalist No. 85, supra, at 526–27 (Alexander Hamilton).

toward an Article V amendment[29] requires the participation of both national and state legislatures, at least in part as a method of preserving federalism through the constitutional amendment process.[30] Insofar as the Framers contemplated the issue and raised it via *The Federalist Papers* during the ratification debates, they emphasized that the requirements of Article V were intended to assure broad deliberation and support.[31]

2. *Supreme Court Explication of Article V.* — The Supreme Court's sporadic explications of Article V generally support and further the expressed intent of the Framers. In *Hollingsworth v. Virginia*, the Supreme Court addressed a challenge to the Eleventh Amendment, based in part on a claim that it was invalid because it had not been submitted to the President for his signature.[32] Justice Chase, in a footnote, wrote that "[The President] has nothing to do with the proposition, or adoption, of amendments to the Constitution" and rejected plaintiffs' argument that the presentment requirements of Article I should be read into Article V.[33] This case shows the Supreme Court's initial understanding of Article I and Article V as separate and distinct—an understanding that emerges, explicitly or implicitly, in the rest of the Court's admittedly sparse Article V jurisprudence.

The Supreme Court did not discuss Article V at all during the nineteenth century. This is surprising, given that the 1800s saw the ratification of perhaps the most consequential amendment in the nation's history: the Fourteenth Amendment.[34] That no judge has ever issued an

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29. This Note uses the term "traditional" to refer to the proposal of amendments by a two-thirds vote in Congress and ratification by three-quarters of state legislatures. There has never been a national amendment-proposing convention, though some scholars suggest that Congress sent the Seventeenth Amendment to the States in order to forestall a national convention that twenty-seven of the then-requisite thirty-one states had called for. See generally Ralph A. Rossum, The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment, 36 San Diego L. Rev. 671 (discussing ratification history of Seventeenth Amendment). And only one amendment—the Twenty-First Amendment ending Prohibition—has been ratified not by state legislatures but by state conventions. See generally Willard H. Pedrick & Richard C. Dahl, Let the People Vote! Ratification of Constitutional Amendments by Convention, 30 Ariz. L. Rev. 243 (1988) (describing ratification of Twenty-First Amendment).

30. The Federalist No. 85, supra note 28 (Alexander Hamilton). *The Federalist Papers* describe the amendment process as "neither wholly *national* nor wholly *federal*," The Federalist No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961), and add, "[E]very amendment to the Constitution, if once established, would be a single proposition, and might be brought forth singly. There would then be no necessity for management or compromise in relation to any other point—no giving nor taking." The Federalist No. 85, supra note 28, at 525 (Alexander Hamilton).

31. See generally Amar, America's Constitution, supra note 23, at 285–99 (summarizing historical accounts of Article V).

32. 3 U.S. (3 Dall.) 378, 378 (1798).

33. Id. at 381 & n.* (opinion of Chase, J.).

34. Arguments about the validity of the Fourteenth Amendment persist to this day and have been addressed in a number of ways. See infra Part II.C (discussing Fourteenth Amendment).

opinion assessing the validity of the Fourteenth Amendment indicates a truth that subsequent courts made increasingly clear: The judiciary's role in policing Article V is limited, at best.[35] The Court's actions in the twentieth century confirm this analysis. For example, in *Coleman v. Miller*, the Court made a number of holdings indicating a limited role for the judiciary in the Article V process.[36] *Coleman* involved a challenge to Kansas's initial rejection in 1925 and its subsequent ratification in 1937 of the Child Labor Amendment.[37] Unlike a number of other amendments proposed during the Progressive Era, the Child Labor Amendment as proposed did not include a time limit for ratification.[38] The Kansas legislature therefore considered itself entitled to reconsider the question well after Congress had sent the amendment to the states. The Supreme Court in *Coleman* held that questions arising under Article V are federal questions within the jurisdiction of the federal courts because "Article V . . . alone conferred the power to amend and determined the manner in which that power could be exercised."[39] The Court further ruled, citing its earlier decision in *Dillon v. Gloss*,[40] that Congress had the power to include as part of an amendment a time limit for its ratification, but declined to place a judicial limit on a "reasonable time for ratification."[41] Finally, the Court ruled that the determination of whether a state had duly ratified an amendment was a nonjusticiable political question because "the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications."[42] Four Justices would have ruled that the petitioners had no standing to challenge the amendment.[43] Two dissenters would have held that the

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35. For a discussion of the role of justiciability doctrines in the Article V context, see Erwin Chemerinsky, Federal Jurisdiction 167–69 (5th ed. 2007) [hereinafter Chemerinsky, Federal Jurisdiction] (discussing Article V standing); see also infra Part III.C (discussing difficulty of judicial challenge to constitutional amendment).

36. 307 U.S. 433, 437–38 (1939).

37. Id. at 435–36. The Child Labor Amendment read,

> Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.
>
> Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

Id. at 435 n.1 (quoting H.R.J. Res. 184, 68th Cong. (1924)).

38. Id. at 452. Such time limits have become relatively common, most notably in the Equal Rights Amendment, discussed in Part II.B, infra.

39. 307 U.S. at 438.

40. 256 U.S. 368 (1921).

41. 307 U.S. at 452.

42. Id. at 456.

43. Id. at 456 (Black, J., concurring); id. at 460 (opinion of Frankfurter, J.).

thirteen-year period between proposal and ratification was unreasonable.[44]

Hawke v. Smith similarly limited the judicial role in the amendment process.[45] It held that a provision of the Ohio Constitution reserving the ratification of amendments to the Federal Constitution to a referendum of Ohio voters violated Article V.[46] The case predates *Coleman*, but its reasoning is not dissimilar. The Court ruled that Article V "is a grant of authority by the people to Congress," and Congress has the sole authority to choose between the state legislature method and the state convention method of ratification by the states.[47] Because "[t]he act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented," Congress alone has the power to choose between the options established by Article V for how amendments are ratified.[48]

Coleman and *Hawke* helped establish the Supreme Court's reluctance to become involved in Article V issues. *Coleman* indicates that Congress has the power to restrict the ratification of amendments in ways that are not directly mentioned in the text; Article V itself does not textually permit Congress to set a time limit for ratification.[49] *Coleman* further vested in Congress the power—unreviewable by the courts—to determine when a state has properly ratified an amendment.[50] Since *Coleman*, the Supreme Court has been notably silent on Article V issues. Perhaps the only holding placed beyond doubt by the Court's Article V jurisprudence is the clear statement from *Hollingsworth* that the Article V power is not the same as the Article I power.[51]

3. *Other Sources of Article V Interpretation.* — Beyond the narrow takeaways available from Supreme Court doctrine, academics and a few state courts have filled the void left by the Supreme Court, offering a variety of insights about the nature of Article V. The academic commentary on Article V generally seeks to answer a number of questions that are only tangentially related to this Note. First, and most closely relevant here, is

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44. Id. at 470 (Butler, J., dissenting).

45. 253 U.S. 221 (1920).

46. Id. at 231.

47. Id. at 227.

48. Id. at 230.

49. Since the Eighteenth Amendment, it has become quite common for Congress to place a time limit on the ratification of amendments. The Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments included seven-year time limits for ratification, as did several failed amendments, including the Equal Rights Amendment, discussed in Part II.B, infra, and the District of Columbia Voting Rights Amendment, passed by Congress in 1978. H.R.J. Res. 554, 95th Cong. (1978); 124 Cong. Rec. 27,260 (1978) (Senate passage); 124 Cong. Rec. 5272–73 (1978) (House passage).

50. Coleman v. Miller, 307 U.S. 433, 450 (1939).

51. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (opinion of Chase, J.).

the question of whether Article V permits coercion of federal legislators by state voters. Second, a strand of literature has emerged debating whether Article V is the sole and exclusive method of amending the Constitution.

Article V has emerged as a focal point in debates about whether the voters of a state may "coerce" their federal representatives to pass constitutional amendments.[52] The Supreme Court's 5-4 decision in *U.S. Term Limits, Inc. v. Thornton* held state-imposed term limits on federal officials unconstitutional.[53] After that decision, pro-term-limits groups in a number of states attempted to circumvent the decision via so-called "Scarlet Letter" referenda.[54] These state referenda—passed through the ordinary process of popular votes on state constitutional amendments[55]—called upon senators and representatives elected by such states to push for a federal term limits amendment to the U.S. Constitution.[56] Any legislator who failed to follow the constituent instructions would have his or her name appear on subsequent ballots alongside a notation that read "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS," the eponymous "Scarlet Letter."[57] State courts struck down as violative of Article V nearly all of these provisions,[58] though the Idaho provision survived an Article V challenge in state court.[59] The Arkansas Supreme Court, striking down a term limits amendment in *Donovan v. Priest*, reasoned that "the proposed Amendment . . . is clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures—not from the people."[60]

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52. See Simpson v. Cenarrusa, 944 P.2d 1372, 1376–77 (Idaho 1997) (describing coercion and finding no Article V violation in push for federal term limits amendment).

53. 514 U.S. 779, 837–38 (1995); see also id. at 844–45 (1995) (Kennedy, J., concurring) ("[I]f we are to respect the republican origins of the Nation and preserve its federal character . . . there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.").

54. See generally Kris W. Kobach, May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution, 33 U.C. Davis L. Rev. 1, 3–9 (1999) [hereinafter Kobach, May "We the People" Speak?] (discussing push for term limits).

55. Unlike the federal Constitution, most state constitutions are amended by simple popular votes on referenda. See generally Robert F. Williams, State Constitutional Law Processes, 24 Wm. & Mary L. Rev. 169, 224–27 (1983) (describing state constitutional amendment processes).

56. Kobach, May "We the People" Speak?, supra note 54, at 3–4.

57. Id.

58. Id. at 7–9 (listing and describing state court cases).

59. See Simpson v. Cenarrusa, 944 P.2d 1372, 1376–77 (Idaho 1997) (finding no Article V violation for coercion).

60. 931 S.W.2d 119, 128 (Ark. 1996).

The term limits controversy appears to have abated without seeing its day in federal court,[61] but the notion of coercion in the context of Article V nonetheless remains relevant to this Note. Both Kris Kobach and Vikram Amar have argued that state courts erred in using the coercion[62] frame to strike down constituent instructions.[63] However, only the Idaho Supreme Court has rejected a coercion challenge under Article V, and it reasoned that the ballot measure was noncoercive.[64] The Idaho Supreme Court therefore never reached the question of whether coercion of federal officials would violate Article V. Much like the U.S. Supreme Court's early-twentieth-century jurisprudence on Article V,[65] the term limits controversy illustrates a judicial tendency to hold that Article V is the province of Congress[66]—not the federal courts, and not citizens acting through state referenda.

The question of whether Article V provides the exclusive means of amending the Constitution has emerged as a hotly contested issue in modern scholarship. Broadly speaking, one side argues that Article V is exclusive, and another side suggests that it is not and that "We the People" retain the power to amend the Constitution outside of Article V.[67] Both sides of this debate acknowledge that Article V is a legitimate

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61. The Supreme Court denied certiorari in *Donovan* in 1997, Arkansas v. Donovan, 519 U.S. 1149 (1997).

