

## ARTICLES

### THE PUZZLES AND POSSIBILITIES OF ARTICLE V

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*Legal scholars describe Article V of the U.S. Constitution, which sets forth rules for amending the document, as an uncommonly stringent and specific constitutional provision. A unanimous Supreme Court has said that a “mere reading demonstrates” that “Article V is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction.” Although it is familiar that a small set of amendments, most notably the Reconstruction Amendments, elicited credible challenges to their validity, these episodes are seen as anomalous and unrepresentative. Americans are accustomed to disagreeing over the meaning of the constitutional text, but at least in the text itself we assume we can find some objective common ground.*

*This paper calls into question each piece of this standard picture of Article V. Neither the language nor the law of Article V supplies a determinate answer to a long list of fundamental puzzles about the amendment process. Legally questionable amendments have not been the exception throughout U.S. history; they have been the norm. After detailing these descriptive claims, the paper explores their doctrinal and theoretical implications. Appreciating the full extent of Article V’s ongoing ambiguity, we suggest, counsels a new approach to judging the validity of contested amendments, undermines some of the premises of originalism and textualism, and helps us to see new possibilities for constitutional change. Because the success or failure of attempted amendments turns out not to be exclusively or even primarily a function of following the*

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*rules laid out in the canonical document, all constitutional amending in an important sense takes place outside Article V.*

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## INTRODUCTION

One of the distinctive features of the original U.S. Constitution was its capacity for lawful change. In George Washington's words, the Constitution "contain[ed] within itself a provision for its own amendment."<sup>1</sup> That provision was and is Article V, which instructs that an amendment shall become "Part of this Constitution" when "propose[d]" by "two thirds of both Houses" of Congress and "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof."<sup>2</sup> The Supreme Court gave voice to the standard view of Article V when it wrote in 1956 that "[n]othing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."<sup>3</sup>

Constitutional theorists have challenged or complicated this view in a variety of ways. Akhil Amar has suggested that the Constitution may be amended by a national popular referendum.<sup>4</sup> Some have proposed that norms without a foothold in the canonical document may nevertheless attain "constitutional" status.<sup>5</sup> And many have emphasized the extent to

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1. George Washington, Farewell Address (Sept. 17, 1796), *in* 1 *A Compilation of the Messages and Papers of the Presidents, 1789–1907*, at 213, 217 (James D. Richardson ed., 1908); see also Carl J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* 138 (4th ed. 1968) ("[T]he clear recognition and deliberate organization of the amending power was an achievement of the American revolution."); Sanford Levinson, Introduction: Imperfection and Amendability, *in* *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 3, 4 (Sanford Levinson ed., 1995) [hereinafter *Responding to Imperfection*] ("It was a fundamental breakthrough in American constitutional theory . . . that the 'rules of government' would be decidedly 'alterable' through a stipulated legal process." (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 139–44* (1980))).

2. U.S. Const. art. V. Article V also permits "the Legislatures of two thirds of the several States" to apply to Congress to "call a Convention for proposing Amendments," which then go to the states for ratification. *Id.* No such convention has yet been called. See *infra* section III.M.

3. *Ullmann v. United States*, 350 U.S. 422, 428 (1956); see also, e.g., Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 458 (1994) [hereinafter *Amar, Consent of the Governed*] ("The conventional reading of Article V sees it as the exclusive mechanism of lawful constitutional amendment . . ."); Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* *Responding to Imperfection*, *supra* note 1, at 145, 147 [hereinafter *Schauer, Amending the Presuppositions*] ("Article V appears on its face to exhaust the possibilities for amending the Constitution consistent with the Constitution itself . . .").

4. See *Amar, Consent of the Governed*, *supra* note 3, at 462–94; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. Chi. L. Rev.* 1043, 1044–76 (1988) [hereinafter *Amar, Philadelphia Revisited*].

5. See, e.g., Richard Primus, *Unbundling Constitutionality*, 80 *U. Chi. L. Rev.* 1079, 1129 (2013) [hereinafter *Primus, Unbundling Constitutionality*] (explaining that "small-c" constitutional theorists insist that "the text of the written Constitution" is not a necessary "basis for a rule's constitutionality"); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 410 (2007) ("[T]he American 'constitution' consists of a

which new propositions of supreme law, including propositions that depart sharply from prior understandings, may emerge and become entrenched in the absence of formal amendment.<sup>6</sup> Virtually all constitutional lawyers, however, take as given that conformity with Article V's "amendatory process" has determined ever since the Founding what is and is not "put into" the written Constitution, and therefore what its text does and does not say.<sup>7</sup>

This paper questions Article V's capacity to perform that function.<sup>8</sup> It is by now familiar that the perceived clarity of the constitutional text is "constructed" to a significant degree by norms of legal argument and other social practices.<sup>9</sup> We endeavor to show that *what counts as the constitutional text in the first place* is also constructed to a significant degree by such practices.<sup>10</sup> Part of the reason is that the ultimate rule of recognition in any system is a matter of official and popular acceptance, rather

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much wider range of legal materials than the document ratified in 1789 and its subsequent amendments.").

6. See, e.g., Richard S. Kay, Formal and Informal Amendment of the United States Constitution, 66 Am. J. Compar. L. 243, 260 (2018) [hereinafter Kay, Formal and Informal Amendment] ("It is fair to say that most of what now goes under the caption 'constitutional law' in the United States is attributable to extraconstitutional, 'off-the-books' developments."); Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Calif. L. Rev. 1323, 1327 (2006) (arguing that social "movements regularly succeed in changing the Constitution without amending it").

7. Even the most radical Article V revisionists do not necessarily dispute this. Although Amar contends that the Constitution may lawfully be amended by a popular referendum or comparable mechanism, he never suggests that such an amendment has in fact occurred. See, e.g., Amar, Consent of the Governed, *supra* note 3, at 457–61. Likewise, although Bruce Ackerman advances an elaborate theory of constitutional change outside Article V, he never suggests that new words have been put into the Constitution's text by a procedure that does not purport to follow Article V. See, e.g., 2 Bruce Ackerman, We the People: Transformations 15–31 (1998) [hereinafter Ackerman, We the People].

8. Although this piece is technically an "Article," it will be referred to as a "paper" throughout to avoid confusion with references to Article V.

9. See, e.g., Curtis A. Bradley & Neil S. Siegel, Constructed Constraint and the Constitutional Text, 64 Duke L.J. 1213, 1216 (2015) ("The perceived clarity of the text . . . is often partially constructed by [interpretive] practice."); Peter Jeremy Smith, Commas, Constitutional Grammar, and the Straight-Face Test: What if Conan the Grammarian Were a Strict Textualist?, 16 Const. Comment. 7, 17 (1999) (discussing "all-too-common" situations in which "we are confronted by [constitutional] text that, according to established rules of grammar, does not actually say what we all know it to mean").

10. Amar has made a conceptually similar, but empirically narrower, point about the original Constitution. While most assume that the parchment Constitution in the National Archives is the authoritative document, a printed version with minor differences was transmitted to and ratified by the states. See Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 63–68 (2012) [hereinafter Amar, America's Unwritten Constitution]. That latter version is probably the legally operative one. *Id.* But there would be no way to ascertain which version is legally operative simply by studying the documents themselves. *Id.*; cf. Laurence H. Tribe, The Invisible Constitution 6 (2008) [hereinafter Tribe, The Invisible Constitution] ("[N]othing in the visible text can tell us that what we are reading really *is* the Constitution . . .").

than constitutional design. Even an amending clause that looks itself like the system's "supreme criterion of law"<sup>11</sup> owes its efficacy, and indeed its legality, to extratextual forces.<sup>12</sup> But another, more U.S.-specific part of the reason—and the one on which this paper focuses—is that neither the language of Article V nor subsequent constructions of Article V specify the amendatory process in enough detail to establish in many cases which amendments are valid and which are not. Article V continues to be shrouded in a remarkable amount of legal uncertainty, which further attenuates the link between its contents and the failure or success of any given amendment effort.<sup>13</sup>

Leading scholars have characterized Article V as an unusually clear and constraining constitutional provision.<sup>14</sup> The Supreme Court has said that a "mere reading demonstrates" that "Article V is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction."<sup>15</sup> Yet, as we explain, the text of Article V leaves open numerous fundamental questions, from the time limits (if any) on an amendment's pendency to the substantive limits (if any) on an amendment's subject matter to the role (if any) of the President and state governors in the amendatory process to the respective roles (if any) of Congress and the courts in deciding whether an amendment has been validly adopted.<sup>16</sup> Debates during the drafting and ratification of the Constitution

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11. Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 632 (1987) [hereinafter Greenawalt, *Rule of Recognition*].

12. See *infra* Part I.

13. A "successful" effort to enlist Article V, for purposes of this paper, is one that results in a new amendment widely understood to have become part of the written Constitution. In other words, we equate success with sociological legitimacy. And we contend that amendment success is not exclusively or even primarily a function of following the rules laid out in Article V.

14. See, e.g., Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 270 (2006) [hereinafter Vermeule, *Judging Under Uncertainty*] (listing the "rules governing . . . constitutional amendment" as an example of "clear and specific constitutional text[]"); Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. Rev. 1029, 1035 (2014) [hereinafter Albert, *Constitutional Disuse or Desuetude*] ("The simplicity and clarity of Article V's enabling clause allow us to identify when the Constitution has been formally amended . . ."); David R. Dow, *The Plain Meaning of Article V, in Responding to Imperfection*, *supra* note 1, at 117, 117 ("The meaning of Article V . . . is an example of yet another text the meaning of which is essentially clear."); John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. Chi. L. Rev. 375, 457–61 (2001) (depicting Article V as privileging "clarity" and "certainty" over other values).

15. *United States v. Sprague*, 282 U.S. 716, 730 (1931).

16. See *infra* section II.A. This is by no means the first work to observe that Article V is vague or underspecified in certain respects. See, e.g., Richard B. Bernstein with Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* 248 (1993) ("The procedures outlined in Article V pose a host of unresolved difficulties."); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 432 (1983) [hereinafter Dellinger, *Legitimacy of Constitutional Change*] (acknowledging that "[t]he spare language of article V leaves

shed hardly any light on these questions.<sup>17</sup> More than two centuries later, post-ratification practice has done little to resolve them, or to establish much of anything concerning the never-used amendment-through-convention procedure. As a result, the overwhelming majority of amendments added to the Constitution since 1787 have faced credible challenges to their validity—challenges that were beaten back by proponents at the time but that in many respects have never been definitively dispelled—while other amendments have plausibly satisfied Article V’s formal criteria yet nevertheless failed to gain widespread acceptance.<sup>18</sup>

Charles Black once advised Congress that “[f]undamental law should be not merely of arguable, but of clear legitimacy,” and that accordingly the “legitimization of constitutional amendments” is an area “where, perhaps more than anywhere else, square corners should be cut.”<sup>19</sup> The actual experience of constitutional amendment throughout U.S. history has been far messier. Article V contains so many ambiguities and lacunae that it can be expected to yield, and in fact has yielded, amendments of only “arguable” legal legitimacy at the time of their adoption.<sup>20</sup> Consider, in this regard, that no fewer than twenty-six of our twenty-seven recognized amendments failed to comply with a requirement of presidential approval that Black himself found “plain” on the face of the Constitution.<sup>21</sup>

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open critical questions,” yet contrasting Article V with “open-textured provisions of the Constitution”). And “some scholars have cited difficulties arising out of the ratification of a handful of constitutional amendments.” Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 *Harv. L. Rev.* 1220, 1270 n.267 (2019) [hereinafter Prakash, *Of Synchronicity*]. So far as we are aware, however, this is the first work to document all of the major unresolved legal questions raised by Article V and to explore their collective significance for constitutional law, politics, and theory.