62. The anticoercion principle emerges principally from the Supreme Court's decisions in New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997), both discussed in Part I.B, infra. Professor Vikram Amar suggests that these cases stand for a principle of "deliberative autonomy enjoyed by state institutions, especially state legislatures, when they carry out their duties." Vikram David Amar, The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?, 41 Wm. & Mary L. Rev. 1037, 1040 (2000) [hereinafter Amar, The People Made Me Do It].

63. Amar, The People Made Me Do It, supra note 62, at 1041; Kobach, May "We the People" Speak?, supra note 54, at 88–89.

64. *Simpson*, 944 P.2d at 1376–77 ("Without the ballot legends, Proposition 4 is . . . a non-binding, advisory initiative. Proposition 4's instruction does not require the voters to determine whether to ratify the proposed amendment. . . . Members of congress and legislators are not compelled to support the proposed amendment; they are free to act as they wish.").

65. See supra notes 36–50 and accompanying text (describing *Hawke* and *Coleman*).

66. In the case of an Article V convention, the amendment process would not be the province of Congress. The legislature is required to call a national convention upon receiving a sufficient number of state petitions. As discussed earlier, however, such a convention is highly unlikely. See supra note 26.

67. This has been the subject of extensive debate. Akhil Reed Amar is the leading proponent of the notion that the Constitution does not provide the exclusive method by which it may be amended; he argues that the ratification history of the Constitution itself (the Constitutional Convention was tasked with modifying the Articles of Confederation, and instead created a new document) indicates that Article V is nonexclusive and that "We the People" retain sovereignty. See Amar, America's Constitution, supra note 23, at 285–99 (discussing ratification history); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1044 (1988) [hereinafter Amar,

method of amending the Constitution. Those who argue that Article V is nonexclusive vest the residual amendment power not in the legislature but in "We the People."[68] It is therefore unnecessary for this Note to address this debate, because both sides support its fundamental premise that Article V offers a sufficient method to amend the Constitution, and Article I does not.

The above discussion of Article V leaves, perhaps, more questions than it answers. It is fairly well established that the power to amend the Constitution is a federal power vested in Congress, and that the power of the states to initiate constitutional amendments consists of the ability to call for a national convention and not the ability to coerce representatives to propose certain amendments. Moreover, Congress *does* have some power over the amendment process that is not explicitly granted in Article V, specifically the power to impose time limits for ratification at the time it proposes an amendment. Beyond this, however, the contours of its extratextual power are unclear. In order to further understand the contours of the Article V power, it is useful to compare it to Congress's Article I power, which has been more fully explicated by the judiciary, by academics, and by Congress itself.

B. *The Article I Power*

In contrast to the scant doctrine and minimal practice informing our understanding of Article V, voluminous practical history, judicial doctrine, and academic commentary describe congressional power under Article I. A full discussion of congressional power under Article I is well beyond the scope of this Note, but it is necessary to describe in brief the breadth and flexibility of Congress's power to legislate—as well as a few other Article I powers that are nonlegislative—in order to distinguish it

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Philadelphia Revisited] (arguing for amendment process outside of Article V); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 458–62 (1994) (same). Several scholars, including Henry Monaghan, have argued that the original intent reveals that the dual methods of amendment were meant to be exclusive. See Dow, supra note 28, at 59–61 (arguing, contra Amar, that Article V reflects dual sovereignty structure of Constitution, that it was meant to be exclusive method of amendment, and should be considered as such); Henry Paul Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 Colum. L. Rev. 121, 127–30 (1996) (same). In a largely separate project, Professor Bruce Ackerman has argued that quite a bit of constitutional amendment takes place outside of Article V, via what he has termed "constitutional moments." See Bruce Ackerman, We the People: Foundations 47–50, 307 (1991) (describing constitutional development outside of Article V); Bruce Ackerman, We the People: Transformations 406–20 (1998) [hereinafter, Ackerman, Transformations] (describing constitutional moments). For an overview of this debate, see Ackerman, Transformations, supra, at 172–85 (arguing Fourteenth Amendment is not legitimate Article V amendment); Amar, Bill of Rights, supra note 23, at 298–301 (responding to Ackerman); see also infra Part II.C (describing ratification of Fourteenth Amendment).

68. See Amar, Philadelphia Revisited, supra note 67, at 1072–75 (arguing for Constitution to be amended by popular sovereignty).

from Congress's narrow and defined role in amending the Constitution under Article V.

1. *Congress's Power to Legislate: A Core Competency*. — The most important section of Article I for congressional power is Section 8, which enumerates seventeen areas over which Congress has plenary power and grants to Congress the power to "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."[69] The Committee of Detail, the committee tasked with transforming the Constitutional Convention's agreements into a written constitution, was instructed to ensure that Congress would have broad authority to legislate over issues of national concern.[70] That power was tested by Maryland's challenge to the Bank of the United States in *McCulloch v. Maryland*, and the Supreme Court, speaking through Chief Justice John Marshall, set forth a resounding defense of federal legislative power.[71] During the New Deal, Congress passed a number of ambitious federal programs using its power under the Commerce and Necessary and Proper Clauses.[72] Early in President Roosevelt's tenure, the Supreme Court voided a number of these pieces of legislation.[73] Beginning in 1936 and 1937, however, the Supreme Court reversed course and began blessing expansive exercises of federal power.[74] By 1942, with *Wickard v. Filburn*, the Supreme Court's willingness to affirm congressional exercise of the commerce power and the necessary and proper power extended to

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69. U.S. Const. art. I, § 8, cl. 18.

70. See David O. Stewart, The Summer of 1787: The Men Who Created the Constitution 168–72 (2007) (discussing Committee of Detail).

71. 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* laid down a famous test of Congress's Commerce Clause and Necessary and Proper Powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." Id. at 421; see also Amar, America's Constitution, supra note 23, at 110 (discussing *McCulloch* and its fame).

72. Representative examples include the Works Progress Administration (WPA), the Tennessee Valley Authority (TVA), the National Recovery Act (NRA), the National Industrial Recovery Act (NIRA), the Public Works Administration (PWA), and the Agricultural Adjustment Act (AAA).

73. See Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936) (striking down Bituminous Coal Conservation Act), abrogated in part by Currin v. Wallace, 306 U.S. 1 (1939); United States v. Butler, 297 U.S. 1, 77–78 (1936) (striking down AAA), abrogated in part by Oklahoma v. U.S. Civil Serv. Comm'n, 330 U.S. 127 (1947); Schechter Poultry Corp. v. United States, 295 U.S. 495, 554–55 (1935) (striking down NIRA on nondelegation grounds), overruled by Nat'l Broad Co. v. United States, 319 U.S. 190 (1943).

74. The so-called "switch in time that saved nine" is the topic of some historical debate not relevant to this Note. See generally William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (1995) (discussing history of Supreme Court during 1930s); Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (2010) (same).

a ruling that Congress could permissibly regulate a farmer's growth of wheat for use on his own farm because of the possibility that such acts could have a "substantial effect" on interstate commerce in the aggregate.[75] *Wickard* is widely considered the high-water mark of federal legislative power under the Commerce Clause.[76]

Two decisions by the Rehnquist Court near the end of the twentieth century appeared to be harbingers of a more limited view of federal power under the Commerce Clause and the Necessary and Proper Clause.[77] The Court in *United States v. Lopez* struck down the Gun-Free School Zones Act, finding that the statute failed to meaningfully regulate interstate commerce and applying a structural argument that Congress would have unlimited power under Article I if the legislation were allowed to stand.[78] In *Morrison v. United States*, the Court cited *Lopez* and applied similar reasoning to strike down a portion of the Violence Against Women Act.[79] These cases failed to herald a new era of limited federal power[80] for two reasons. First, *Gonzales v. Raich* held that the Constitution permits the federal government to enforce a prohibition on growing marijuana for personal use even in a state (California) that had legalized medicinal marijuana.[81] Second, Congress repassed the statute at issue in *Lopez* to include (as the struck-down statute did not) a specific jurisdictional "hook" requiring that the firearm at issue have traveled in interstate commerce.[82] As a practical matter, the "hook" is trivial—it is nearly impossible to find a firearm in the United States that has not

75. 317 U.S. 111, 128–29 (1942).

76. See, e.g., Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 34–35 (2010) (discussing *Wickard* in context of Commerce Clause jurisprudence).

77. See generally Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1 (2004) (reviewing scholarship on Rehnquist Court federalism jurisprudence).

78. 514 U.S. 549, 567 (1995); see also Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752 (1996) (discussing structural argument in *Lopez*).

79. 529 U.S. 598, 626–27 (2000).

80. Overall, scholars seem to have concluded that the Rehnquist Court's "federalism revolution," see Erwin Chemerinsky, The Federal Revolution, 31 N.M. L. Rev. 7, 30 (2001) (describing *Lopez* and *Morrison* as hailing possible "federalism revolution"), was mostly smoke and little fire, see Simon Lazarus, Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?, 56 DePaul L. Rev. 1 (2006) (arguing federalism revolution ultimately had minimal impact). But see Calvin Massey, Federalism and the Rehnquist Court, 53 Hastings L.J. 431 (2001) (arguing federalism revolution substantially changed Court's jurisprudence). Scholars who suggest that the Rehnquist Court's federalism revolution was successful have a stronger case after National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566, 2591, 2600 (2012) (upholding Affordable Care Act as permissible exercise of power to tax and spend but finding Act exceeded Commerce Clause power).

81. 545 U.S. 1, 25–26 (2005).

82. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369 to -370 (1996) (codified at 18 U.S.C. § 922 (2006)).

traveled in interstate commerce.[83] As a constitutional matter, however, the addition of the "hook" apparently relieves doubts about the constitutionality of federal criminal legislation passed pursuant to the Commerce Clause.[84]

In the summer of 2012, the Supreme Court held in *National Federation of Independent Business v. Sebelius* that Congress lacks the power under the Commerce Clause to mandate the purchase of health insurance by individuals.[85] That decision introduced a new restriction on congressional Commerce Clause power: Congress may regulate "activity" under the Commerce Clause but may not regulate "inactivity" by, for example, mandating the purchase of a good by a person who is not a participant in the relevant market. The Court in *Sebelius* ultimately upheld the individual mandate as a permissible exercise of Congress's Article I taxing power,[86] and the case's impact on Commerce Clause doctrine going forward remains unclear.[87] For the purposes of this Note, the more important implications of *Sebelius* may lie in its holding regarding the federal government's power to coerce the states via the Spending Clause.

Congress's power to legislate based on other enumerated powers is similarly expansive, though subject to question after *Sebelius*. The Supreme Court has held that Congress has the power to induce state legislative action via its control over the purse. *South Dakota v. Dole* held that Congress has the power to condition a state's receipt of highway funds on the state's passing a law setting the drinking age at twenty-one.[88] The Supreme Court in *Sebelius* ruled, however, that Congress does not possess the power to force states to choose between expanded Medicaid eligibility requirements and a complete loss of federal Medicaid funds.[89]

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83. See Diane McGimsey, Comment, The Commerce Clause and Federalism After *Lopez* and *Morrison*: The Case for Closing the Jurisdictional-Element Loophole, 90 Calif. L. Rev. 1675, 1700–01 (2002) ("Given that today almost all persons and goods move through interstate commerce at some point, the jurisdictional element has devolved into a mere formality.").

84. See United States v. Dorsey, 418 F.3d 1038, 1045–46 (9th Cir. 2005) (upholding § 922 with jurisdictional hook), overruled on other grounds by Arizona v. Gant, 556 U.S. 332 (2009); United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999) (same).