17. See Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress* 161 (1993) (explaining that “the consideration of amending procedures was one of the least adequate of the Convention debates”); Carlos A. González, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution’s Ratification Clauses*, 38 *U.C. Davis L. Rev.* 1373, 1444 (2005) (“To the extent that Article V was discussed during the Philadelphia drafting convention and in the subsequent ratification process, only Article V’s federalism and entrenchment [implications]—whether Article V made amendment too difficult—were mentioned.”).

18. See *infra* Part III.

19. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 *Yale L.J.* 189, 190, 209 (1972).

20. Cf. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1794–801 (2005) [hereinafter Fallon, *Legitimacy and the Constitution*] (defining legal legitimacy and contrasting it with sociological and moral legitimacy). As this paper uses the term, an amendment enjoys “legal legitimacy” at the time of its adoption if the amendment’s proposal and ratification complied with Article V. A constitutional amendment, or for that matter an entire constitution, may come to be accepted as authoritative notwithstanding defects under then-existing law in the process by which it was created. See *id.* at 1803–06.

21. Article I, Section 7, Clause 3 of the Constitution states that “[e]very Order, Resolution, or Vote” of Congress “shall be presented to the President” and must be

Recent controversies over the Twenty-Seventh Amendment and the Equal Rights Amendment (ERA) underscore just how many questions about Article V remain unsettled at this late date.<sup>22</sup> The Twenty-Seventh Amendment was “ratified” by the requisite number of states nearly 203 years after it was proposed by Congress alongside the amendments that became the Bill of Rights. As the Supreme Court opined in the 1921 case *Dillon v. Gloss*, there is a serious objection that this violates an implicit condition of Article V that ratification take place within a reasonable time frame.<sup>23</sup> The *Dillon* Court specifically stated that it was “quite untenable” to think that what is now the Twenty-Seventh Amendment could be revived “by some future generation.”<sup>24</sup> And the Justice Department’s Office of Legal Counsel disagreed with members of Congress over whether the Archivist of the United States was required to refer the amendment to Congress prior to its official certification.<sup>25</sup>

Meanwhile, the ERA has not, at this writing, been accepted by the legal community as part of the Constitution because several state ratifications occurred after a deadline imposed by Congress, among other complications, even though the amendment seems to have checked all of the boxes for validity indicated on the face of Article V. In addition to the ERA, five amendments have been proposed by Congress but never ratified by a sufficient number of states.<sup>26</sup> Or, at least, so goes the conventional wisdom. A recent lawsuit contends that the other amendment proposed by Congress alongside the current Twenty-Seventh and the Bill of Rights, regarding congressional apportionment, *did* receive the requisite number of ratifications in the eighteenth century.<sup>27</sup> These unsuccessful amendments dwell in a kind of legal purgatory due to the apparent acceptance

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approved by the President before it “take[s] Effect.” According to Black, this instruction would seem to mean, “if plain words can have plain meaning,” that once passed by Congress a proposed amendment must be approved by the President. Charles L. Black, Jr., On Article I, Section 7, Clause 3—And the Amendment of the Constitution, 87 Yale L.J. 896, 899 (1978) [hereinafter Black, On Article I]. Only one amendment has ever received a presidential signature prior to state ratification: President Abraham Lincoln’s on the Thirteenth. See Harrison, *supra* note 14, at 389 n.79; *infra* note 130. The so-called Corwin Amendment, proposed by Congress in 1861 but never ratified, was “inadvertently presented” to and then signed by President James Buchanan. Cong. Globe, 38th Cong., 2d Sess. 630 (1865) (statement of Sen. Trumbull); see also Bernstein with Agel, *supra* note 16, at 91. The presentment issue is discussed in detail *infra* section III.B.

22. For more extensive discussion of both amendments, see *infra* sections III.K, III.L.3.

23. 256 U.S. 368, 375 (1921) (“We conclude that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.”).

24. *Id.*

25. See Cong. Pay Amendment, 16 Op. O.L.C. 85, 99–105 (1992); Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L. Rev. 497, 540–41 (1992).

26. See H.R. Doc. No. 110-50, at 29–31 (2007) (listing unratified amendments).

27. See *LaVergne v. U.S. House of Representatives*, 392 F. Supp. 3d 108, 114 (D.D.C. 2019) (three-judge court). The dispute hinges on whether Connecticut validly ratified the

of the Twenty-Seventh Amendment after its long dormancy. Even more striking, there is a colorable argument that enough states have “applied” for a constitutional convention to obligate Congress to call one—even though few, if any, members of Congress appear to realize this.<sup>28</sup>

Beyond its intrinsic interest, Article V’s ambiguity carries significant doctrinal and theoretical implications. On the doctrinal side, it points toward a new defense of, and twist on, the Supreme Court’s ruling in *Coleman v. Miller* that Congress has the power to “promulgate” or “proclaim” constitutional amendments after ratification.<sup>29</sup> Many commentators have criticized *Coleman* on textual and historical grounds, but the persistent controversy over the validity of amendments suggests a distinct prudential rationale for allowing one organ of government to resolve the status of a new amendment more quickly and democratically than the Court is capable of. Congress, we suggest, is the branch best suited for this task—and could further bolster its comparative competence through the use of subconstitutional mechanisms such as special commissions and advisory referenda.

On the jurisprudential side, our account informs multiple debates about constitutional change through and beyond Article V. Because the success or failure of an attempted amendment bottoms on social acceptance, which throughout U.S. history has not turned on punctilious adherence to a set of rules, all constitutional amending in an important sense takes place “outside” as well as “inside” Article V. Textual and extra-textual considerations are entwined right from the start of the law-recognition process. Article V, in consequence, may have more play in the joints than is typically realized. Given the extreme antidemocratic potential of the double-supermajoritarian Article V formula, there is a strong case for what might be called *Article V Thayerianism*: an interpretive presumption favoring ease of amendability on those (many) questions that Article V does not clearly resolve. Vicki Jackson has warned that “sociocultural beliefs in the difficulty of amendment . . . may contribute to the difficulty of amendment today,” as claims about the impossibility of amendment “can become self-fulfilling.”<sup>30</sup> Our descriptive analysis of Article V bears out this warning, while our proposed adaptation of Thayerianism furnishes a practical tool for breaking out of the vicious cycle that Jackson identifies. At the same time, our showing of the constructedness of the constitutional text holds lessons for constitutional interpretation more

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amendment when each house of its legislature approved the amendment seven months apart, during different legislative sessions. See *infra* notes 280–288 and accompanying text.

28. See *infra* section III.M.

29. 307 U.S. 433, 450 (1939); see *infra* section IV.B.

30. Vicki C. Jackson, *The (Myth of Un)Amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 *Int'l J. Const. L.* 575, 576–77 (2015) [hereinafter Jackson, *The (Myth of Un)Amendability*] (emphasis omitted).



generally, as it undermines some of the positivist premises of originalism and textualism.<sup>31</sup>

The paper proceeds in five parts. Part I sets the general jurisprudential stage by explaining the inherent limits of Article V, or any constitution's amending clause, to determine which efforts at constitutional change will be seen as legally valid. Part II catalogs the many questions about the amendment process that the text of Article V fails to answer, and it explains that these uncertainties are striking both from a comparative perspective and because of Article V's unique function as the gateway to the constitutional text. Part III provides a historical review of amendment efforts, which reveals that legally plausible contestation over amendment validity is the norm in U.S. practice, not the exception, and that many important questions about the amendment process remain unsettled. Parts II and III are the empirical centerpiece of the paper. Taken together, they confound any notion that Article V is a clear<sup>32</sup> or "straightforward"<sup>33</sup> guide to amendment, even though there is arguably no more fundamental issue in U.S. law than what is or is not inscribed in the constitutional text. Moving from deconstruction to reconstruction, Part IV considers doctrinal implications of this account and argues, in particular, that it provides a stronger basis for *Coleman* than the reasons given by the Court. Finally, Part V explores broader implications for constitutional theory and interpretation.

#### I. "EXTERNAL" LIMITS TO ARTICLE V'S (OR ANY AMENDING CLAUSE'S) RESOLVING POWER

The main descriptive burden of this paper is to demonstrate that Article V of the U.S. Constitution is significantly less clear and constraining, and therefore significantly less determinative of the success or failure of attempted amendments, than is generally assumed. But before turning to those claims, let us imagine a hypothetical country, Sovereignia, with an amending clause in its written constitution, known as Article X, that is as precise as a legal directive can be, spelling out in meticulous detail and with meticulous care the requirements for any amendment to be added. Would the requirements of Article X, in themselves, dictate which attempted amendments are considered part of the supreme law of Sovereignia?

They would not be capable of doing this for at least two reasons. First, in the terminology of Friedrich Waismann, the sort of language used in

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31. On all points previewed in this paragraph, see *infra* Part V.

32. See *supra* notes 14–15 and accompanying text.

33. See, e.g., Paul M. Schwartz, *Constitutional Change and Constitutional Legitimation: The Example of German Unification*, 31 *Hous. L. Rev.* 1027, 1088 (1994) ("Article V sets out a relatively straightforward process for changing the Constitution.").

any amending clause might be “open texture[d].”<sup>34</sup> Even the most “carefully delimited empirical terms,” according to Waismann, “might nevertheless produce uncertainty in the face of unforeseen and virtually unimaginable instances.”<sup>35</sup> And because legal rules are written in and dependent on “empirical” language, law might necessarily be open textured as well—not just in a system that treats legal rules as defeasible but also in one that treats the literal meaning of rules as binding in all cases, without exceptions or modifications to avoid absurd or unjust outcomes.<sup>36</sup> If this is right, then no matter how detailed the drafting of Article X or how rigid Sovereignia’s interpretive culture, the potential for future uncertainty based on unanticipated developments will remain. When such developments arise, the plain meaning of Article X will run out; any resulting disputes as to the validity of an amendment will have to be resolved with reference to something other than the internal resources of Article X.<sup>37</sup>

Second, and more fundamentally, even if no confusion ever arises as to the meaning of Article X, nothing contained within Article X or any other clause of Sovereignia’s constitution can explain why Article X is treated as the authoritative means of amending the constitution—or ensure that it will continue to be treated this way in the future. It is always possible that the citizens and officials of Sovereignia will decide one day to interpret Article X in a less literal manner; or to recognize alternative amendment rules as equally authoritative; or to deny the validity of an amendment that indisputably satisfied the requirements of Article X; or to ignore the requirements of Article X altogether (as the Founding generation of Americans effectively did with the amendment procedures in the

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34. Friedrich Waismann, *Verifiability*, in *Logic and Language: First and Second Series* 117, 119–20 (Antony Flew ed., 1951).

35. Frederick Schauer, *On the Open Texture of Law*, 87 *Grazer Philosophische Studien* 197, 198 (2013) [hereinafter Schauer, *Open Texture*] (discussing Waismann’s ideas); see also Stewart Shapiro & Craig Roberts, *Open Texture and Analyticity*, in *Friedrich Waismann: The Open Texture of Analytic Philosophy* 189, 192 (Dejan Makovec & Stewart Shapiro eds., 2019) (describing open texture as “a kind of semantic indeterminacy” that cannot be ruled out in advance “since we do not know where the indeterminacy comes from”). Waismann was not entirely clear what he meant by associating open texture with “empirical” terms and concepts, see Joost Jacob Vecht, *Open Texture Clarified*, *Inquiry*, July 2020, at 4, but no one seems to dispute that codified legal language qualifies as empirical in his sense.