85. 132 S. Ct. at 2587–91.

86. Id. at 2600.

87. So far, the academic commentary on the implications of the *Sebelius* decision is largely confined to blog posts and working papers. E.g., Lawrence B. Solum, How *NFIB v. Sebelius* Affects the Constitutional Gestalt (Georgetown Pub. Law & Legal Theory, Research Paper No. 12-152, 2013), available at http://ssrn.com/abstract=2152653 (on file with the *Columbia Law Review*) (speculating on future impact of decision); Jonathan H. Adler, Silver Linings in Health Care Decision, Volokh Conspiracy (July 12, 2012, 11:52 AM), http://www.volokh.com/2012/07/12/silver-linings-in-the-health-care-decision/ (on file with the *Columbia Law Review*) (describing potentially consequential aspects of decision).

88. 483 U.S. 203, 205, 208 (1987).

89. 132 S. Ct. at 2601–08.

Given this background understanding, the question of whether Congress can condition the receipt of *some* federal funds on a state's ratification of a constitutional *amendment*—as opposed to an ordinary law—remains an open one. Indeed, the most principled basis for an understanding that legislative coercion is acceptable but constitutional amendment coercion is not is a statement that the amendment power is different from the legislative power. Congress's power to induce state action through its legislative power is not plenary—it may not, for example, co-opt state officials to achieve enumerated ends.[90] Not unlike the Rehnquist Court's limitations on the commerce power, these restrictions do not as a practical matter serve to limit Congress's power, though the Court may require Congress to use certain means (spending) and avoid others (direct conscription of state officials). The *Sebelius* decision may lead to a different kind of restriction, limiting the amount of federal funds Congress may permissibly withhold in its attempts to induce certain behavior by states—though the implications of this portion of the *Sebelius* holding remain unclear.

2. *Congress's Nonlegislative Powers.* — The foregoing discussion demonstrates that Congress's legislative power, though not unlimited, is undeniably vast, and that even the restrictions imposed by the Court effectively serve as checks on means and not generally as checks on ends.[91] For the purposes of this Note, however, it is insufficient to discuss merely Congress's legislative power. Article I vests Congress with the power to legislate, alongside a few powers (most notably impeachment) that are best understood as nonlegislative. Under the Constitution, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[92]

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90. See Printz v. United States, 521 U.S. 898, 935 (1997) (holding certain interim provisions of Brady Act unconstitutional because they required state officials to implement them); cf. New York v. United States, 505 U.S. 144, 188 (1992) (holding certain provisions of Low-Level Radioactive Waste Policy Amendments Act unconstitutional because states were required to carry them out).

91. A national single-payer healthcare system would almost certainly have been a legitimate method of achieving universal coverage under the Spending Clause, see Mark A. Hall, Health Care Reform—What Went Wrong on the Way to the Courthouse, 364 New Eng. J. Med. 295, 295 (2011) ("Under long-established Supreme Court precedent, Congress would have authority, if it wanted, to enact a single-payer socialized insurance system, using its powers to tax and spend 'for the general welfare.'"), even though the insurance mandate was an impermissible exercise of the commerce (though not the taxing) power. *Sebelius*, 132 S. Ct. at 2591.

92. U.S. Const. art. I, § 1. Articles II and III contain similar Vesting Clauses, without the word "herein"—more evidence that the legislative power is one of enumerated powers and does not include powers beyond those enumerated. See id. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); id. art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see also Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 587–88

The Constitution grants to Congress the power to impeach (in the House) and remove (in the Senate) executive officers and judges, and to each house the power to make its own rules.[93] The Constitution also vests the Senate with the power to ratify treaties and confirm executive and judicial nominations.[94] These powers ought to be viewed separately from Congress's traditional legislative power not only because the Supreme Court and commentators have done so but also because they are somewhat different in nature from the traditional legislative power.[95] These are relevant to the relationship between Article I and Article V because exploring the reach of Congress's nonlegislative powers can hopefully elucidate the extent of its role in amending the Constitution.

Among Congress's nonlegislative powers is the authority of each chamber to make its own rules.[96] Courts are generally wary of intruding on this authority, though they do consider whether the passed rule is itself constitutional.[97] In *United States v. Ballin*, which involved the method of determining whether a quorum existed, the Court described its role vis-à-vis the cameral rulemaking power.[98] The House of Representatives had passed a rule describing how to count the number of present congressmen, and petitioners challenged a law passed pursuant to that rule.[99] The Court found that the rule was valid, and that the challenge was inappropriate given each house's authority to pass its own rules.[100]

(1952) (discussing separation of executive and legislative powers through Vesting Clauses); id. at 681–82 (Vinson, C.J., dissenting) (providing contrasting perspective on relationship among Vesting Clauses); infra note 178 (discussing Vesting Clauses in relation to amendment power).

93. U.S. Const. art. I, § 5, cl. 2 (discussing each house's rulemaking power); id. § 2, cl. 5 (discussing House's power of impeachment); id. § 3, cl. 6 (discussing Senate's power to try impeachments).

94. These powers are listed not in Article I but in Article II. See id. art. II, § 2, cl. 2. Only the Article I Vesting Clause includes the word "herein"; this discrepancy implies a possible distinction between the legislative power on the one hand and the executive and judicial powers on the other. See supra note 12 (discussing text of vesting clauses).

95. The traditional legislative power might be best understood by reference to the Constitution itself, which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers [listed above]." U.S. Const. art. I, § 8, cl. 18. The legislative power deals with the power to make laws of general applicability for the nation. The rulemaking power, to the contrary, involves the power of the Congress to govern itself; congressional rules do not apply to private actors the way generalized laws created by Congress do. As a corollary, Congress's rulemaking power does not require bicameralism or presentment.

96. Id. § 5, cl. 2.

97. See United States v. Rostenkowski, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("[T]he Rulemaking Clause of Article I clearly reserves to each House of Congress the authority to make its own rules, and judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution.").

98. 144 U.S. 1 (1892).

99. Id. at 4–5.

100. Id. at 9.

Beyond congressional control over its own rulemaking power, Congress possesses the decidedly nonlegislative power of impeachment[101] and removal.[102] The Constitution itself makes the nonlegislative nature of the Senate's removal power quite explicit; the Senate sits "on Oath or Affirmation" when trying impeachments, though no such oath (other than the oath taken by federal officers generally[103]) is required for ordinary legislative business. The Impeachment Clause states, "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[104] Akhil Reed Amar has compared the impeachment power to the bifurcated system of criminal justice at the time of the founding, involving indictment by a grand jury and conviction by a petit jury.[105] In an impeachment proceeding, the House of Representatives acts as a grand jury, drafting articles of impeachment (similar to an indictment) that must be ratified by majority vote.[106] The Senate then "tries" the impeachment; a two-thirds majority is necessary to convict and remove.[107] The leading academic authorities on impeachment indicate that impeachment is a nonlegislative power, despite its placement among legislative powers in Article I.[108] This interpretation is bolstered by the unreviewability by the judicial branch of impeachment proceedings.[109] Charles Black has written that this unreviewability makes impeachment unique, and calls upon congressmen to put aside their typical partisan motivations when

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101. See U.S. Const. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment.").

102. See id. § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

103. See id. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . .").

104. Id. art. II, § 4.

105. See Amar, America's Constitution, supra note 23, at 199–204 (comparing impeachment process with process of indictment by grand jury and trial by jury in American legal system).

106. U.S. Const. art. I, § 2, cl. 5.

107. Id. § 3, cl. 6.

108. See generally Charles L. Black, Jr., Impeachment: A Handbook 10 (1974) ("[T]he Senate—whether for this occasion you call it a 'judicial' body or not—is taking on quite a different role from its normal legislative one.").

109. See Randall K. Miller, Presidential Sanctuaries After the Clinton Sex Scandals, 22 Harv. J.L. & Pub. Pol'y 647, 700–01 (1999) (discussing unreviewable role of Congress in impeachment); see also Nixon v. United States, 506 U.S. 224, 238 (1993) (holding challenge by federal judge to failure of Senate to "try" impeachment nonjusticable). Justice Souter's concurrence in *Nixon* suggested an expanded role for the courts in impeachment, but his position seems unlikely to garner a majority. Id. at 252–54 (Souter, J., concurring in the judgment).

sitting as grand and petit juries for an impeachment.[110] This stands in stark contrast to the modern legislative power, where partisan behavior is widely considered appropriate.

Despite the apparently neat world created by the Vesting Clause, a survey of congressional power indicates that even Congress's Article I powers cannot be described completely as "legislative." Perhaps the authority of each house to make its own rules can be understood as purely incidental to the function of making laws for the nation. But in other instances, as with advice and consent, the treaty power, and the impeachment power, America's federal legislative body acts not to make law but rather to approve appointments or even try other federal officers in a quasi-judicial atmosphere. Why, then, did the Framers, in granting to Congress "all legislative power" in Article I—and tacking on a few powers that virtually no one considers legislative—nonetheless vest Congress with a role in the amendment process in an entirely separate Article? One possible answer involves federalism concerns: Article I involves only Congress and other federal actors, whereas Article V implicates the states quite extensively. But given that the mixing of even certain powers within Article I would be highly questionable,[111] what about the possibility of Congress mixing its legislative role with its role in the amendment process? It is to that question that this Note now turns.

II. THREE INSTANCES OF PAST PRACTICE, AND A RECENT EVENT CALLING PAST PRACTICE INTO QUESTION

Part II discusses two recent failed amendments in order to posit a model of a well-functioning Article V[112] that makes the Constitution difficult to amend.[113] It then discusses the precedent set by the Budget

110. Black, supra note 108, at 11.

111. Consider, for example, the possibility of trading votes on legislation for a vote in favor of impeaching a federal official in the Senate. Such a thing would probably violate the Senator's "Oath or Affirmation," and the leading authority on impeachment suggests that such behavior is impermissible. See Black, supra note 108, at 57.

112. This Note repeatedly uses the language "functional" and "well-functioning" to indicate, paradoxically, that proposed amendments usually fail. Perhaps this superficially odd linguistic choice is best justified by reminding the reader that Article V, unlike Article I, is not designed to facilitate action or empower Congress, but rather to permit changes to the organic law that are sufficiently supported by overwhelming majorities of varying constituencies for a sustained period of time. In other words, Article V—unlike Article I—is not a grant of power vested in a branch, but rather an orderly method of channeling popular passions. The amendment process is meant to fail more often than it succeeds, because it is designed to filter out all but the worthiest popular passions. See generally The Federalist No. 85, supra note 28, at 526 (Alexander Hamilton) (arguing Article V moderates "zeal to amend" Constitution because "judgments of many must unite").

113. It may be helpful to state some background assumptions before proceeding further. First, this Note presumes that the difficulty of amending the Constitution is in itself a good thing, regardless of one's particular policy feelings on a given amendment. The case studies chosen (the Equal Rights Amendment (ERA) and the Flag-Burning

Control Act (BCA) and applies the possible reach of that precedent back into the previously discussed amendment battles, considering whether a legislative move as seemingly innocuous as the one in the BCA could have altered the results of these amendments and whether it could alter future amendment fights.

A. *The Flag-Burning Amendment*

In 1989, the Supreme Court decided *Texas v. Johnson* by a 5-4 vote, holding that burning an American flag was expressive conduct protected by the First Amendment.[114] Because it was a constitutional decision, the ruling was beyond legislative reversal by a mere act of Congress.[115] The ruling in *Johnson* drew significant ire from then-President George H.W. Bush,[116] the political establishment,[117] the media,[118] and the American public.[119] Indeed, the establishment's negative response to the decision was sufficiently pronounced at one point to prompt a 97-3 vote in the Senate expressing disapproval of the ruling.[120] The public reaction prompted congressional attempts to overturn the decision both by stat-

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Amendment) deliberately represent opposite ends of the political spectrum. The ERA was a product of the Democratic Party of the 1970s and the Flag-Burning Amendment a product of the Republican Party of the 1990s. Even more conveniently for this Note's purposes, the Equal Rights Amendment failed to garner sufficient state ratifications, while the Flag-Burning Amendment failed by one vote in the Senate at one point but would have had a strong chance of garnering sufficient state ratifications. See infra note 127 and accompanying text (describing popularity of Flag-Burning Amendment). These two case studies, then, are designed to analyze the choke points within Article V and not the relative merits of the amendments themselves. This Note takes no position on those merits; it merely posits that as a general matter the Constitution is and ought to be difficult to amend. Others disagree, most prominently Sanford Levinson. See generally Sanford Levinson, Framed: America's 51 Constitutions and the Crisis of Governance (2012) (discussing difficulty of amending U.S. Constitution and proposing various negative ramifications); Sanford Levinson, Our Undemocratic Constitution (2006) (positing that difficulty of amendment makes governing more difficult).

114. 491 U.S. 397, 420 (1989), modified, Spence v. Washington, 418 U.S. 405 (1974).

115. A number of amendments to the Constitution were specifically designed to reverse Supreme Court constitutional decisions that could not be reversed by ordinary legislation. See, e.g. U.S. Const. amend. XI (reversing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)); id. amends. XIII–XIV (reversing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); id. amend. XVI (reversing Pollock v. Farmers' Loan & Trust, 157 U.S. 429 (1895)); id. amend. XXVI (reversing in part Oregon v. Mitchell, 400 U.S. 112 (1970)). But see Robert Justin Goldstein, The Great 1989–1990 Flag Flap: An Historical, Political, and Legal Analysis, 45 U. Miami L. Rev. 19, 28–30 (1990) (describing legislative efforts to overturn *Johnson* decision without amendment).

116. See Joan Biskupic, Flag-Burning, "Dial-a-Porn" Acts Struck Down by Justices, 47 Cong. Q. 1547, 1547 (recounting George H.W. Bush's reaction to *Texas v. Johnson*).

117. See Goldstein, supra note 115, at 27 (describing legislative resolutions disapproving of *Johnson* ruling).

118. See id. at 26–27 (describing media reaction).

119. See id. at 27–28 (describing public opinion toward decision).

120. Id. at 27.

ute and by constitutional amendment.[121] The proposed Flag-Burning Amendment has since been brought to the floor repeatedly, failing by one vote to achieve the requisite two-thirds majority in the Senate as recently as 2006.[122] The Flag-Burning Amendment would have allowed the federal government to criminalize the desecration of an American flag.[123]

The Flag-Burning Amendment's failure in the Senate permits an examination of one "vetogate"[124] built into Article V.[125] Because of the linear ratification structure of Article V—both houses of Congress must vote by a two-thirds majority to send an amendment to the states, and only then may state legislatures consider the amendment—any discussion about the efficacy of either house of Congress as an essential vetogate is necessarily hypothetical, because failure in the Senate or the House ensures that the states have no occasion to register their disapproval.[126] Yet it should be noted that polls in the wake of *Johnson* indicated stronger public support for an amendment banning flag burning than either house of Congress registered at the time.[127] If, as one can assume with a

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121. See id. at 28–29 (describing history of congressional and state efforts to circumvent decision).

122. 152 Cong. Rec. 12,654 (2006) (reporting roll call vote on S.J. Res. 12, 109th Cong. (2006)).

123. S.J. Res. 12, 109th Cong. (2006).

124. See William N. Eskridge, Jr., Vetogates, *Chevron*, Preemption, 83 Notre Dame L. Rev. 1441, 1444–46 (2008) (describing vetogates as places where legislation might be stopped by negative vote in either House or Senate, or vetoed by president). More broadly, vetogates refer to votes, including at the committee level, that proposals in Congress must pass in order to proceed. Id.

125. Under the "traditional" model of constitutional amendment, there are three weighted vetogates built into Article V. One-third plus one member of either the House or Senate can constitute a vetogate, as can one-quarter plus one of the state legislatures or state conventions. State-level vetogates are discussed in Part II.B, infra, in the context of the Equal Rights Amendment.

126. It is possible to argue, especially in the case of an amendment like the Flag-Burning Amendment that does not affect the balance of federalism, that blockage by a national representative body like the Senate makes failure in the states more likely. Compare U.S. Const. amend. XIV (granting power to Congress to restrict state violations of due process, equal protection, and "privileges or immunities"), and id. amend. XVII (requiring direct election of senators and removing that prerogative from state legislators), with, e.g., id. amend. XXVII (regulating congressional pay increases). Senators and state legislatures represent the same constituents (though with greater granularity for the legislatures) and are therefore likely to face similar constituent pressure. Where a proposed amendment might shift the balance of federalism, it becomes more likely that each will vote in favor of its institutional interest, with senators granting more power to the federal government and state legislatures seeking to protect state prerogatives.

127. See Goldstein, supra note 115, at 27 (citing Newsweek poll finding 65% opposed *Johnson* decision and 71% favored amendment overturning it, and noting 1.5 million Americans signed petition calling for its reversal). By the time of the first vote on a Flag-Burning Amendment the political environment had become "less hysterical" than in the immediate wake of the *Johnson* decision. Id. at 29.

reasonable degree of confidence, state legislatures are more responsive to popular will than federal representatives, it is at least plausible that repeated failures in Congress were the only reasons that an amendment prohibiting the desecration of the United States flag never became a part of the Constitution. Moreover, it is not strictly necessary to argue that the Senate was the *only* successful vetogate; perhaps, by preventing a series of political fights in the state legislatures, the national legislature exerted an agenda-setting function that helped redirect the nation's political attention to other matters. Suffice it to say that, on at least two occasions between 1989 and 2006, a handful of votes in the Senate[128] blocked the Flag-Burning Amendment, or at the very least prevented an ugly and consuming political fight in state legislatures.

The saga of the Flag-Burning Amendment is relevant to an understanding of a well-functioning Article V because it highlights the absence of presidential involvement[129] in the amendment process and the importance of "clean" votes. Recall that both Presidents George H. W. Bush and George W. Bush registered support for the Flag-Burning Amendment when simple majorities (but not supermajorities) of Congress voted in its favor. Either President could have, therefore, pushed for legislation creating a trigger[130] that would have conditioned, say, some portion of defense appropriations on Congress's sending the Flag-Burning Amendment to the states.[131] Would the possibility of voting

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128. In 2006, one more vote in favor of the Flag-Burning Amendment would have sent it to the states. See supra note 122 and accompanying text (describing roll call vote).

129. See Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (opinion of Chase, J.) (describing lack of presidential role in amendment process). At the time of the failed vote in 2006, the Republican Party (which overwhelmingly backed the amendment) controlled the House, the Senate, and the White House. It would have been politically possible to pass "triggering" legislation and receive presidential assent to such legislation, assuming that President Bush's support for the Flag-Burning Amendment extended to support for legislation that would tend to make its passage more likely. See Carl Hulse, Flag Amendment Narrowly Fails in Senate Vote, N.Y. Times, June 28, 2006, at A1, available at http://www.nytimes.com/2006/06/28/world/americas/28iht-flag.2070997.html (reporting George W. Bush's support for Flag-Burning Amendment).

130. For a discussion of legislative triggers, see supra note 4.

131. This proposal drifts, once again, into the land of the hypothetical—though it strives to roughly approximate the sorts of triggers used by Congress in the Budget Control Act. A peculiar feature of the Flag-Burning Amendment is its status as a "wedge issue" (that is, a nonfiscal proposal designed at least in part to inspire political participation among voters in a party's base). One particular concern related to the mixing of Article I and Article V involves the possibility that Congress will use Article I triggers involving essential fiscal appropriations or popular spending of the type that would harm a representative's reelection chances if he or she voted against it to pass Article V amendments similar to the Flag-Burning Amendment. It has become relatively common practice for legislators to attempt to embarrass members of the other party by inserting poison-pill amendments in legislation (witness the brief Viagra-for-sex-offenders saga during the final debates on the Patient Protection and Affordable Care Act, see infra note 172), and it is not the role of the courts to police that kind of legislative chicanery, childish though it may be. The hypothetical presented here offers a problem of a different

against not only a popular constitutional amendment but also must-pass appropriations have been sufficient to sway the minds of wavering senators?[132] Even if the answer to that question is no, it is incontestable that such a hypothetical situation would condition a legislative result—appropriating funds—on an Article V event—sending a constitutional amendment to the states for ratification.

There is no evidence that the Senate votes on the amendment were anything but "clean"—the text of the amendment, and nothing else, was before the Senate at the time of the vote.[133] Put simply, throughout the sixteen-year saga of the Flag-Burning Amendment, it appears that Article V was followed to the letter, and despite consistent popular and legislative majorities in favor of the amendment, it failed.[134]

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sort that is a genuine structural issue separate from "normal politics." In essence, the hypothetical draws the normal legislative process, which encompasses the power of each house to make its own rules and presidential involvement in signing legislation, into the separate world of Article V, which concerns itself only with the question of whether the states ought to consider an amendment.

132. Though this question is essential to answer whether the amendment would have been sent to the states in this hypothetical situation, it is actually irrelevant to the constitutional question. This Note argues that the mere presence of an Article V amendment in a legislative trigger—or, more generally, the conditioning of any legislative result (as defined primarily by Article I, Section 8) on the passage of a constitutional amendment—violates *Hollingsworth*'s prohibition of formal presidential involvement in the amendment process, Federalist No. 85's requirement that "every Amendment . . . be brought forward singly," The Federalist No. 85, supra note 28, at 525 (Alexander Hamilton), and the constitutional structure's abundant and obvious separation between Article I and Article V.

133. It is impossible to assess what kind of backroom wrangling, if any, took place in the House and Senate surrounding the amendment. Even if legislators traded votes on the proposed amendment, their behavior is irrelevant to this Note. The Constitution is concerned with structures and checks, not with the process of vote trading that goes on behind closed doors.