36. See Schauer, *Open Texture*, supra note 35, at 202 (“If Waismann’s idea is sound, then open texture is indeed an ineliminable feature of law . . . precisely because it is ineliminable in language.”).

37. Although we find his formulation helpful, we do not mean to endorse all of Waismann’s ideas or to wade into debates about open texture in the philosophy of language. The point here is simply that even the clearest amendment rule conceivable may give rise to legal underdeterminacy.

Articles of Confederation<sup>38</sup>); or to ignore their written constitution altogether. That the people of Sovereignia treat Article X as the exclusive gateway to constitutional amendment is a contingent social fact, subject to change whether or not Article X itself changes. All constitutions and all constitutional provisions, as Frederick Schauer and others following H.L.A. Hart have detailed, “owe their ‘constitutionality’ to logically and politically antecedent conditions” that “are not themselves legal or constitutional in any important sense.”<sup>39</sup> Article X may inform the rule of recognition in Sovereignia with respect to the validity of constitutional amendments.<sup>40</sup> But the ultimate rule of recognition determining what is and is not considered the law of Sovereignia, or any other system, is predicated on public acceptance.<sup>41</sup>

None of the above is meant to be controversial. The practical-minded reader might fairly ask, though, how much these conceptual caveats matter. In countries such as the United States, one particular amending clause has been treated as the gateway to the constitutional text. While many

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38. The Articles of Confederation required any amendment to “be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.” Articles of Confederation of 1781, art. XIII, para. 1. On the Constitution proposed by the Philadelphia Convention as a violation of this requirement, see Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 *U. Chi. L. Rev.* 475, 479–80 (1995); Richard S. Kay, *The Illegality of the Constitution*, 4 *Const. Comment.* 57, 67–70 (1987). Even a constitution that purported to make itself “unalterable,” such as the constitution for the Carolinas drafted by John Locke, *Fundamental Consts. of Carolina of 1669*, art. 120, could in practice be amended if there were sufficient public and official support.

39. Schauer, *Amending the Presuppositions*, *supra* note 3, at 160–61; see also, e.g., Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *The Rule of Recognition and the U.S. Constitution 175, 192* (Matthew Adler & Kenneth Einar Himma eds., 2009) (noting “the unavoidable dependence of law on the nonlegal environment in which it exists, not simply to decide how law should be interpreted . . . but more broadly to determine just what is to count as law and what is not”); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 *Harv. L. Rev.* 1221, 1291 (1995) (“Ultimately, one must step outside the Constitution—as with any legal text—to identify criteria for legitimating that body of law . . .”).

40. But cf. Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *The Rule of Recognition and the U.S. Constitution*, *supra* note 39, at 69, 73 (observing that “one must look outside the Constitution itself for the rules and standards governing how amendments are recognized as having satisfied the criteria” of an amending clause).

41. See Schauer, *Amending the Presuppositions*, *supra* note 3, at 150 (“The ultimate rule of recognition is a matter of social fact, and so determining it is for empirical investigation rather than legal analysis.”); Young, *supra* note 5, at 422 (describing the ultimate rule of recognition as “predicated on social acceptance”); see also H.L.A. Hart, *The Concept of Law 97–120* (1961) (discussing the “ultimate rule of recognition” in similar terms). We bracket the questions of exactly how and by whom a norm must be “accepted” to qualify as legally valid or sociologically legitimate. Cf. Fallon, *Legitimacy and the Constitution*, *supra* note 20, at 1805 (“elid[ing]” the same questions).

argue that the small-c constitution, or the “constitution in practice,”<sup>42</sup> has been updated through judicial rulings, framework statutes, and more, no one seriously suggests that the big-C or written Constitution has been revised through a process that does not purport to comply with Article V.<sup>43</sup> The requirements of a clear and concrete amending clause, widely seen as the definitive route to formal constitutional change, could go a very long way toward determining which attempted amendments are accepted as valid and which are not.

In principle, then, the success or failure of attempted amendments rests unavoidably on extralegal or prelegal foundations. But in practice, such success or failure might, in certain systems, be tightly tied to the rules of an amending clause, so that the sociological legitimacy as well as the legality of amendments is in effect a function of their fit with those rules. Alternatively, an amending clause might contain vague language yet nonetheless give rise to a body of law that supplies determinate legal answers to the vast majority of real world questions raised by amendment efforts.<sup>44</sup>

Is either true of the United States?

## II. “INTERNAL” LIMITS TO ARTICLE V’S RESOLVING POWER: TEXT

The short answer is no. This Part first tours the many ambiguities and lacunae in Article V’s text, before discussing why these underdeterminacies are so significant.<sup>45</sup> The next Part then surveys the history of successful constitutional amendments to show that the lived experience of Article V has been, and continues to be, beset by legal uncertainty.

### A. *Interpretive Puzzles*

Article V provides in full:

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42. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *Harv. L. Rev.* 1457, 1459 (2001) [hereinafter *Strauss, Irrelevance of Amendments*] (noting the distinction between “the small-‘c’ constitution—the fundamental political institutions of a society, or the constitution in practice—and the document itself”); see also Primus, *Unbundling Constitutionality*, *supra* note 5, at 1082 (associating the small-c constitution with “the web of documents, practices, institutions, norms, and traditions that structure American government”).

43. See *supra* notes 4–7 and accompanying text.

44. See Kent Greenawalt, *How Law Can Be Determinate*, 38 *UCLA L. Rev.* 1, 56–62 (1990) (discussing circumstances in which “open-ended” constitutional directives can yield determinate legal answers).

45. We describe Article V as “underdeterminate,” rather than “indeterminate,” because it does have a core of relatively clear meaning. Cf. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 *U. Chi. L. Rev.* 462, 473 (1987) (distinguishing between underdeterminacy and indeterminacy in law). Essentially every reader of Article V agrees, for instance, that the “Houses” of Congress referenced therein are the U.S. Senate and House of Representatives rather than, say, the personal residences of individual members.

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; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.<sup>46</sup>

This run-on sentence immediately presents a host of puzzles that, the next Part shows, are not clearly resolved by context. Bracketing for the moment all issues regarding how “a Convention for proposing Amendments” is supposed to work, consider the following questions raised by each clause in order.

- “*two thirds of both Houses*”: Does this voting rule require the support of two-thirds of each chamber, voting separately, or two-thirds of the total membership of Congress, voting together?<sup>47</sup> And does it require the support of two-thirds of all members of the House and Senate or only the support of two-thirds of those present, assuming there is a quorum? Or two-thirds of those present and voting, such that abstaining members can contribute to the quorum without

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46. U.S. Const. art. V. The text reproduced here and in other quotations of the Constitution is drawn from the parchment version on display in the National Archives. As noted above, a distinct version of the Constitution was printed and distributed to the states, which may be more authoritative because it was voted upon by state ratifying conventions. See *supra* note 10; see also Denys P. Myers, For a Master File of the Constitution, in S. Doc. No. 87-49, at 67, 70–71 (1961) (noting “slight” discrepancies among the texts that were voted on by the state conventions). These two versions contain numerous differences in capitalization and punctuation; for a list of all the variations in Article V, see Philip Huff, The Constitution of the United States: A Variorum 21–22 (Apr. 15, 2017), <https://ssrn.com/abstract=2778049> [<https://perma.cc/947X-52J9>] (unpublished manuscript). In addition, a third version of the Constitution was printed on September 18, 1787, “at the Philadelphia Convention’s behest,” and “formed the basis for the earliest newspaper printings of the Constitution.” Philip Huff, How Different Are the Early Versions of the United States Constitution? An Examination, 20 Green Bag 2d 163, 165 (2017). That version contained a significant typo in Article V. It said that Congress could not regulate the slave trade prior to the year 1708 rather than 1808—rendering the provision inoperative. *Id.* at 171–72. The typo was corrected in most, but not all, early newspaper and pamphlet printings disseminated to the public as the debates over ratification began. See Leonard Rapport, Printing the Constitution: The Convention and Newspaper Imprints, August–November 1787, Prologue, Fall 1970, at 69, 82–83. This all goes to show yet again that the literal identity of “the constitutional text” rests on extratextual foundations.

47. See Dow, *supra* note 14, at 118 (noting this ambiguity); Kay, Formal and Informal Amendment, *supra* note 6, at 244 (same). In several other places, the Constitution uses the clearer phrase “Each House.” E.g., U.S. Const. art. I, § 5, cls. 1–3.

counting in the denominator for the two-thirds calculation?<sup>48</sup> Must both chambers vote on an amendment within a single session? If not, does an amendment passed by one chamber remain pending and available for approval by the other chamber indefinitely? Once an amendment has cleared the two-thirds hurdle (however understood) and been “propose[d]” to the states, may Congress rescind it?<sup>49</sup> If so, does rescission likewise require two-thirds supermajorities?<sup>50</sup>

- “*shall deem it necessary*”: What does it mean for an amendment to be “necessary”? Is Congress required to make any kind of finding of necessity in the process of promulgating an amendment?<sup>51</sup> Is such a finding, whether express or implicit, a legal determination reviewable by a court?
- “*Amendments*”: Is there any limitation on the scope of permissible constitutional reforms implicit in this term? Could an entirely new Constitution be passed through Article V’s procedures, or would that no longer constitute an “Amendment”? Does the choice of the term “Amendment” suggest that constitutional changes pursued through Article V must be incremental and limited to a “perfecting” role?<sup>52</sup>

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48. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361, 409 (2004) (“The framers . . . blundered by leaving open the critical interpretive question whether the express majority quorum for ordinary majority voting still obtains where the Constitution requires a supermajority of the votes cast.”). An additional set of puzzles, not specific to the amendment process, concerns how to calculate a quorum if a large proportion of Congress is incapacitated or deceased. See Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 Cath. U. L. Rev. 949, 959 (2004) (“The Constitution does not define whether the quorum requires a majority of authorized seats in a house or a majority of occupied seats, of living, selected, and sworn members of that house.”).

49. Compare, e.g., Akhil Reed Amar, *America’s Constitution: A Biography* 456 (2005) [hereinafter *Amar, America’s Constitution*] (yes), with John Alexander Jameson, *A Treatise on Constitutional Conventions: Their History, Powers, and Modes of Proceeding* 634 (4th ed. 1887) (no).

50. See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 728–29 (1993) [hereinafter *Paulsen, A General Theory*] (arguing in the affirmative while noting alternative possibilities).

51. See 1 *Annals of Cong.* 430 (1789) (statement of Rep. Vining) (contending that both houses must agree that an amendment is “necessary” before deliberating on a proposal).

52. See Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 Mich. L. Rev. 239, 300–01 (1989) (arguing that most Framers and ratifiers envisioned amendments as limited to a “perfecting” role); see also Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 Mich. L.J. 109, 118 (1893) (“[A]n amendment . . . in the very nature of the case, must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose.”); Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *Responding to Imperfection*, supra note 1, at 163, 177 (“The word *amend* . . . means to correct or improve; amend does not mean ‘to

- “*ratified*”: When and how must a state legislature “ratify” an amendment for that ratification to be effective? Is there a time limit? Must both houses of a bicameral state legislature approve an amendment in the same legislative session? Must they adopt a simple majority voting threshold, or can they set their own voting procedures?<sup>53</sup> Does it matter if those procedures are contained in the state constitution? And must each state legislature vote on the identical text, or can differences in punctuation or wording defeat ratification of an amendment?
- “*Legislature*”: What is a “Legislature” for purposes of Article V? If the people of a state participate directly in the process of making laws, can they qualify as the “Legislature”?<sup>54</sup> May a state hold an advisory or binding referendum on ratification? If the state governor plays a role in the normal legislative process, must the governor play the same role in the Article V process?<sup>55</sup> If the lieutenant governor may break a tie in the state senate for other matters, like the Vice President does at the federal level, may the lieutenant governor cast a tiebreaking vote for ratification?<sup>56</sup>
- “*three fourths*”: How should “three fourths” be understood in circumstances where the denominator is not cleanly divisible by four?<sup>57</sup> If a state initially rejects a proposed amendment, can the

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deconstitute and reconstitute,’ to replace one system with another or abandon its primary principles.”); Roman J. Hoyos, Article V and the Law of Constitutional Conventions 28–29 (2020), <https://ssrn.com/abstract=3723119> [<https://perma.cc/74ZL-3FA9>] (unpublished manuscript) (maintaining that “the 1787 convention’s decision to use the term *amendment* rather than *alteration* suggests that Article V does not envision a general revision power”).

53. See *Dyer v. Blair*, 390 F. Supp. 1291, 1304 (N.D. Ill. 1975) (three-judge court) (“[T]he Constitution is totally silent with respect to the procedure which . . . each state legislature . . . should follow in performing its ratifying function.”). This question is important because of the wide variety of procedures followed by states to ratify an Article V amendment. See Matt Gehring, Rsch. Dep’t, Minn. House of Reps., United States Constitutional Amendment Process: Legal Principles for State Legislators 15–37, 52–55 (2016), <https://www.house.leg.state.mn.us/hrd/pubs/conamendlegal.pdf> [<https://perma.cc/AU3G-HQ6W>] (collecting state constitutional provisions and legislative rules).

54. Cf. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 813–24 (2015) (answering in the affirmative in the Elections Clause context).

55. See Herman V. Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History, in 2 Annual Report of the American Historical Association for the Year 1896, at 5, 297 (1897) (“There has been a great lack of uniformity in the actual practice by the governors of the States in this respect.”).

56. See *Coleman v. Miller*, 307 U.S. 433, 447 (1939) (dividing equally on whether this question is justiciable).

57. In the First Congress, a Senate committee apparently took the position that “nine states out of thirteen had sufficed to ratify the Bill of Rights,” even though three-fourths of thirteen is 9.75. David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, at 208 (1997) [hereinafter Currie, The Federalist Period] (citing 6 Annals of Cong. 1537 (1797)). South Carolina Representative Robert Goodloe Harper countered with the arresting claim that “there must be twelve ratifying States to be three-fourths [of fourteen], as intended by the Constitution, because that number would be three-fourths of sixteen,

state later change its mind and be counted toward three-fourths (and, if so, how)? Conversely, once a state has ratified an amendment, can it subsequently rescind its ratification (and, if so, how)? What if only one house of the state legislature votes to rescind ratification? If new states join the Union while an amendment is pending, do they necessarily affect the numerator and denominator?

- “*Conventions*”: If an amendment is ratified by state conventions rather than legislatures, who chooses the process to be followed—Congress or each state? Are there any limits or requirements regarding how a convention is to operate? How are the delegates to such conventions selected? Can a statewide referendum or other plebiscitary process qualify as a “convention”?
- “*one or the other Mode of Ratification*”: Does Congress have complete discretion in specifying which mode of ratification shall be followed? Or are there certain sorts of amendments that must be ratified pursuant to certain modes? When choosing a mode of ratification, may Congress put a time limit on it (and, if so, how)? Once in place, may such time limits be extended (and, if so, how)? For example, does the imposition or modification of a deadline require a two-thirds vote?

These are some of the uncertainties that are apparent on the face of Article V and, as the next Part details, have given rise to legal controversy. If one burrows into the text’s silences and elisions, the uncertainties compound. For instance, is Article V the sole method of amendment consistent with the Constitution, or does the Constitution preserve for “We the People” the option to amend the text through other routes, such as a national referendum?<sup>58</sup> Apart from the procedures used, are there substantive limits on acceptable amendments implicit in the constitutional structure or in the concept of popular sovereignty?<sup>59</sup> For example, could

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which was the nearest number to fourteen capable of four equal divisions.” 6 Annals of Cong. 2281 (1797).

58. The most famous argument for an unenumerated constitutional “right” to amend the document outside Article V belongs to Amar. See *supra* notes 4, 7 and accompanying text. As Amar notes, Article V “emphatically does *not* say that it is the *only* way to revise the Constitution.” Amar, *Consent of the Governed*, *supra* note 3, at 459. Amar concedes that government officials are stuck with Article V; his argument applies only to “People-driven” amendment efforts. *Id.* at 460. For a prominent rebuttal of Amar on textual and historical grounds, see Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 *Colum. L. Rev.* 121, 130–73 (1996).

59. For illustrative discussions of this issue, see Richard Albert, *America’s Amoral Constitution*, 70 *Am. U. L. Rev.* 773, 786 (2021) (arguing that “nothing in America’s modern Constitution is legally immune to change”); Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 *Ariz. L. Rev.* 717, 733 (1981) (arguing that the amending power remains limited by Article V’s express prohibition against restructuring the Senate and by an implied prohibition against amendments that “create any new limitations on the amending power” itself); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 *S. Cal. L.*



the First Amendment be repealed, or is it too fundamental to the republican underpinnings of the constitutional project?<sup>60</sup> Could an amendment change the amendment process or make itself unamendable? If not, does it follow that the one unexpired substantive limit stated in the text of Article V—the final clause providing that no amendment shall deprive a state of “equal Suffrage” in the Senate without its consent—is void?<sup>61</sup>

An additional set of uncertainties involves the legal role of the President. There is no express mention of the executive branch in Article V. But Article I, Section 7, Clause 3 of the Constitution seems to demand that *every* order, resolution, or vote requiring the concurrence of the House and Senate be presented to the President for approval.<sup>62</sup> Must every Article V amendment, then, be presented to the President before being transmitted to the states for ratification? If so, does the President have the power to veto a proposed amendment?

Yet another fertile source of uncertainty is the provision for a state-initiated convention to propose amendments to the Constitution, which has never been successfully invoked.<sup>63</sup> Article V says virtually nothing about how this process works. How does a state submit an “application” to Congress?<sup>64</sup> May a state rescind an application once submitted? Do applications for a convention remain pending in perpetuity, or do they expire after some period of time? Can the states call a “limited” convention to craft amendments for a particular purpose, or even to propose a specific

Rev. 703, 754–57 (1980) (arguing that amendments must be consistent with human dignity to be valid); John R. Vile, *Limitations on the Constitutional Amending Process*, 2 *Const. Comment.* 373, 380–87 (1985) [hereinafter Vile, *Limitations on the Amending Process*] (disputing Linder’s and Murphy’s positions).

60. See, e.g., John Rawls, *Political Liberalism* 239 (expanded ed. 2005) (suggesting that an “amendment to repeal the First Amendment and replace it with its opposite” should be deemed “invalid” by the Court); Amar, *Consent of the Governed*, *supra* note 3, at 505 (contending that repealing the core of the First Amendment would be “unconstitutional . . . despite formal compliance with Article V”).

61. See Linder, *supra* note 59, at 722–28 (reviewing arguments to this effect); see also Vile, *Limitations on the Amending Process*, *supra* note 59, at 379 (explaining that some members of Congress argued in the period leading up to the Civil War “that the equal suffrage provision is not legally binding” but rather “a mere declaration”). The other substantive limit stated in the text of Article V (“no Amendment which may be made prior to [1808] shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article”) has been a legal nullity since 1808.

62. U.S. Const. art. I, § 7, cl. 3; see *supra* note 21 and accompanying text.

63. For broad attempts to think through many of these uncertainties, see generally Russell L. Caplan, *Constitutional Brinkmanship: Amending the Constitution by National Convention* (1988); John R. Vile, *Conventional Wisdom: The Alternate Article V Mechanism for Proposing Amendments to the U.S. Constitution* (2016); Arthur Jacobson, John C. Maloney, Jr. & Kenneth F. Ripple, *Article V and the Proposed Federal Constitutional Convention Procedures Bills: Report and Recommendation to the New York State Bar Association by the Committee on Federal Constitution*, 3 *Cardozo L. Rev.* 529 (1982).

64. Cf. *Harisay v. Clarno*, 474 P.3d 378, 379 (Or. 2020) (determining, as “an issue of first impression,” that Oregonians’ “initiative power” does not “authorize the people to directly apply for a federal constitutional convention”).

amendment, or would a convention have plenary power to devise any amendments it wants?<sup>65</sup> If a limited convention is permissible, how similar must the various state applications be to trigger such a convention? Does Congress have any discretion in determining whether a convention should be called or in specifying its procedures and the scope of its authority? How would delegates to such a convention be apportioned and selected? What internal procedures would the convention follow to draft and approve amendments? Would the delegates vote by state, as in the Philadelphia Convention, or according to some population-based formula? Whatever the answer to these questions, note that the product of any such convention would be submitted to the states, thus layering on top of these uncertainties all of the uncertainties regarding the state ratification process cataloged above.

The final lacuna in Article V, which Part IV revisits, is in some ways the most fundamental. Given the myriad puzzles raised by the text, it will often be unclear whether the requirements of Article V have been satisfied. Who decides, then, whether an amendment has been validly promulgated? If there is a disagreement among the branches, does any branch have the ultimate say? And does an amendment become effective as soon as the final state needed to reach three-fourths ratifies it, or only when ratification has been confirmed by the appropriate federal organ?

#### B. *Putting These Puzzles in Perspective*

There are many provisions of the Constitution that are vague or underdeterminate in certain respects and many questions of constitutional law that have not yet been resolved by the Supreme Court. What is special about the case of Article V? Two things, we think: the *extent* of the underdeterminacy and the *function* of Article V in our constitutional order.

The sheer number of questions about constitutional amendment that Article V leaves open is striking. The questions, moreover, are not limited to subsidiary or minor matters. The silences and ambiguities of Article V—How many members of Congress must vote on an amendment? How long may an amendment remain pending? How is a state ratifying convention to be constituted? Does the President have a role? Is there anything an

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65. See Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 *Tenn. L. Rev.* 693, 715 (2011) (“Perhaps no Article V question has been debated so fiercely, on so little evidence, as whether applying states may limit the scope of a convention for proposing amendments.”). Compare Michael B. Rappaport, *The Constitutionality of a Limited Convention: An Originalist Analysis*, 81 *Const. Comment.* 53, 56 (2012) (contending “that the original meaning of the Constitution allows for limited conventions” and “forbids runaway conventions”), with Michael Leachman & David A. Super, *Ctr. on Budget & Pol’y Priorities, States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues 2* (2017), <https://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf> [<https://perma.cc/22GZ-M389>] (“There is no guarantee that a convention could be limited to a particular set of issues . . .”).

amendment cannot change?—go to the heart of the amendment process and the conception of popular sovereignty that it embodies.