134. The Flag-Burning Amendment offers a classic example of a social wedge issue. Such issues frequently become poison pills in more traditionally substantive legislation, and they make frequent fodder for purely political attacks. Consider the creation of the Department of Homeland Security and the machinations involved in making collective bargaining rights in that Department a wedge issue. See Jennifer Lowen, Bush Pushes Homeland Security Issue, Associated Press, Sept. 27, 2002, available at http://www.apnewsarchive.com/2002/Bush-Pushes-Homeland-Security-Issue/id-1939c2c2292df862429cff17e2cd129b (on file with the *Columbia Law Review*) ("President Bush on Friday sought to drive a wedge between Senate Democrats and their labor allies on a new homeland security department."). Other times, relatively minor amendments designed to win the votes of wavering legislators become substantial political talking points. For example, some argued that the so-called "Cornhusker Kickback," part of negotiations that led to the enactment of the Affordable Care Act (ACA), offered privileges to Nebraska in exchange for swinging Democratic Senator Ben Nelson's vote. Congress removed the provision from the final legislation. Jordan Fabian, Obama Healthcare Plan Nixes Ben Nelson's 'Cornhusker Kickback' Deal, The Hill Blog Briefing Room (Feb. 22, 2010, 11:00 AM), http://thehill.com/blogs/blog-briefing-room/news/82621-obama-healthcare-plan-nixes-ben-nelsons-cornhusker-kickback-deal (on file with the *Columbia Law Review*) (describing so-called "Cornhusker Kickback" and its removal from final healthcare bill).

B. *The Equal Rights Amendment*

Where the Flag-Burning Amendment usefully illustrates a failed amendment that came about in response to a single Supreme Court decision and that has repeatedly failed to achieve a sufficient congressional majority to be sent to the states, the Equal Rights Amendment (ERA) offers a picture of the opposite situation: a failed amendment that benefited from a sustained campaign in its favor and succeeded in Congress but failed to achieve the requisite thirty-eight state ratifications. The ERA's failure therefore provides a case study in the aspects of a functional model of Article V that were not apparent in the context of the Flag-Burning Amendment.

Both houses of Congress passed the Equal Rights Amendment[135] in 1972, with overwhelming majorities in each chamber.[136] The amendment included a seven-year deadline for state ratifications, which had by then become common practice.[137] With thirty-five ratifications by 1979, Congress passed (through the ordinary legislative order) a bill extending

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The political attacks on the kickback were sufficiently successful that Justice Scalia mentioned the provision at oral argument in the ACA case, apparently unaware that it had been removed. David Weigel, Does Antonin Scalia Know What's in the Affordable Care Law?, Slate (Mar. 28, 2012, 2:24 PM), http://www.slate.com/blogs/weigel/2012/03/28/does_antonin_scalia_know_what_s_in_the_affordable_care_law_.html (on file with the *Columbia Law Review*).

135. The Equal Rights Amendment, as proposed, read,

> 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.

H.R.J. Res. 208, 92d Cong. (1972).

136. 118 Cong. Rec. 9598 (1972) (reporting 84 senators in favor); 117 Cong. Rec. 35,815 (1971) (reporting 354 members of House in favor).

137. Like so much else surrounding Article V, there is ample disagreement about whether such restrictions are valid. The Twenty-Seventh Amendment, which included no such restriction, became part of the Constitution in 1992, more than 200 years after it was first proposed as part of the original Bill of Rights. See Bernstein, supra note 24, at 536–42 (describing modern revitalization of Twenty-Seventh Amendment); Stewart Dalzell & Eric J. Beste, Is the Twenty-Seventh Amendment 200 Years Too Late?, 62 Geo. Wash. L. Rev. 501, 501–03 (1994) (same). Since the deadline, a few states have introduced resolutions to approve the ERA, but none has succeeded. See George Will, Op-Ed., The Night of the Living Dead Amendment, Wash. Post, Feb. 13, 1994, at C7 (describing ratification efforts after expiration of deadline). Some scholars argue that time limits on ratification might be considered unconstitutional. See Allison L. Held, Sheryl L. Herndon & Danielle M. Stager, The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States, 3 Wm. & Mary J. Women & L. 113, 130–31 (1997). But cf. Brannon P. Denning & John R. Vile, Necromancing the Equal Rights Amendment, 17 Const. Comment. 593, 596–98 (2000) (discussing relevant differences between Twenty-Seventh Amendment and ERA).

the deadline by three years, to 1982.[138] That law was subsequently challenged as a violation of Article V, and a federal district court in Idaho held it unconstitutional.[139] Meanwhile, several states had purported to withdraw their ratifications, leading to legal challenges about the propriety of doing so.[140]

In *Idaho v. Freeman*, the United States District Court for the District of Idaho directly addressed the constitutionality of Congress's use of the Article I legislative process to extend the deadline for state ratifications from seven years to ten.[141] The *Freeman* court framed the issue as follows:

> First, it must be recognized that Congress' power to participate in the amendment process stems solely from article V. As Justice Stevens noted, "the function of a state Legislature in ratifying a proposed amendment to the federal Constitution, *like* the function of Congress in proposing the amendment, *is a federal function* derived from the federal Constitution . . . ." Thus Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I. The power of Congress to set a time period in which ratification must be completed is derived from their function of setting the mode of ratification.[142]

In other words, Congress lacks the power under Article I to directly alter or interfere with the amendment process once it has sent an amendment to the states.[143] At the same time, it is worth noting the relatively modest nature of the alteration or interference at issue in *Freeman*: Congress simply wanted to give the states more time to deliberate. By doing so, Congress was obviously hoping to save the ERA from what appeared to be certain death under its original terms and enable three more years of social pressure that would change the minds of a few more

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138. H.R.J. Res. 638, 95th Cong. (1978). The vote did not receive a two-thirds majority in either house, and President Jimmy Carter signed the bill.

139. Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982). The Supreme Court took the case, but ultimately concluded that the controversy was moot because the amended deadline passed without the requisite thirty-eight states ratifying the amendment. *Carmen*, 459 U.S. at 809.

140. See Brendon Troy Ishikawa, Everything You Always Wanted to Know About How Amendments Are Made, but Were Afraid to Ask, 24 Hastings Const. L.Q. 545, 557–66 (1997) (describing litigation over attempted withdrawals of previous ratifications).

141. 529 F. Supp. at 1150–54.

142. Id. at 1151 (citation omitted) (quoting Dyer v. Blair, 390 F. Supp. 1291, 1303 (N.D. Ill. 1975)).

143. In the context of *Freeman*, this holding should probably be understood narrowly to prohibit precisely the kind of congressional behavior that occurred there: a purported change to the very text of the proposed amendment, namely its expiration clause, via the legislative process. But this Note argues that there is no particular reason to limit *Freeman* to its narrow facts. See infra Part III (arguing for expansion of basic *Freeman* holding to cover legislative mixing).

state legislatures.[144] It was not, however, using any of its legislative powers to influence state results directly.[145]

The *Freeman* court's analysis of the nature of congressional behavior under Article V further supports the notion of textual separation between Article I and Article V. The *Freeman* court found that Congress was not "functioning in a legislative capacity when [it exercised] its powers under article V."[146] The *Freeman* court suggests that the word "Congress" must be read to have a consistent definition in Article V, and that the "Congress" of Article V is not necessarily the same entity as the "Congress" of Article I because of the different voting requirements necessary for it to exert its power.[147] Although it addresses only the narrow context of a decision about subsequent modifications of an amendment resolution by a legislative measure, the *Freeman* court offers a strong statement in favor of the separation between Article I and Article V.

The *Freeman* decision eventually became moot; even the legislatively extended deadline came and went without the requisite thirty-eight ratifications,[148] and the ERA failed, apparently permanently.[149] Still, several

144. The pages of the Texas Law Review played host, in 1979 and 1980, to a debate between then-Professor Ruth Bader Ginsburg and Grover Rees III regarding the appropriateness of the extension. Professor Ginsburg argued that Congress had behaved properly in extending the deadline, whereas Rees took the opposite position. Ruth Bader Ginsburg, Ratification of the Equal Rights Amendment: A Question of Time, 57 Tex. L. Rev. 919 (1979); Grover Rees III, Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension, 58 Tex. L. Rev. 875 (1980).

145. South Dakota v. Dole, 483 U.S. 203 (1987), discussed infra at note 152, had not yet been decided. It is therefore unclear what, if anything, Congress thought of its ability to use its power of the purse to influence state lawmaking.

146. 529 F. Supp. at 1153.

147. See id. The court explained,

> Article V grants Congress only one power which can be exercised with regard to two separate considerations. Congress has the power to "propose." It can "propose" the text of the amendment and it can "propose" the mode of ratification. When acting in its function of proposing the amendment itself, article V has given the term "Congress" a particular definition. Article V states, "The Congress, *whenever two thirds of both Houses shall deem* it *necessary*, shall propose Amendments[."] . . . [T]he word "Congress" has been specifically defined earlier in the same sentence. Rather than give the word "Congress" two different meanings within the same provision, it seems more logical to give it a consistent interpretation throughout.

Id. (citation omitted).

148. See Carmen v. Idaho, 459 U.S. 809, 809 (1982) ("[T]he judgment of the United States District Court for the District of Idaho is vacated and the cases remanded to that Court with instructions to dismiss the complaints as moot.")

149. It might be more accurate to say that *this particular iteration* of the ERA failed permanently; Congress retains the power, by a two-thirds majority in each house, to send a new version of the ERA to the states with a deadline for ratification of its choosing or no deadline at all. Indeed, the ERA has been introduced in recent Congresses. See, e.g., H.R.J. Res. 40, 110th Cong. (2007); S.J. Res. 10, 110th Cong. (2007). On the other hand, some scholars argue that Supreme Court doctrine has evolved in such a way that the ideals of the ERA are imbedded in our current understanding of the Fourteenth Amendment's

aspects of the ERA saga shine a light on the proper function of Article V. First, it should be noted that, like the Flag-Burning Amendment, the Equal Rights Amendment very nearly reached a critical threshold. Had three more states ratified the ERA before 1979, it would have become for "all Intents and Purposes" part of the Constitution.[150] As with the Flag-Burning Amendment, there is no evidence that Congress used its Article I authority to place formal pressure on any state legislature, despite the fact that from 1977 until 1979, Democrats (the party that more strongly supported the ERA) controlled both houses of Congress and the White House.[151] It is impossible to do more than hypothesize about the actual effect of a legislative inducement (modeled on the statute in *South Dakota v. Dole*,[152] but explicitly conditioned on state acceptance of a constitutional amendment), but once again the effect of the inducement is less significant than its existence.

These two cases of failed amendments illustrate, oddly enough, a well-functioning model of Article V. *The Federalist Papers* have little to say about the amendment process, but one line from Hamilton's Federalist No. 85 lays a framework that has been consistently followed in both successful[153] and unsuccessful attempts at amending the Constitution: "But every amendment to the Constitution, if once established, would be a single proposition, and might be brought forth singly. There would then be no necessity for management or compromise in relation to any

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Equal Protection Clause. See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Calif. L. Rev. 1323, 1324 (2006) ("[T]he amendment's proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination.").

150. U.S. Const. art. V.

151. This Note distinguishes between "pressure" of the sort envisioned and blessed by the Court's decision in South Dakota v. Dole, 483 U.S. 203 (1987), and the extension granted by the legislature and overturned in *Freeman*. See supra notes 142–149 and accompanying text (discussing *Freeman*). It is, granted, something of an artificial distinction, and is not meant to suggest that the *Freeman* court was incorrect to find the legislative intervention unconstitutional.

152. 483 U.S. 203. *Dole* did not grant Congress plenary authority to condition federal funds on state lawmaking, but instead imposed four conditions: first, that the exercise of the spending power be "in pursuit of 'the general welfare'"; second, that Congress condition receipt of federal funds "unambiguously"; third, that the funds be related "to the federal interest in particular national projects or programs"; and finally, that Congress not violate another constitutional provision in conditioning the funds. Id. at 207–08 (citations omitted). Applying that four-part test to this hypothetical, it is possible to argue that there is no way to further the general welfare or a federal interest in a particular national project via conditioning a proposed amendment's passage on the spending power. The strength of those theories rests on an implicit assumption that when Congress is acting in furtherance of its Article V power, it lacks the power to define "general welfare" under Article I. *Dole* also includes a distinction between "compulsion" and "pressure," but the inquiry to determine the difference between the two in the sensitive amendment context is likely to be unsatisfactory. Id. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)) (internal quotation marks omitted).

153. But see infra Part II.C (discussing Fourteenth Amendment).

other point—no giving nor taking."[154] In other words, the Article V amendment process is unlike the legislative process—the structure does not provide for horse-trading or other machinations that we consider a typical part of the legislative order.[155] Since the ratification of the Constitution, that understanding has persisted. *Hollingsworth* illustrates that the difference between amendments and ordinary legislation rests in part on the lack of presidential involvement in the amendment process.[156] Justice Marshall reminds us that "it is a *constitution* we are expounding," distinguishing the Constitution from a legislative code.[157] Put simply, the course of judicial and legislative history of Article V should leave little doubt that the Article V amendment power is different from the Article I legislative power. And with one exception, it does not appear that the legislative power has mixed with the amendment power, even when such mixing could have meant the difference between passage and failure for an amendment.

C. *The Fourteenth Amendment*

The Fourteenth Amendment, passed by Congress in 1866 and ratified by the states in 1868, challenges the proposition that Congress has never used its legislative power to induce passage of a constitutional amendment. But this Note argues that the Fourteenth Amendment ought to be viewed as an exception that proves the rule; when Congress used its legislative power to induce the former Confederacy to pass the Fourteenth Amendment, it did so relying on a theory that the Southern states were not fully states. Such an argument would not have been tenable at any time in our nation's history, except in the immediate aftermath of a bloody civil war.

The House of Representatives passed the Fourteenth Amendment by the requisite two-thirds majority on June 13, 1866,[158] following the Senate's ratification five days earlier.[159] The congressional vote on the Fourteenth Amendment was "clean"; the House and the Senate "brought

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154. The Federalist No. 85, supra note 28, at 525 (Alexander Hamilton).

155. The Constitution and the Supreme Court do not police the legislative process to the extent that a congressman trading a vote on an amendment for a vote on legislation would be impermissible under the separation of Articles I and V doctrine articulated here. Structurally, however, the Constitution does both permit and encourage enforcing a separate role for Article I behavior and Article V behavior by Congress, and it should not be difficult to identify the difference between a structural blending and the incidence of ordinary behavior by legislators. One legislator agreeing to support another's proposed amendment in exchange for cosponsoring a bill is an obvious example of the latter, whereas the triggering process discussed in this Note more resembles the former.

156. See supra notes 32–33 and accompanying text (discussing Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)).

157. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

158. Cong. Globe, 39th Cong., 1st Sess. 3148–49 (1866).

159. Id. at 3042.

forth singly" the resolution to send the Fourteenth Amendment to the states.[160] But the Fourteenth Amendment faced substantial hurdles in the form of state legislatures; the old Confederacy was intractably opposed, and a number of border states were uncertain votes in favor.

In 1867, with the Fourteenth Amendment languishing before recalcitrant state legislatures, Congress passed the first of four Reconstruction Acts over President Andrew Johnson's veto.[161] That Act declared that "no legal State governments" existed anywhere in the old Confederacy except for Tennessee, which had already ratified the Fourteenth Amendment.[162] The Act divided the South into five military districts and set forth certain requirements for readmission to the Union—including that each state draft a new constitution and ratify the Fourteenth Amendment.[163]

The Reconstruction Act appears to be a straightforward violation of the separation between Article I and Article V. Congress passed a law requiring several states to pass a constitutional amendment that the states bitterly opposed—so bitterly, in fact, that they had engaged in five years of armed rebellion against the principles the amendment espoused. But it is precisely the Civil War—and the uncertain status of the former Confederacy in its wake—that makes the Fourteenth Amendment an exception that proves the rule proposed by this Note. Congress, in the Reconstruction Act, specifically declaimed the notion that the old Confederacy consisted of states able to fulfill their constitutional roles.[164] In doing so, it at least partially rejected President Lincoln's theory of an indivisible Union,[165] acknowledging instead that the Union had partially dissolved and devising conditions, including ratification of the Fourteenth Amendment, to protect against subsequent dissolution.

By July 13, 1868, a supermajority of states (including numerous states of the old Confederacy) had ratified the Fourteenth Amendment.[166] Secretary of State William Seward issued a proclamation to that effect on July 28, 1868.[167] To this day, an academic controversy exists regarding whether the Fourteenth Amendment is a "legitimate"

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160. For a history of the ratification of the Fourteenth Amendment, see generally Amar, America's Constitution, supra note 23, at 364–80; Eric Foner, A Short History of Reconstruction, 1863–1877, at 114–17 (1990).

161. Reconstruction Act, ch. 153, 14 Stat. 428 (1867).

162. Id.

163. Id. § 5, 14 Stat. at 429.

164. Id. (describing Southern states as "Rebel states" throughout act); id. pmbl. ("[N]o legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas . . . .").

165. See Paul C. Nagel, One Nation Indivisible: The Union in American Thought, 1776–1861, at 136–37 (1964) ("Lincoln introduced larger absolutes, for he insisted that 'universal law' made union perpetual.").

166. Proclamation No. 13, 15 Stat. 708, 710 (1868).

167. Id.

Article V amendment, or whether Congress violated Article V by conditioning reentry of the Southern states on their ratification of the Amendment.[168] Suffice it to say for the purposes of this Note that a "precedent" arising from the dissolution of the Union and the Civil War is hardly a precedent for normal circumstances, and the existence of the academic controversy regarding the legitimacy of Article V is evidence of the rarity of the Thirty-Ninth Congress's behavior. It is certainly true that Congress used its Article I power in 1867 to induce ratification of an Article V amendment; whether it used that power *against the states* or whether the Southern states had ceased to exist qua states at the time is another question entirely. In any case, the Reconstruction Act, by virtue of its moment in history, should be viewed not as a precedent for the Budget Control Act but as an illustration of the extraordinary circumstances necessary to justify inducement of an Article V event by Article I means. There should be little doubt that today's Congress would lack the power to dissolve state governments in part of the country, establish military rule, and condition readmission on the passage of an Article V amendment.

D. *The Budget Control Act*

In the context of the Equal Rights Amendment and the Flag-Burning Amendment, the Budget Control Act introduces a new wrinkle into the ordinary course of proposing an amendment. This wrinkle appears quite modest. The BCA, passed through the normal legislative order and signed by President Obama, provides a $1.5 trillion increase in the debt ceiling if both houses of Congress pass (by the requisite two-thirds majority) a resolution sending a Balanced Budget Amendment to the states.[169] Given the other provisions of the BCA, it is entirely possible that a vote on a Balanced Budget Amendment may become a decision not between sending and not sending the amendment to the states, but between sending an amendment to the states and risking default. Such an amendment would not "be brought forward singly,"[170] as *The Federalist*

168. This academic controversy has played itself out primarily as a debate between Akhil Reed Amar and Bruce Ackerman, and its full contours are beyond the scope of this Note. For a brief summary, see Amar, America's Constitution, supra note 23, at 364–80.

169. See Budget Control Act of 2011, Pub. L. No. 112-25, § 3101A(a)(2)(A)(ii), 125 Stat. 240, 252 (raising debt ceiling by $1.5 trillion upon congressional passage of "a proposed amendment to the Constitution of the United States pursuant to a joint resolution entitled 'Joint resolution proposing a balanced budget amendment to the Constitution of the United States'"). The effect of this bill is that any vote on the Balanced Budget Amendment while the Act is in force is not "clean"; Congress is deciding between the status quo debt ceiling and no amendment or a raised debt ceiling and the amendment. Given the panic that took hold in international markets as the United States approached its debt ceiling, this possibility is hardly remote, and certainly could be said to influence congressional votes.

170. The Federalist No. 85, supra note 28, at 525 (Alexander Hamilton).

Papers suggested. Moreover, it would involve the use of an Article I process to influence the legislature's vote on an Article V amendment.

It is fair at this point to ask why this presents a constitutional problem. After all, there would be no issue if an individual legislator attempted to garner support for (or against) an amendment from another legislator by promising to support (or oppose) a piece of legislation. Even in the case of a Senate impeachment trial, such behind-the-scenes behavior—though questionable—would likely be found nonjusticiable.[171] Legislators use poison pills to embarrass opponents[172] and triggers to bind future Congresses[173] on a regular basis. A judicial attempt at regulating what goes on in everyday congressional wrangling would present a classic nonjusticiable political question, and would be unlikely to see the light of day in court.[174] The Balanced Budget Amendment trigger in the BCA, by one account, brings congressional wrangling out into the open, where it can be assessed by the press and by the voters.

The idea that the Balanced Budget Amendment trigger brings welcome transparency is motivated primarily by a belief that the amendment process is more similar to than different from the legislative process.[175] But such a belief is difficult to ground in any theory of the

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171. Cf. Nixon v. United States, 506 U.S. 224, 226, 235–38 (1993) (finding delegation of impeachment proceedings against federal judge to Senate committee nonjusticiable and suggesting limited Supreme Court role in policing impeachment).

172. A recent and notable example is Senator Tom Coburn's proposed "no Viagra for sex offenders" amendment to the Affordable Care Act. H.R. 4872, 111th Cong. (2010). That amendment was offered for the purpose of forcing Democratic senators to vote against it, thereby enabling the possibility of subsequent attack ads. See Brian Montopoli, GOP Amendment: No Viagra for Sex Offenders, CBS News (Mar. 23, 2010, 6:51 PM), http://www.cbsnews.com/8301-503544_162-20001033-503544/gop-amendment-no-viagra-for-sex-offenders/ (on file with the *Columbia Law Review*) ("One part of [the Republican] strategy is to offer amendments on which Democrats would be hard-pressed to cast a 'no' vote. If the Senate makes any amendments to the legislation, it has to go back to the House—a possibility that Democrats are hoping to avoid.").

173. Consider the budget sequester in the Budget Control Act §§ 101–106. The sequester automatically cuts spending for most federal programs by a fixed percentage if Congress fails to reduce the deficit by other means. See generally Karen Spar, Cong. Research Serv., R42050, Budget "Sequestration" and Selected Program Exceptions and Special Rules (2013), available at http://www.fas.org/sgp/crs/misc/R42050.pdf (on file with the *Columbia Law Review*) (describing sequester). As of February 2013, Congress was engaged in negotiations to avert the budget sequester. Jonathan Weisman & Annie Lowrey, Congress Passes Debt Bill as a $1 Trillion Ax Looms, N.Y. Times, Feb. 1, 2013, at A16, available at http://www.nytimes.com/2013/02/01/us/politics/extension-of-debt-limit-clears-congress.html (on file with the *Columbia Law Review*).

174. See Baker v. Carr, 369 U.S. 186, 217 (laying out six factors Court considers in political question analysis). See generally Chemerinsky, Federal Jurisdiction, supra note 35, at 147–71 (describing political question doctrine).