It is difficult to nail down the extent to which Article V, or any legal directive, is underdeterminate. But perhaps some headway can be made by drawing two comparisons. The first is to other structural provisions of the U.S. Constitution. The Constitution devotes more than six times the number of words to presidential eligibility and elections as it does to constitutional amendments, going into such niceties as what constitutes a quorum and how electoral votes are to be transmitted to the capital.<sup>66</sup> The Constitution devotes nearly three times as many words to the rules for dealing with presidential vacancies and disabilities.<sup>67</sup> Both of these other processes have generated high-profile legal controversies of their own, including in and around the 2020 presidential race.<sup>68</sup> But much more often, they have generated legally uninteresting compliance, whether because their language is more determinate than that of Article V, because frequency of usage enhances legal clarity over time, or both. At a minimum, the Constitution's treatment of presidential change, as compared to its treatment of constitutional change, shows that its authors were capable of greater procedural specificity when they wished.

Moreover, the legal uncertainty associated with Article V is not just a product of a spare text and limited precedent. It also follows from the absence of an authoritative interpreter. For most provisions of the Constitution, as every U.S. law student learns, the federal judiciary is widely understood (and understands itself) to enjoy interpretive supremacy.<sup>69</sup> When the judiciary has recognized exceptions to this rule, it is generally on account of “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>70</sup> Thus, while the Constitution is vague about many details of the impeachment process, the Supreme Court accepts that the Senate has “the sole Power to try all Impeachments.”<sup>71</sup> By contrast, the Court, Congress, and the executive

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66. Compare U.S. Const. art. V (143 words), with id. art. II, § 1, cls. 1–5, (479 words), and id. amend. XII (398 words).

67. Compare id. art. V (143 words), with id. amend. XXV (388 words).

68. See Ann Gerhart, Election Results Under Attack: Here Are the Facts, Wash. Post, <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> (on file with the *Columbia Law Review*) (last updated Mar. 11, 2021) (compiling Electoral College challenges pursued by the Trump campaign and allied groups); Brett Samuels, Pence Rejects Calls to Invoke 25th Amendment to Remove Trump, Hill (Jan. 12, 2021), <https://thehill.com/homenews/administration/533957-pence-rejects-calls-to-invoke-25th-amendment> [<https://perma.cc/YVL6-F9Q9>] (describing House Democrats' claims that President Trump was unable to discharge the duties of the office).

69. See David E. Pozen & Adam M. Samaha, Anti-Modalities, 119 Mich. L. Rev. 729, 769–70 (2021) (documenting this feature of the U.S. system). This is not to deny that “many different government bodies and civil-society groups contribute to the long-run development of constitutional law.” Id. at 770.

70. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

71. U.S. Const. art. I, § 3, cl. 6; see *Nixon v. United States*, 506 U.S. 224, 229–38 (1993).

branch have each, at times, claimed interpretive primacy over the question whether an amendment has become part of the Constitution.<sup>72</sup>

The second comparison that throws some light on the extent of Article V's underdeterminacy is to amending clauses in other democracies' written constitutions. Consider Canada. As Walter Dellinger has observed, the "detailed provisions" of the "Canadian amendment procedures . . . answer several perplexing questions that Article V of the American Constitution has left to speculation."<sup>73</sup> The Canadian text makes clear that a "proposed amendment lapses unless ratified by the requisite number of assemblies within three years of the adoption of the resolution which initiated the amendment procedure."<sup>74</sup> The approval of an amendment may be revoked at any time before the amendment is proclaimed.<sup>75</sup> The amendment process is not itself amendable, except with the agreement of every province and the federal parliament.<sup>76</sup> Pursuant to an "intricate" framework elaborated across a dozen subsections, "[e]ach of Canada's five formal amendment procedures is specially designated for amending specific constitutional provisions."<sup>77</sup>

Canada's amendment scheme may be particularly well reticulated, but many other constitutions around the world specify time limits for ratification of amendments,<sup>78</sup> substantive limits on their content,<sup>79</sup> and distinct procedures for different categories of amendments.<sup>80</sup> Within the

72. See *infra* notes 265–272 and accompanying text; *infra* section IV.B.

73. Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, *Law & Contemp. Probs.*, Autumn 1982, at 283, 298 [*hereinafter* Dellinger, *A Comparative Perspective*]. Canada's amendment rules are laid out in *Procedure for Amending Constitution of Canada*, Part V of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

74. Dellinger, *A Comparative Perspective*, *supra* note 73, at 299. This time limit applies to one of Canada's five amendment procedures. See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 *Wake Forest L. Rev.* 913, 944–45 (2014) [*hereinafter* Albert, *Structure of Amendment Rules*].

75. Dellinger, *A Comparative Perspective*, *supra* note 73, at 299.

76. *Id.* at 299–300.

77. Albert, *Structure of Amendment Rules*, *supra* note 74, at 921, 945.

78. See *id.* at 952 (explaining that "temporal limitations" on the amendment process "are commonly entrenched in written constitutions").

79. See Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 *Am. J. Compar. L.* 657, 660 (2013) (discussing "the global trend . . . towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power").

80. See Markus Böckenförde, *Int'l Inst. for Democracy & Electoral Assistance, Constitutional Amendment Procedures* 13 (2d ed. 2017), <https://www.idea.int/sites/default/files/publications/constitutional-amendment-procedures-primer.pdf> [<https://perma.cc/5AT7-JCFS>] ("In an attempt to identify the right balance between rigidity and flexibility in constitutional amendments, many constitutions offer different thresholds for different parts of the constitution."). There is a burgeoning literature comparing the design of constitutional amendment rules. See, e.g., Albert, *Structure of Amendment Rules*, *supra* note 74; Joel Colón-Ríos, *Introduction: The Forms and Limits of Constitutional Amendments*, 13 *Int'l J. Const. L.* 567 (2015); Rosalind Dixon, *Constitutional Amendment*

United States, most state constitutions likewise have amending clauses that are significantly more detailed and precise than Article V.<sup>81</sup> Other democracies' amending clauses, meanwhile, seem less perplexing than Article V not because their procedures are more detailed and precise but rather because they are simpler and more streamlined—employing what Richard Albert calls a “comprehensive single-track framework.”<sup>82</sup>

This is far from a complete survey, of course, and textual comparisons across constitutions of different ages and lengths are vexed. Our point is merely that the revision rules in many other constitutions seem on their face to raise fewer interpretive puzzles than does Article V. Even the most carefully crafted amending clause cannot foreclose future uncertainty, as Part I explains, and disputes about the meaning of such clauses are bound to arise sooner or later in Canada and elsewhere.<sup>83</sup> But we think it is fair to say that, both globally and domestically, the U.S. Constitution stands out in just how many questions about the amendment process it leaves to “speculation.”<sup>84</sup>

The fact that Article V is so underdeterminate would not necessarily matter much if it were addressed to some obscure issue of governance. But the topic of Article V could hardly be more important. Unlike other vague provisions in the Constitution, Article V sets out the rules of formal constitutional change and thereby constitutes the constitutional text itself. As Bruce Ackerman explains, Article V can be seen as “*the* most fundamental text of our Constitution, since it seeks to tell us the conditions under which all constitutional texts and principles may be legitimately transformed.”<sup>85</sup> In Gordon Wood's words, Americans “institutionalized and legitimized revolution” by enabling sweeping social change through a preestablished

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Rules: A Comparative Perspective, *in* *Comparative Constitutional Law* 96 (Tom Ginsburg & Rosalind Dixon eds., 2011).

81. For a thorough inventory of every U.S. state's constitutional amendment rules, see Amending State Constitutions, Ballotpedia, [https://ballotpedia.org/Amending\\_state\\_constitutions](https://ballotpedia.org/Amending_state_constitutions) [<https://perma.cc/5TJ4-QRRS>] (last visited Aug. 5, 2021). The amending clause in our home state of New York, for example, is over five times as long as Article V. N.Y. Const. art. XIX (807 words).

82. See Albert, Structure of Amendment Rules, *supra* note 74, at 937–39 (categorizing ten of the thirty-six democracies in his study as adopting such a framework and noting that it “has the virtue of clarity”).

83. Cf. Otto Pfersmann, Comparative Hermeneutics of Constitutional Revision Clauses and the Question of Structural Closure of Legal Systems, 40 *Cardozo L. Rev.* 3191, 3194–96 (2019) (discussing “interpretative problems” common to all constitutional revision clauses).

84. Dellinger, A Comparative Perspective, *supra* note 73, at 298.

85. Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 *Yale L.J.* 1013, 1058 (1984) [hereinafter Ackerman, *Discovering the Constitution*].

legal process.<sup>86</sup> Constitutions are often described as focal points that coordinate expectations<sup>87</sup> and “channel disputes.”<sup>88</sup> The underdeterminacy of Article V threatens these coordination and channeling functions by eliciting reasonable disagreement not just about the Constitution’s meaning but also about its very terms.

During the Constitutional Convention of 1787, James Madison made a similar observation. He urged that the amendment process be made clearer because “difficulties might arise as to the form, the quorum &c. which in Constitutional regulations ought to be as much as possible avoided.”<sup>89</sup> This is not just an American instinct. The European Commission for Democracy Through Law (known as the Venice Commission), which advises the Council of Europe on constitutional matters, concluded in its 2009 report on constitutional amendment procedures that “[r]ules and procedures on constitutional amendment should be as clear and simple as possible, so as not to give rise to problems and disputes of their own.”<sup>90</sup>

It is an interesting question whether and under what circumstances this conclusion should be qualified on account of the potential benefits of uncertainty. Ackerman, for instance, has suggested that wise constitutional drafters will follow the U.S. Framers in recognizing “the limited extent to which they [can] legitimately specify the higher lawmaking procedures to be followed by succeeding generations.”<sup>91</sup> As Part V discusses, some play in the joints may help keep the amendment process from thwarting change that is overwhelmingly desired by the people. Regardless, the point remains that significant amounts of legal uncertainty concerning a purportedly exclusive constitutional amendment clause raise very different—and potentially more destabilizing—issues than such uncertainty surrounding, say, a rights guarantee.<sup>92</sup>

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86. Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 614 (1969). Note that Wood’s characterization of Article V implicitly rejects the idea that amendments are limited to an incremental, “perfecting” role. See *supra* note 52 and accompanying text.

87. See Pozen & Samaha, *supra* note 69, at 793 n.313 (collecting sources).

88. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373, 427 (2007).

89. 2 *The Records of the Federal Convention of 1787*, at 630 (Max Farrand ed., 1937); see also *supra* note 19 (quoting Charles Black to similar effect). Madison was talking specifically about the convention procedure, but his general point—that the amendment rules ought to be as clear as possible—applies equally to the whole of Article V.

90. Eur. Comm’n for Democracy Through Law, *Final Draft Report on Constitutional Amendment Procedures* 46 (2009), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2009\)168-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2009)168-e) [<https://perma.cc/9PUH-C8SZ>].

91. Ackerman, *Discovering the Constitution*, *supra* note 85, at 1058.

92. Cf. Cong. Pay Amendment, 16 *Op. O.L.C.* 85, 95 (1992) (“The very functioning of the government would be clouded if Article V, which governs the fundamental process of constitutional change, consisted of ‘open-ended’ principles without fixed applications.”).

## III. "INTERNAL" LIMITS TO ARTICLE V'S RESOLVING POWER: PRECEDENT

A skeptic may respond at this juncture: Even if one can conjure up an array of interpretive puzzles when squinting at the text of Article V in isolation, surely most of the important issues have been cleared up by a quarter millennium of historical practice and judicial doctrine. The law of Article V, in other words, might be considerably clearer than the language of Article V. We turn in this Part to that body of law and demonstrate that the skeptic's response misses the mark. Ever since the Founding, amendments of uncertain legal validity have been the norm in the United States, not the exception. According to the conventions of mainstream constitutional reasoning, the overwhelming majority of recognized amendments had significant arguable legal infirmities at the time of their adoption.<sup>93</sup> And still to this day, the "gloss" of judicial and nonjudicial precedent has not cleared up many of the uncertainties regarding the operation of Article V that the previous Part discusses.

The best way to establish these points, we believe, is to review the history of debates over the validity of amendments that are widely seen to have become part of the constitutional text. If anything, focusing on successful efforts to amend the Constitution ought to bias our results toward suggesting greater clarity and settlement about the Article V process than really exists. But even the successful amendments, it turns out, have left a legacy of legal contestation and confusion.

A. *The Bill of Rights*

The story of legally dubious amendments begins at the beginning, with the Bill of Rights.<sup>94</sup> The most serious concern with the procedure used for these amendments is that the First Congress did not present them to President Washington for his consideration before they went to the states

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93. A qualifier such as "arguable" is unavoidable here because one cannot adjudicate all of these issues without a full-blown theory of constitutional interpretation, about which people will disagree. Cf. *infra* note 323 (discussing limitations of this paper's approach). Past Article V infirmities do not necessarily mean that an amendment is presently infirm, insofar as longstanding acceptance can cure or render irrelevant earlier legal concerns. See Greenawalt, *Rule of Recognition*, *supra* note 11, at 640–42; see also *supra* note 20; *infra* note 424.

94. The ten amendments that comprise the Bill of Rights were not the first ten amendments sent to the states. Congress's first proposed amendment would have changed the apportionment formula for the House, but it fell just short of ratification. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1137, 1143 n.52 (1991) [hereinafter Amar, *The Bill of Rights*]. Congress's second proposed amendment prohibited a congressional salary increase without an intervening election. *Id.* at 1145. That amendment also fell short in the eighteenth century and was left for dead—until revived in the twentieth century as the Twenty-Seventh Amendment. Recent litigation has similarly sought to revive the "first" first amendment. We come back to both of these developments later. See *infra* sections III.K–L. We mention them here to highlight that legal controversy over amendment validity dates back to, and indeed continues to involve, the very first amendments proposed by Congress.

for ratification, notwithstanding Article I, Section 7's language on presidential approval.<sup>95</sup> "The Annals reveal no discussion of this important question" in either the House or Senate.<sup>96</sup> The next section considers this issue in more detail in conjunction with the Eleventh Amendment, which prompted *Hollingsworth v. Virginia*.<sup>97</sup> For now, it suffices to say that there is a serious argument that presidential presentment is mandated by the plain terms of the Constitution. The most significant counterargument, even by the time of *Hollingsworth*, is based on historical practice—but of course that argument was not available the very first time Article V was enlisted.

A second concern involves the role of new states. Article V says nothing about what to do with states that join the Union after an amendment has been submitted to the states but before the amendment has been ratified. Nor is the answer to this question obvious as a matter of policy or political morality. Excluding new states from ratification might unduly privilege their predecessors; including them might disrupt and delay an ongoing process. When the Bill of Rights was proposed by Congress, the Union contained eleven states. Nine ratifications were therefore required to reach three-fourths.<sup>98</sup> By 1791, three more states had joined the Union, increasing the necessary number of ratifications to eleven.<sup>99</sup> Thomas Jefferson declared the Bill of Rights part of the Constitution in 1792, counting the new states in both the numerator and denominator.<sup>100</sup> We are not aware of any discussion as to why this position was taken. But if one only counts states that are part of the Union at the moment an amendment is proposed, constitutional history would look "dramatically different": The first amendment proposed by Congress, on congressional apportionment, would be ratified, and the Bill of Rights would not have made it into the document until the twentieth century.<sup>101</sup>

A final legal objection to the Bill of Rights is that there were discrepancies in the instruments of ratification sent by the states to the federal

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95. See *supra* note 21 and accompanying text.

96. Currie, *The Federalist Period*, *supra* note 57, at 115. Delaware Representative John Vining raised a separate objection: that, under the language of Article V, both Houses of Congress had to concur by a two-thirds vote that a proposed amendment was "necessary" before proceeding to consider it. 1 *Annals of Cong.* 430 (1789). This objection did not carry the day and apparently was not pursued further. See Edward S. Corwin & Mary Louise Ramsey, *Constitutional Law of Constitutional Amendment*, 26 *Notre Dame L. Rev.* 185, 191 (1951).

97. 3 U.S. (3 Dall.) 378 (1798).

98. See Cong. Pay Amendment, 16 Op. O.L.C. 85, 107 (1992).

99. *Id.* But cf. *supra* note 57 (noting controversy in the First Congress over how to construe the "three fourths" requirement for state ratification).

100. See Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 *S. Cal. Interdisc. L.J.* 577, 597 (1999).

101. See *id.* at 598–99. This assumes, perhaps implausibly, that such a change in counting method would not otherwise have changed the course of amendment history. It also elides the question whether Massachusetts and Virginia should have had to re-ratify because the new states of Maine and West Virginia were carved out of their respective borders.



government. Take the Second Amendment as an example. In its 2008 opinion in *District of Columbia v. Heller*, the Supreme Court quoted the text as follows: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>102</sup> This is the version of the Second Amendment that was proposed by Congress and ratified by Delaware (though “arms” was uncapitalized).<sup>103</sup> But according to their ratification resolutions, New Jersey ratified a Second Amendment with no commas;<sup>104</sup> New York, Pennsylvania, Rhode Island, and South Carolina ratified a version with only the middle comma;<sup>105</sup> and Maryland and North Carolina ratified a version with the middle and last commas.<sup>106</sup> Thomas Merrill, in an unpublished paper, has similarly documented an evolution in how the Fifth Amendment’s Takings Clause is punctuated.<sup>107</sup>

This may be more than constitutional flyspecking. After all, “punctuation is a permissible indicator of meaning.”<sup>108</sup> Judge Laurence Silberman

102. 554 U.S. 570, 576 (2008).

103. Resolution of Congress Proposing Amendatory Articles to the Several States (Mar. 4, 1789), in 2 *Documentary History of the Constitution of the United States of America, 1786–1870*, at 321, 322 (1894) [hereinafter *Documentary History*]; Delaware Ratification Resolution (Jan. 28, 1790), in *Documentary History*, supra, at 347, 349. This documentary compilation was derived from official records held at the Department of State. We have not independently confirmed that the compilation in fact reflects the original documents on file.

104. New Jersey Ratification Resolution (Aug. 3, 1790), in *Documentary History*, supra note 103, at 325, 327.

105. Rhode Island Ratification Resolution (June 15, 1790), in *Documentary History*, supra note 103, at 363, 364; New York Ratification Resolution (Mar. 27, 1790), in *Documentary History*, supra note 103, at 357, 359; Pennsylvania Ratification Resolution (Mar. 10, 1790), in *Documentary History*, supra note 103, at 352, 354; South Carolina Ratification Resolution (Jan. 19, 1790), in *Documentary History*, supra note 103, at 340, 342.

106. North Carolina Ratification Resolution (Dec. 22, 1789), in *Documentary History*, supra note 103, at 335, 337; Maryland Ratification Resolution (Dec. 19, 1789), in *Documentary History*, supra note 103, at 330, 332. There were also differences in capitalization in the various states. For an overview of all these differences, see Ross E. Davies, *Which Is the Constitution?*, 11 *Green Bag 2d* 209, 210–11 (2008).

107. See Thomas W. Merrill, *The Constitution and the Comma 15–18* (on file with the *Columbia Law Review*) (unpublished manuscript).

108. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161 (2012). It is debatable what the Founding generation thought about the significance of punctuation. On the one hand, Chief Justice John Marshall wrote that “the construction of a sentence in a legislative act does not depend on its pointing [i.e., punctuation].” *Black v. Scott*, 3 F. Cas. 507, 510 (C.C.D. Va. 1828); see also Caleb Nelson, *Preemption*, 86 *Va. L. Rev.* 225, 258 n.102 (2000) (discussing the “relatively casual attitude toward punctuation” taken by British and American legal authorities at the time of the Founding). On the other hand, during the Constitutional Convention, the Committee on Style apparently tried to effect a major change in congressional power through punctuation (the insertion of a semicolon) until it was caught in the act. See Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 *Sup. Ct. Rev.* 271, 317 n.112 (describing an attempt to create a separate spending power by adding a semicolon to the first paragraph of Article I, Section 8).

began the merits portion of his D.C. Circuit opinion affirmed in *Heller* with a reference to the “provision’s second comma.”<sup>109</sup> Justice Antonin Scalia’s opinion for the Court in *Heller* divided the amendment into two clauses and cited a source that seemed to place weight on the same comma.<sup>110</sup> Merrill has argued that the punctuation of the Takings Clause could very well affect its modern meaning.<sup>111</sup> If Congress proposes and some of the states (but not three-fourths) ratify a text that most objective observers at the time would understand to mean *X*, while other states ratify a slightly different text that most would understand to mean *Y*, it is not at all clear that either text should be seen as part of the Constitution.<sup>112</sup> And if punctuation can change the meaning of a legal text, it does not seem far-fetched to insist that states ratify an identical text.<sup>113</sup>

### B. *The Eleventh Amendment*

In the 1793 case *Chisholm v. Georgia*,<sup>114</sup> the Supreme Court held that Georgia could be sued without its consent by a citizen of another state. The day after the decision was announced, a constitutional amendment to

109. *Parker v. District of Columbia*, 478 F.3d 370, 378 (D.C. Cir. 2007).

110. Justice Scalia wrote that the “Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause.” *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008). For support, he cited a “Linguists’ Brief” that had suggested the second comma was significant, as it “marks the customary separation of an adverbial clause . . . from a main clause.” Brief for Professors of Linguistics and English Dennis E. Baron et al. in Support of Petitioners at 5–6, *Heller*, 554 U.S. 570 (2008) (No. 07-290).

111. Merrill, *supra* note 107, at 8–11.

112. William W. Van Alstyne, A Constitutional Conundrum of Second Amendment Commas: A Short Epistolary Report, 10 *Green Bag* 2d 469, 475–76 (2007). This scenario is distinguishable from, though related to, one in which states ratify an identical text with divergent understandings of that text’s communicative content. Cf. *Cong. Pay Amendment*, 16 *Op. O.L.C.* 85, 95 n.13 (1992) (reserving the question whether ratification would be valid if the public meaning of a proposed amendment changed while it was pending); David Pozen, E.R.A. Puzzles, Balkinization (Feb. 27, 2020), [https://balkin.blogspot.com/2020/02/era-puzzles\\_27.html](https://balkin.blogspot.com/2020/02/era-puzzles_27.html) [<https://perma.cc/XG6Z-7QHH>] (discussing this issue with respect to the ERA).

113. Another significant question that arose in Congress as it debated the Bill of Rights concerned the placement of amendments. Specifically, should amendments be woven into the text of the original Constitution, or should they appear as supplements at the end of an unchanged original text? James Madison favored the former approach; Roger Sherman was the leading proponent of the latter. See Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era 177–90* (2018). Sherman prevailed, of course. *Id.* at 189. According to Jonathan Gienapp, this decision “numbers among the most important milestones in the entire sweep of American constitutional history” by fostering the perception of “the original Constitution as a ‘sacred’ text,” fixed for all time, rather than an “organic, evolving” project. *Id.*; see also Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions 231–33* (2019) [hereinafter Albert, *Constitutional Amendments*] (reviewing the Madison–Sherman debate).