175. A somewhat humorous demonstration is the reference to the lack of a veto threat from the Obama Administration on a recent amendment passed by the House. See Brian Beutler, Twitter (Nov. 15, 2011, 12:51 PM), https://twitter.com/brianbeutler/status/136547010521219072 (on file with the *Columbia Law Review*) ("#constitutionfail RT

Constitution. After all, the legislative process works by one set of rules (bicameralism, presentment, presidential veto, the possibility of an override, no state involvement[176]) and the amendment process works by another. As Justice Chase made abundantly clear, the President is not formally involved in the Article V amendment process.[177] Moreover, the amendment process is structurally separate from the legislative process—more structurally separated than even nonlegislative congressional behaviors like impeachment.[178]

The question remains: What is so questionable and repugnant about this particular legislation-triggering-an-amendment structure? The possibility of a default-or-pass-a-balanced-budget-amendment scenario is quite remote and unlikely to occur. The argument for the Budget Control Act as a constitutionally questionable piece of legislation, then, rests on a slippery slope argument about the future consequences of allowing a hypothetical and seemingly innocuous provision to stand.[179] In this case, the slippery slope argument is justified. Consider, once again, the Court's jurisprudence involving Article I and the repeated holdings that it will police the bounds of congressional power but will not inquire into the

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@2chambers: OMB says the admin 'strongly opposes' the BBA the House will take up on Friday. But no outright veto threat.").

176. See, e.g., U.S. Const. art. I (enumerating powers and describing structure of Congress); Bowsher v. Synar, 478 U.S. 714, 722 (1986) ("The Framers provided a vigorous Legislative Branch and a separate and wholly independent Executive Branch, with each branch responsible ultimately to the people."); INS v. Chadha, 462 U.S. 919, 928, 959 (1983) (holding one-house legislative veto "violates the constitutional doctrine of separation of powers").

177. Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (opinion of Chase, J.) ("The negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution.").

178. This point could arguably cut either way. This Note argues that the text of Article I's Vesting Clause, U.S. Const. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . . ."), and the separation of the amendment process from Article I imply that the power to amend is not a legislative power. Mixing amendments and legislation therefore makes the amendment power too legislative, in violation of that structure. But there could be other valid reasons for the separation; namely, the fact that the states play a role in the amendment process might mean that it is better separated textually even if Congress's amendment power is quasi-legislative. Or one could argue that this Note asks a small piece of constitutional text to bear too much weight, which would quickly turn into an argument about originalism and methodology that far exceeds the scope of this Note.

179. The slippery slope argument, though often considered disreputable, plays an important role here. The slippery slope's low status arises from the fact that, in many instances where it is invoked, the invoker fails to identify the reason that the "downward slide" must continue indefinitely. See Britell v. United States, 204 F. Supp. 2d 182, 191, 194–95, 197–98 (D. Mass. 2002) (discussing and refuting slippery slope arguments), rev'd, 372 F.3d 1370 (Fed. Cir. 2004); see also Eric Lode, Comment, Slippery Slope Arguments and Legal Reasoning, 87 Calif. L. Rev. 1469, 1482–92 (1999) (describing varieties of slippery slope argumentation).

wisdom of legislation.[180] If, under these holdings, Congress may permissibly affect the Article V power by exercising its enumerated Article I power, the Court lacks a principled basis for determining how much influence is too much.[181] The intrusion at issue in *Freeman* was relatively innocuous and involved no direct attempt to influence the result of state ratification votes, but the district court nonetheless offered a strong statement of the bounds separating Article I and Article V.[182]

The procedural problems inherent in the Supreme Court declaring an amendment unconstitutional further counsel in favor of finding the constitutional violation to occur when potentially problematic legislation is passed and not when an amendment emerges as a result of the questionable legislation. It should be obvious that the prospect of the Supreme Court—or any other agent of the federal government—declaring a constitutional amendment unconstitutional because of the way it was passed is something to be avoided.[183] The judicial power to declare legislation that is repugnant to the Constitution null and void is firmly established in our law.[184] Legislation that threatens the separation between Article I and Article V need not actually result in the successful passage of an amendment to be unconstitutional.[185] Indeed, the moment of unconstitutionality takes place not when votes on an amendment occur, but when the legislation that undermines constitutional structure becomes law.

The potential problems inherent in a model of Article V that permits Article I influence are perhaps best understood by asking whether either the Flag-Burning Amendment saga or the Equal Rights Amendment saga could have turned out differently had the norms of

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180. See supra Part I.B (discussing Article I jurisprudence); see also City of Boerne v. Flores, 521 U.S. 507, 523–36 (1997) (striking down Religious Freedom Restoration Act as exceeding Congress's Fourteenth Amendment enforcement power, but also recognizing that legislative "conclusions are entitled to much deference").

181. The Court's power to draw lines is stronger than its power to assess the efficacy or wisdom of legislation involved. See *Boerne*, 521 U.S. at 519–20 ("While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive chance in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

182. See Idaho v. Freeman, 529 F. Supp. 1107, 1151 (D. Idaho 1981) ("Congress, outside of the authority granted by article V, has no power to act with regard to an amendment, i.e., it does not retain any of its traditional authority vested in it by article I."), vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982).

183. See Robert Justin Lipkin, Can Constitutional Amendments Be Unconstitutional?, Ratio Juris (Jan. 29, 2007, 10:10 AM), http://ratiojuris.blogspot.com/2007/01/can-constitutional-amendments-be.html (on file with the *Columbia Law Review*) (describing power of Indian Supreme Court to declare amendments unconstitutional and noting impossibility of such occurrence under U.S. system).

184. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

185. See *Freeman*, 529 F. Supp. at 1152–53 (striking down extension of time for ERA despite lack of ratified amendment).

separation between Articles I and V been violated during the pendency of those amendments. It is not difficult, in either case, to imagine a different story. In the flag-burning context, Congress could have passed a law conditioning essential expenditures or appropriations on the passage of a flag-burning amendment by a certain deadline, perhaps forcing senators to make a choice not about the wisdom of such an amendment but about whether adding the amendment would be preferable to concretely harmful fiscal consequences. In the Equal Rights context, Congress could have passed a law conditioning certain federal block grants to states on the passage of the Equal Rights Amendment.[186] In either case, given the popular support for the amendments at issue and the closeness of their ratification, one need not delve too far into a world of counterfactuals to conclude that the unspoken norms separating the legislative power from the amendment power were instrumental in preventing the ratification of both the Flag-Burning Amendment and the Equal Rights Amendment.

Through decades of practice, involving amendments both successful and unsuccessful, our legislators and courts have hewed to a model that forbids legislative meddling with the amendment process not only after the proposal of an amendment to the states[187] but also during its consideration in Congress. The Budget Control Act, by linking a legislative result—$1.5 trillion in extra borrowing power to the executive—to a distinctly Article V event—the passage by both houses of Congress, by a two-thirds majority, of a resolution sending a Balanced Budget Amendment to the states—undermines and infringes upon these historical norms. That it does so modestly and in a way unlikely to come to pass is irrelevant to the sanctity of the norms; by conflating Article I and Article V without extraordinary justification, Congress may have crossed the Rubicon. In this era of political polarization and legislative gamesmanship,[188] it is entirely possible, even likely, that Congress's next

186. Recall that *Dole* was not on the books, but legislation satisfying the test in *Dole* could have been crafted that linked the passage of the Equal Rights Amendment with spending on, for example, education—arguing that a sufficient nexus existed between the importance of the Equal Rights Amendment and ensuring gender equality in public schools. Such an argument would fail the *Dole* test if legislation influencing an Article V "event" presumptively undermines Article I, but that solution presumes the validity of the argument put forward in this Note. Absent a separate constitutional norm prohibiting the mixing of the powers, it is entirely conceivable that Congress could tailor a package linking federal monies to amendment ratification that would satisfy *Dole* while still being powerful enough to induce ratification. After *Sebelius*, it appears that such a tack would remain possible, provided that the coercion was not too onerous.

187. The Fourteenth Amendment is a notable exception, but as discussed in Part II.C, supra, it should be considered an exception that proves the rule due to the extraordinary circumstances surrounding its proposal and adoption.

188. Consider, for example, the unprecedented use of the filibuster beginning in 2008, see Mimi Marziani, Brennan Ctr. for Justice, Filibuster Abuse 1 (2010), available at http://www.brennancenter.org/sites/default/files/legacy/Filibuster%20Abuse_Online%20Version.pdf (describing "*de facto* supermajority" requirement that "takes the Senate far

conflation will be less modest and less hypothetical. Given the historical protection of the Article V amendment process from executive interference, dating back to *Hollingsworth*, its degradation would undermine established constitutional norms and likely result in more amendments to the Constitution.

III. CAN THE GENIE BE PUT BACK INTO THE BOTTLE?

A number of institutional actors may have the capability to interfere with the conflation of Article I and Article V described above: Congress itself, the executive, and the courts. For more than 200 years, with the notable exception of the Fourteenth Amendment and the slight exception of the legislative extension of the Equal Rights Amendment at issue in *Idaho v. Freeman*, congressional restraint was a sufficient check on the possibility of Congress using its Article I power to induce the passage of a constitutional amendment.[189] And while Congress has not attempted since the BCA to pass legislation that invokes its Article V amendment power, the possibility that it could do so calls for a solution.

A. *Congress: An Unrealistic Solution*

The most obvious, and most unsatisfying, solution to the problem of Article I and Article V conflation would simply call for Congress to stop including Article V triggers in Article I legislation, never use its Article I spending power to induce a state ratification, and generally return to the prevailing norms as they stood between 1789 and 2011. The story of the Budget Control Act as a tragicomic blip that is unlikely to be repeated holds a certain appeal; as Democrats pointed out during the legislative battles leading to passage of the Act, never before had a nation defaulted on its debt due to sheer intransigence.[190] Perhaps the norm can be restored.

This argument is unsatisfactory largely because it rests on a theory of politics and of the Constitution that defies longstanding intuitions dating back to *The Federalist Papers* and beyond. The separation of powers structure underlying the Constitution assumes that each branch will jealously guard its power and seek to assume more power at the expense of the

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from its constitutional ideal"), the recess appointment crisis of 2012 that culminated in the D.C. Circuit invalidating several appointments to the National Labor Relations Board, see Noel Canning v. NLRB, No. 12-1115, 2013 U.S. App. LEXIS 1659 (D.C. Cir. Jan. 25, 2013), and the negotiations leading up to the Budget Control Act itself.

189. See supra Part II.B (discussing *Freeman*). Even *Freeman* did not entail a challenge to an attempted congressional inducement, though the decision offers a model of the sort of aggressive policing that this Note calls for.