114. 2 U.S. (2 Dall.) 419 (1793).

overrule *Chisholm* was introduced in the House.<sup>115</sup> In its final form, the amendment passed the House and Senate by large majorities in 1794, was ratified by the requisite number of states in 1795, and was declared part of the Constitution by President John Adams in 1798.<sup>116</sup>

As with the Bill of Rights, however, President Washington had never approved the amendment before it was sent to the states. This fact formed the basis for a challenge to the amendment's validity in *Hollingsworth v. Virginia*, in which plaintiffs argued that the "amendment ha[d] not been proposed in the form prescribed by the Constitution" because it "was never submitted to the President for his approbation."<sup>117</sup> The Supreme Court tersely rejected this challenge. The report of the decision contains only the following explanation: "The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction . . ."<sup>118</sup> During the defendant's oral argument, though, Justice Samuel Chase had made the following statement: "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."<sup>119</sup>

Justice Chase's statement is dubious on its own terms. According to Article I, Section 7 of the Constitution, the veto power extends not only to "ordinary cases of legislation" but also to "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)."<sup>120</sup> A resolution or vote proposing a constitutional amendment seems to fall within the latter category. Perhaps Justice Chase meant to suggest that Article V sets forth "its own separate higher-lawmaking track" not subject to the presentment rules of Article I.<sup>121</sup> But Congress and the Court have arguably taken the opposite position with respect to

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115. See David P. Currie, *The Constitution in Congress: The Third Congress, 1793–1795*, 63 U. Chi. L. Rev. 1, 35–38 (1996).

116. See John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 12–29 (1987); see also 1 Charles Warren, *The Supreme Court in United States History* 101 n.2 (1922) (discussing "the extremely informal and careless manner in which the ratification was promulgated" by President Adams).

117. 3 U.S. (3 Dall.) 378, 379 (1798).

118. *Id.* at 382.

119. *Id.* at 381 n.\*. On why Justice Chase's spoken statement is "clearly not" part of the Court's opinion, see Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 Tex. L. Rev. 1265, 1285 (2005) [hereinafter Tillman, *A Textualist Defense*].

120. U.S. Const. art. I, § 7, cl. 3.

121. Amar, *America's Constitution*, supra note 49, at 594 n.7 (noting this theory without endorsing it).

the quorum rules of Article I,<sup>122</sup> and to call Article V a separate track risks begging the question whether the Presentment Clause applies by its plain terms to the amendment process.

Another possible view is that presidential presentment is superfluous because Article V already requires a two-thirds vote, which is enough to override a veto.<sup>123</sup> This view is not persuasive. When Presidents veto a bill or resolution, they must state their “Objections,” and the bill or resolution must be “reconsidered” by both chambers of Congress in light of those objections.<sup>124</sup> As the *Hollingsworth* plaintiffs’ counsel pointed out, this reconsideration requirement presumes a dialogic model of governance in which the President’s objections might influence some members of Congress.<sup>125</sup> Even a “Bill” that initially passes by a two-thirds vote in both chambers still needs presidential approval or repassage after a veto before it becomes law.<sup>126</sup> In addition, if the initial vote in either chamber was taken with a quorum but less than full membership, a presidential veto could cause the number of members present and voting to be different upon reconsideration.<sup>127</sup>

In short, the Court’s ruling in *Hollingsworth* is questionable as a matter of constitutional text and structure. Charles Black has described it as “an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason even projectable.”<sup>128</sup> In 2000, the Supreme Court of Wyoming invalidated a proposed amendment to its state constitution on the ground that it had not been presented to the governor, under a provision that is identical in relevant part to the federal presentment requirement.<sup>129</sup> If Black and the Wyoming high court are correct, then *Hollingsworth* deserves little if any deference on the merits—and all thoroughgoing textualists must face the prospect that twenty-six of our twenty-seven ostensible amendments are void.<sup>130</sup>

122. See Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920); David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829*, at 61–63 (2001) [hereinafter Currie, *The Jeffersonians*].

123. See Amar, *America’s Constitution*, supra note 49, at 594 n.7 (describing this as the other “main” theory that has been offered in support of Justice Chase’s contention).

124. U.S. Const. art. I, § 7, cl. 2.

125. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 379 (1798) (argument by counsel).

126. See Prakash, *Of Synchronicity*, supra note 16, at 1254 n.180.

127. See Tillman, *A Textualist Defense*, supra note 119, at 1290 n.64.

128. Black, *On Article I*, supra note 21, at 898; see also Primus, *Unbundling Constitutionality*, supra note 5, at 1110 n.78 (“Justice Chase’s dictum . . . makes not the slightest gesture toward explaining how the text could be read to accord with [it].”).

129. *Geringer v. Bebout*, 10 P.3d 514, 523 (Wyo. 2000).

130. See supra note 21 (noting that only the Thirteenth Amendment received a presidential signature). Some have suggested that these twenty-six amendments might be salvaged on the ground that Congress provided copies to the executive branch, and the subsequent transmittal of the amendments to the states for ratification constituted a kind of constructive approval by the President. See Tillman, *A Textualist Defense*, supra note 119, at 1277–83; Sopan Joshi, Note, *The Presidential Role in the Constitutional Amendment*

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Process, 107 Nw. U. L. Rev. 963, 992–97 (2013). This suggestion contravenes the contemporaneous understanding of virtually every relevant official involved in the amendment process. In *Hollingsworth*, the Virginia Attorney General (as well as Justice Chase) argued that presentment was unnecessary, not that it had occurred. 3 U.S. (3 Dall.) at 381 & n.\*. A few years later, the Senate debated and specifically rejected a motion to “present” the proposed Twelfth Amendment to “the President . . . for his approbation.” William Plumer’s Memorandum of Proceedings in the United States Senate 1803–1807, at 79–80 (Everett Somerville Brown ed., 1923). After President Lincoln was presented with and approved the Thirteenth Amendment, the Senate passed a resolution “declar[ing] that such approval was unnecessary” and “inconsistent with the former practice in reference to all amendments heretofore adopted, and being inadvertently done, should not constitute a precedent for the future.” Cong. Globe, 38th Cong., 2d Sess. 629–30 (1865). President Andrew Johnson, who opposed the Fourteenth Amendment, noted that the amendment had not been “submitted by the two Houses for [his] approval” and observed in a letter to Congress that “the steps taken by the Secretary of State” to transmit the proposed amendment to the states “are to be considered as purely ministerial, and in no sense whatever committing the Executive to an approval.” Cong. Globe, 39th Cong., 1st Sess. 3349 (1866). This understanding has persisted in Congress and the Supreme Court. See, e.g., *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983). Under these circumstances, we do not think it is persuasive to say that a requirement of presentment and approval, if one exists, was constructively satisfied.

For similar reasons, we do not think it is persuasive to say that the amendments took effect on account of ten days of presidential inaction. See U.S. Const. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return . . .”). First, it is not clear, as a textual matter, that the approval-through-inaction mechanism carries over from Clause 2 to Clause 3 of Article I, Section 7. See Tillman, A Textualist Defense, supra note 119, at 1320 (noting this ambiguity). Second, it seems a stretch to attach any significance to ten days of inaction when neither Congress nor the President contends that the President has a veto power. Finally, even if one were inclined to invoke this provision, thirteen amendments (the Bill of Rights and the Fifteenth, Eighteenth, and Twenty-Seventh Amendments) would have been pocket vetoed because they were passed fewer than ten days prior to the end of a congressional session and therefore would have been ineffective absent approval. See Joshi, supra, at 994 tbl.1.

Seth Tillman defends the outcome of *Hollingsworth* based on a creative reading of Article I, Section 7, Clause 3 (which he calls the “ORV Clause”). He takes the position “that ‘[e]very order, resolution or vote to which the concurrence of the Senate and House [is] necessary’ refers to single-house action taken pursuant to prior authorizing or later ratifying legislation.” Tillman, A Textualist Defense, supra note 119, at 1364. In other words, Congress can “delegate lawmaking authority” to a single house, or possibly even a single committee, and the ORV Clause ensures that such legislation must still be presented to the President. *Id.* at 1334 n.144. As Tillman acknowledges, his proposal conflicts with the near-unanimous understanding of the ORV Clause from the Founding to the present, including the views of James Madison, Joseph Story, the Federalist Papers, and the Court in *Chadha*. *Id.* at 1364–65. In any event, even if Tillman’s reading were otherwise correct, it is not clear why the ORV Clause would not also apply by its plain terms to constitutional amendments. See Gary Lawson, Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause, 83 Tex. L. Rev. 1373, 1386 (2005) (“Does the ORV Clause also apply to amendment resolutions under Article V? The answer seems to be yes.”).

C. *The Twelfth Amendment*

Congress's efforts to pass the Twelfth Amendment, which revamped the nation's system for selecting presidents, surfaced a number of novel legal questions.<sup>131</sup> One group of senators argued that Article V could not be used to "ingraft new principles into the Constitution which will destroy the rights of individual States, without the consent of those States."<sup>132</sup> The Senate debated whether a two-thirds majority was required for all votes respecting constitutional amendments, or only for the vote on the final proposed amendment.<sup>133</sup> Most contentiously, the Senate debated whether Article V requires two-thirds of the full House and Senate to propose an amendment, or only two-thirds of a quorum. The issue arose because the Senate had a total membership of thirty-four, and the amendment passed the Senate by a vote of 22 to 10, with the votes of two senators unrecorded.<sup>134</sup> The amendment thus crossed the two-thirds threshold among those voting, but not among the whole body, and an objection was raised on that ground.<sup>135</sup>

The objection has real force. To revise the Constitution is an extraordinary step, and Article V's supermajority voting rules demand "a geographically broad and numerically deep consensus" to make it happen.<sup>136</sup> Yet, as Senator William Plumer of New Hampshire explained, if two-thirds of a quorum sufficed to propose an amendment, "it would follow that twelve senators . . . might propose an amendment contrary to the opinion & against the will of twenty two senators," and a "little more than one full third of the Senate" could "be considered as constitutionally performing the act that required the concurrence of two thirds."<sup>137</sup> In contrast to Article V, moreover, the Constitution's impeachment and treaty clauses expressly refer to "two thirds of the [senators] *present*."<sup>138</sup> Of course, Article I provides that "a Majority of each [House] shall constitute a Quorum to do Business,"<sup>139</sup> and a quorum was present for the vote on the

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131. As explained in the preceding footnote, the question of presidential presentment also resurfaced in the Senate debate. Interestingly, it seems that no senators invoked the Court's recent decision in *Hollingsworth*, much less suggested that it had settled the question. One senator wrote in his diary that the relevant "precedents [were] established without debate, or without particular attention to the subject—& therefore they prove nothing." Currie, *The Jeffersonians*, supra note 122, at 58. The Senate nonetheless resolved by a vote of 23 to 7 that the proposed amendment need not be submitted to President Jefferson for his approval. *Id.*

132. 13 *Annals of Cong.* 738 (1803).

133. See Currie, *The Jeffersonians*, supra note 122, at 59–60.

134. *Id.*

135. *Id.* at 61.

136. Lawrence G. Sager, *The Incurable Constitution*, 65 *N.Y.U. L. Rev.* 893, 960 (1990).

137. Currie, *The Jeffersonians*, supra note 122, at 61–62 (emphasis omitted) (quoting a speech by Senator Plumer that was recorded in his diary but not in the *Annals*).