190. See Ewan MacAskill, U.S. Debt Crisis: Tea Party Intransigence Takes America to the Brink, Observer U.K., July 30, 2011, http://www.guardian.co.uk/world/2011/jul/31/us-debt-congress-tea-party (on file with the *Columbia Law Review*) (chronicling Democratic Party's reaction to Budget Control Act).

other branches, and that each branch's desire to protect its own prerogatives is the best check on the others.[191] A solution that rests on unilateral disarmament by one branch is no solution at all. To be sure, if Congress avoids conflating Article I and Article V in the future, no constitutional problems will emerge; the problem described here can be precipitated only by congressional behavior.[192]

B. *The Executive: An Unreliable Solution*

The president does have the power, through his or her ability to veto legislation, to interfere with congressional machinations involving Article I and Article V. Coincidentally or not, the same threshold for sending an amendment to the states applies to overriding a presidential veto—an issue that the Court discussed briefly in *Hollingsworth v. Virginia*.[193] As a result, the potential problem of Congress coercing itself to pass an amendment by first passing triggering legislation that changes the subsequent calculus involved in the amendment vote necessarily implies a few things: More than half but fewer than two-thirds of the members of each house support the amendment, the president supports the amendment, and a sufficient number of congressmen who oppose the amendment in isolation could be induced to support it using triggering legislation to make the amendment's alternative unpalatable. If Congress passes legislation that includes an Article V trigger over a presidential veto, the legislation itself was a fortiori unnecessary to induce congressional assent to the amendment—Congress could have simply passed the amendment by a two-thirds majority without using its legislative power at all.[194] In the *South Dakota v. Dole* context of Congress inducing state ratifications via its power of the purse, executive veto would likely be ineffectual because the same two-thirds majority of Congress that supported the amendment would be able to override a presidential veto attempting to prohibit Congress from using its spending authority to induce state ratifications.[195] More problematically, presidential forbearance is not a struc-

191. See, e.g., The Federalist Nos. 10, 51 (James Madison) (discussing separation of powers in Constitution).

192. See U.S. Const. art. I, § 1 (vesting Congress with power to legislate); id. art. V (vesting Congress with power to propose amendments).

193. 3 U.S. (3 Dall.) 378, 379 (1798) (noting Article V requirement of two-thirds majority of Senate and House for all constitutional amendments and Article I requirement of same margin to overcome presidential veto of legislation).

194. This argument assumes that all Congressmen who support passing the legislation potentially triggering passage of an amendment also support the amendment itself.

195. It is entirely possible—indeed, one hopes that it is likely—that at least some Congressmen who support an amendment would not support legislative efforts to induce state ratification of the same amendment via the power of the purse. In a situation where more than two-thirds of Congress voted for an amendment but less than two-thirds and more than half of Congress voted for legislation attempting to influence state ratification, a presidential veto would be an effective check. This is not, however, a strictly structural

tural solution; no president's decision to veto any legislation including Article V triggers would be binding on his or her successors.

C. *The Courts: A Problem of Standing*

The judiciary offers the best hope for policing the separation between Article I and Article V. As discussed above, the judiciary's power to overturn legislation passed by Congress is firmly established.[196] Moreover, the Supreme Court has recently demonstrated a willingness to overturn legislation specifically when it exceeds Congress's enumerated powers.[197] In the instance of Article I infringement on Article V, the judiciary should inquire whether any text in Article I grants Congress the power to play a role in the amendment process. The answer, quite obviously, is that none does: Congress's amendment power is vested in Article V; as *Freeman* indicates, Article V describes the terms of its own execution in language separate from Article I.[198] In short, courts should embrace and expand the central holding of *Freeman* and find that Congress lacks the Article I power not only to modify Article V resolutions but also to pass legislation that includes even the slightest probability of inducing an Article V event (either ratification by states or ratification by Congress). If a piece of legislation operates conditionally on an Article V occurrence, courts should find the law unconstitutional (subject to severability doctrines[199]). Such a rule would be consistent with decisions holding that state legislatures, when they exercise a federal function in ratifying Article V amendments, may neither add to nor detract from the Constitution's provisions in defining their roles.[200]

Judicial enforcement of the separation between Article I and Article V requires formalism. However, as discussed above in the context of slippery slope arguments, the formalism is justified by the potential consequences of any attempt to fashion a functionalist remedy. Put simply, the federal courts have a longstanding tradition of reluctance to

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check—it depends both on the personal preferences of individual legislators and those of the President.

196. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147–48 (1803) (establishing doctrine of judicial review).

197. See, e.g., United States v. Morrison, 529 U.S. 598, 627 (2000) (overturning Violence Against Women Act); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (overturning Gun-Free School Zones Act).

198. The courts should also consider *Hollingsworth v. Virginia*'s proscription of presidential involvement in the amendment process compared to the requirements in Article I and Article II that the President participate in the legislative process. See 3 U.S. (3 Dall.) at 381 n.* (opinion of Chase, J.) ("The negative of the president applies only to the ordinary cases of legislation . . . .").

199. See John Copeland Nagle, Severability, 72 N.C. L. Rev. 203, 207–09 (1993) (describing severability doctrines).

200. See Dyer v. Blair, 390 F. Supp. 1287 (N.D. Ill. 1974) (holding unconstitutional, in opinion by then-Circuit Judge sitting by designation John Paul Stevens, provision of Illinois law requiring three-fifths majority to ratify amendment to U.S. Constitution).

question the wisdom of congressional judgments. Developing a functionalist remedy—attempting to determine that some Article I influences on Article V processes are acceptable and others are not—would involve precisely those kinds of judgments, as well as predictions about the political behavior of fifty different legislative entities. An attempt to preserve functionalism could, moreover, delay a judicial remedy until such a remedy might require the Supreme Court of the United States to declare an amendment unconstitutional because of procedural defects in its passage—a problematic, to say the least, situation that ought to be avoided. Formalism, moreover, carries its benefits. The judicial branch would be able to avoid delicate questions about whether Article V is subject to the political question doctrine[201] by reframing the question as one of congressional legislative power: Does Article I vest in Congress the power to influence by legislation the nature and structure of the Constitution itself? Framed this way, strict formalism flows naturally from the answer that the text, with little prompting, provides: of course not. Indeed, to answer that question with the functionalist's "it depends" would be borderline absurd. Congress's amendment power flows from Article V; its legislative power flows from Article I. The Framers could have described the amendment power as quasi-legislative, or vested in the Congress the power to introduce amendments "by law,"[202] or even included the process for amending the Constitution among Congress's powers in Article I. Instead, the Constitution includes a separate article describing and enumerating the powers and rules of Congress when it acts as an amendment-proposing body. Insofar as those rules are separate from the rules that Congress follows when it acts as a legislative body—and one need not be a mathematician or a constitutional scholar to see that a majority does not equal two-thirds, that presidential involvement is essential to the legislative role and absent from the amendment role, and that Congress makes its own rules for legislation but follows the rules set forth in the Constitution for amendment—the two powers are themselves separate and distinct. Such determinations—about constitutional text, history, and structure, and about whether legislation is consistent with the Constitution—are "emphatically the province and duty of the judicial department."[203]

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201. See Idaho v. Freeman, 529 F. Supp. 1107, 1123–46 (D. Idaho 1981) (finding no political question), vacated as moot sub nom. Carmen v. Idaho, 459 U.S. 809 (1982). The length of the district court's opinion in *Idaho v. Freeman* is attributable to its discussion of numerous obstacles to justiciability; such doctrines potentially make judicial resolution of Article V issues quite difficult. See Chemerinsky, Federal Jurisdiction, supra note 35, at 167–70, (describing political question doctrine in context of constitutional amendments).

202. See supra note 13 and accompanying text (discussing grants of power to Congress outside Article I).

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

Article III requires that the judiciary exercise its function only in the context of "Cases" and "Controversies."[204] The importance of the issue at hand—and the necessary role that the judiciary seems to play in enforcing the rules surrounding it—does not obviate the need for a court to establish justiciability. The standing problem, in particular, is relatively difficult to resolve.[205] If, as this Note argues, a constitutional violation occurs when Congress passes (and the President signs) a bill that might affect a subsequent vote on an amendment in either a state legislature or Congress itself, who has standing to sue on the basis of that violation? In the state context, the ERA saga indicates that state legislators have standing to sue when a rule of Congress or of the state itself prevents them from exercising their federal function under Article V.[206] It is unclear whether a similar standing right can or should be extended to *federal* legislators who believe that Article V is violated by an act of the legislature of which they are a part.[207] It is similarly unclear whether legislators dissatisfied with the option they confront—either vote in favor of an amendment or suffer the policy and political consequences wrought by a previous trigger—have been stripped of their vote in the same manner as the legislators in *Freeman*, whose votes for rescission were rendered null and void by the extension of the ERA's ratification timeline.[208] On the one hand, we should not generally encourage defeated legislators to pursue politics by other means in the courts—and a legislator on the losing side of a congressional vote asking a court to hold the legislation unconstitutional is perhaps the epitome of such "politics by other means" battles. On the other hand, a member of Congress exercises a federal function under Article V as much as a state legislator does when he or she casts a vote for or against sending an amendment to the states for ratification, and he or she ought to have a judicial forum in which to seek to vindicate the right. Ultimately, the argument that the legislator's right flows not from Article I but from Article V ought to militate in favor of granting standing to federal legislators whose Article V right to vote on an amendment "brought forward singly" has been compromised by an

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204. U.S. Const. art. III, § 2, cl. 1.

205. See Chemerinsky, Federal Jurisdiction, supra note 35, at 109–13 (discussing legislative standing).

206. *Freeman*, 529 F. Supp. at 1118–19 ("The injury to a protected interest that the legislators assert as a basis for their standing in this case stems from an impairment of a vote cast in favor of the proposed constitutional amendment, or in favor of the resolution rescinding the prior ratification."), vacated as moot sub nom. *Carmen*, 459 U.S. 809. Courts protected the right to vindicate a properly cast vote in Coleman v. Miller, 307 U.S. 433 (1935), and later in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), overruled by Raines v. Byrd, 521 U.S. 811 (1997).

207. See generally Chemerinsky, Federal Jurisdiction, supra note 35, at 108–13 (discussing legislators' standing).

208. *Freeman*, 529 F. Supp. at 1121.

act of Congress.[209] The importance of allowing courts to intervene before it may be necessary to overturn an amendment cuts the same way.

The Pandora's box opened by Congress's seemingly innocuous inclusion of an Article V trigger in the Budget Control Act calls for a formalistic judicial remedy, rooted firmly in the judiciary's traditional role. A "solution" relying on either the presidency or the Congress might help significantly in reestablishing long-held norms that the BCA undermined, but such norm renewal is an insufficient solution to a problem that potentially threatens both the separation of powers and the delicate balance of federalism. A traditional norm, once breached, must either assume the status of a constitutional rule via judicial action or risk losing its ability to influence the competitive actors within the political branches.

CONCLUSION

The Budget Control Act of 2011, the culmination of an ugly and often embarrassing political fight, subtly breached an important but infrequently discussed constitutional norm. An analysis of the constitutional provisions involved, as well as the history of previous contentious battles over amendments to the Constitution, indicates that what may have once been viewed as a mere guide to permissible legislative behavior ought to assume the status of a constitutional rule, enforced and protected by an active judiciary. The separation of Article I and Article V—whether enforced by unstated norms or judicial doctrine—forms an essential component of our constitutional framework, allowing Article V to perform its channeling function of ensuring that only those social movements and legal arguments with sustained, broad, and engaged bases of support can enshrine their views in the Constitution of the United States. An alternative vision—in which transient political majorities use self-dealing legislative chicanery to influence the very nature and structure of the Constitution—would have produced a Constitution that looks very different from the one we have now.

209. The Federalist No. 85, supra note 28, at 525 (Alexander Hamilton); see also Chemerinsky, Federal Jurisdiction, supra note 35, at 82 (describing cases where standing requirements were relaxed).

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