138. U.S. Const. art. I, § 3, cl. 6 (emphasis added); *id.* art. II, § 2, cl. 2 (emphasis added).

139. *Id.* art. I, § 5, cl. 1.

Twelfth Amendment. But the validity of the first eleven amendments had apparently been premised on the proposition that the amendment process was special and, therefore, not subject to another provision of Article I—the requirement of presidential presentment.

Ultimately, the objection was overruled in the Senate and the proposed amendment went to the House, where Federalist representatives “essentially reiterated what Plumer had said” in arguing that the Senate had not legally approved it.<sup>140</sup> The House voted 85 to 34 to take up the Senate resolution and then 84 to 42—exactly two-thirds of a quorum—to approve the Twelfth Amendment.<sup>141</sup> Over a century later, the Supreme Court agreed that two-thirds of a quorum was sufficient, in light of longstanding congressional practice.<sup>142</sup> But David Currie, on whose scholarship we have drawn throughout this section, likely spoke for many when he opined in 2001: “I still have trouble convincing myself that when the Framers prescribed a two-thirds majority to ensure broad support for constitutional amendments they meant it could be provided by fewer than half the members.”<sup>143</sup>

#### D. *The Reconstruction Amendments*

In 1861, Congress approved in its lame-duck session an amendment, known as the Corwin Amendment, which would have protected slavery in the South by prohibiting any future amendment giving “Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.”<sup>144</sup> The Corwin Amendment failed to attain ratification, but

140. Currie, *The Jeffersonians*, supra note 122, at 62. Some House Republicans countered with the argument that the first ten amendments had been approved only by two-thirds of those present. See *id.* at 63; see also *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 281–82 (1919) (making the same argument). But the historical record is hazy on this point; “it was entirely possible that [those amendments] had in fact been endorsed by two thirds of all the members.” Currie, *The Jeffersonians*, supra note 122, at 63.

141. Currie, *The Jeffersonians*, supra note 122, at 63–64; David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–2015*, at 116 (rev. ed. 2016). At the time, the House had 141 members. Currie, *The Jeffersonians*, supra note 122, at 63 n.186.

142. *Nat’l Prohibition Cases*, 253 U.S. 350, 386 (1920); *Mo. Pac. Ry. Co.*, 248 U.S. at 281. There is an additional wrinkle: Does Article V require two-thirds of those present, or only two-thirds of those present and voting? See *infra* section III.J.

143. Currie, *The Jeffersonians*, supra note 122, at 64. One might counter that the Framers operated against a background presumption that a quorum was sufficient for legislative business, and Article V should be read in that context. But the very existence of debate in Congress shows that such a presumption was not universally shared by the Founding generation, at least as applied to amendments. Congress’s resolution of the issue, moreover, did not quell contemporaneous debate. After Congress proposed the Twelfth Amendment, the legislatures of three states, “in their resolutions rejecting the amendment, reiterated the charge of unconstitutionality.” Ames, supra note 55, at 295.

144. See generally A. Christopher Bryant, *Stopping Time: The Pro-Slavery and “Irrevocable” Thirteenth Amendment*, 26 *Harv. J.L. & Pub. Pol’y* 501 (2003) (reviewing the history and legacy of the Corwin Amendment).

it raised two novel Article V questions that were not resolved then and have not been resolved since: whether an amendment can make itself unamendable,<sup>145</sup> and whether a state can choose to ratify an amendment by convention even if Congress provides for ratification by legislatures.<sup>146</sup> Another oddity of the Corwin Amendment is that, *Hollingsworth* notwithstanding, it was presented to President James Buchanan, who promptly added his signature.<sup>147</sup>

The next set of amendments to make it out of Congress, aimed at dismantling rather than entrenching slavery, generated still fiercer legal controversy as the nation emerged from the Civil War. Uniquely among the Article V disputes recounted in this Part, the disputes associated with the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments have received prominent attention in the contemporary constitutional literature.<sup>148</sup> The most substantial objections clustered around three issues: the composition of Congress, the legitimacy of the state legislatures that ratified the amendments, and federal coercion of the states.<sup>149</sup>

After the Civil War, Article V was pushed to the breaking point by some stark numerical realities. There were thirty-seven states in the Union in 1868, meaning twenty-eight states were needed to ratify a constitutional amendment.<sup>150</sup> Eleven states had seceded, or purported to secede, and formed the Confederacy.<sup>151</sup> Ten of those states could block an amendment by themselves, assuming no defections from the Northern states—which was not a safe assumption. The former Confederate states would also have

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145. See *id.* at 530–34 (describing the March 1861 congressional debates on this question).

146. See Philip L. Martin, *Convention Ratification of Federal Constitutional Amendments*, 82 *Pol. Sci. Q.* 61, 65 (1967) (noting that Illinois purported to ratify the Corwin Amendment through a convention that had met to draft a new state constitution).

147. See *supra* note 21.

148. Throughout this section, we cite what we take to be the leading works in this genre.

149. Other legal issues surfaced as well. One was whether states may rescind their ratifications. Both New Jersey and Ohio ratified the Fourteenth Amendment and then tried to reverse course, but Congress, when it promulgated the Fourteenth Amendment, listed both of them among the ratifying states. See *Coleman v. Miller*, 307 U.S. 433, 448–49 (1939) (opinion of Hughes, C.J.). There were also quorum questions at the state level in addition to the federal level. Indiana had a general rule in its state constitution requiring two-thirds of the legislature to be present to conduct business, but the speaker of its House of Representatives ruled that a majority of the total membership sufficed to act on the Fifteenth Amendment. See Lester Bernhardt Orfield, *The Amending of the Federal Constitution* 66 n.87 (1942).

150. See Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 *Nw. U. L. Rev.* 1627, 1643–44 (2013) This count assumes that former Confederate states should be included in the Article V “denominator.” But see Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defenses and Implications*, 13 *Duke J. Const. L. & Pub. Pol’y* 167, 169–70 (2017) (arguing that rebel states should be excluded from the Article V denominator).

151. See Colby, *supra* note 150, at 1644; Harrison, *supra* note 14, at 422.



enough clout in Congress to block any amendment proposal.<sup>152</sup> Navigating these obstacles demanded a series of bold legal maneuvers.

First, the Congresses that proposed the Reconstruction Amendments excluded many of the representatives and senators sent from states that had been part of the Confederacy, pursuant to each chamber's power to "be the Judge of the Elections, Returns and Qualifications of its own Members."<sup>153</sup> The Reconstruction Amendments were adopted by two-thirds of a quorum composed mostly of Northern Republicans, and it is exceedingly doubtful that all of the amendments could have passed had the Southern representatives and senators been seated.<sup>154</sup>

Second, in proclaiming the Thirteenth Amendment ratified by three-fourths of the states on December 18, 1865, Secretary of State William Henry Seward included several former Confederate states in the count.<sup>155</sup> Two weeks prior, Congress had refused to seat any senators or representatives from those same states.<sup>156</sup> How could state "legislatures" validly ratify constitutional amendments but not elect senators? Moreover, in the First Military Reconstruction Act of 1867, Congress declared that there were "no legal State governments" in the South and that existing "civil governments" were "provisional only."<sup>157</sup> President Andrew Johnson argued in his veto message that, because the bill "denies the legality of the Governments of ten of the States which participated in the ratification of the amendment . . . abolishing slavery," the implication is that "the consent of three-fourths of the States . . . has not been constitutionally obtained" for the Thirteenth Amendment.<sup>158</sup>

The Southern state governments that ratified the Fourteenth and Fifteenth Amendments, meanwhile, were the products of military reconstruction. The Reconstruction Acts divided the former Confederate states into five military districts and instructed the Union Army to register voters, with universal adult male suffrage, and to hold elections for constitutional

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152. See Ackerman, *We the People*, supra note 7, at 102.

153. U.S. Const. art. I, § 5, cl. 1; see Amar, *America's Constitution*, supra note 49, at 366–76; David P. Currie, *The Civil War Congress*, 73 U. Chi. L. Rev. 1131, 1218–22 (2006); Harrison, supra note 14, at 380–89, 398–401.

154. See, e.g., Ackerman, *We the People*, supra note 7, at 102 ("Every student of the period recognizes that, were it not for the purge of Southern Senators and Representatives, the 'Congress' meeting in June would *never* have mustered the two-thirds majorities required to propose the Fourteenth Amendment."). It is less clear that the Fifteenth Amendment would have been rejected if Congress were complete, see Kyvig, supra note 141, at 180, though opponents of the amendment effort did object on this ground, see David P. Currie, *The Reconstruction Congress*, 75 U. Chi. L. Rev. 383, 454–55 (2008) [hereinafter Currie, *The Reconstruction Congress*].

155. Currie, *The Reconstruction Congress*, supra note 154, at 397.

156. Amar, *America's Constitution*, supra note 49, at 366.

157. Act of Mar. 2, 1867, ch. 153, pmb., § 6, 14 Stat. 428–29.

158. 12 *The Papers of Andrew Johnson*, February–August 1867, at 91 (Paul H. Bergeron ed., 1995).

conventions.<sup>159</sup> Those conventions yielded ten new governments that promptly ratified the Fourteenth and Fifteenth Amendments.<sup>160</sup> Many argued then and afterward that these reconstructed governments lacked legal authority to ratify amendments.<sup>161</sup>

In addition, the Southern state legislatures were arguably coerced into ratifying. The Reconstruction Acts provided that these states would be entitled to representation in Congress only when the Fourteenth Amendment “ha[d] become part of the Constitution.”<sup>162</sup> This pressure to ratify, according to Ackerman, amounted to a “naked violation[] of Article V.”<sup>163</sup> There is little doubt that the unreconstructed Southern states would not have ratified voluntarily, as it “would be difficult to overstate the depth and breadth of opposition to the Fourteenth Amendment” within their white populations.<sup>164</sup> Southern states still under military supervision “faced the same pressure to ratify” the Fifteenth Amendment.<sup>165</sup>

These interrelated legal problems have elicited powerful responses. John Harrison, for instance, has argued that the amendments were “legally effective” (even if not strictly speaking “legal”) under the de facto government doctrine, which recognizes that “a government de facto may bind the state for which it acts despite defects in its claim to power.”<sup>166</sup> Amar has defended the legality of the Reconstruction Amendments on the basis of Congress’s authority to judge its members’ qualifications and to guarantee a republican form of government in the states.<sup>167</sup> And, stepping back, it is notable that the Reconstruction Congresses went to such lengths even to try to adhere to the forms of Article V, given the dire circumstances.<sup>168</sup>

But wherever one comes out in these debates, the legal legitimacy of the Reconstruction Amendments at the time of their adoption is at least *contestable*—as countless scholars have recognized.<sup>169</sup> As Harrison recounts,

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159. See Ackerman, *We the People*, supra note 7, at 110.

160. See Harrison, supra note 14, at 404–09.

161. See Ackerman, *We the People*, supra note 7, at 110–11; Colby, supra note 150, at 1654–56.

162. Act of Mar. 2, 1867, ch. 153, pmb., § 5, 14 Stat. 429.

163. Ackerman, *We the People*, supra note 7, at 111.

164. Colby, supra note 150, at 1644–45.

165. Kyvig, supra note 141, at 181; see also Travis Crum, *The Lawfulness of the Fifteenth Amendment*, 97 *Notre Dame L. Rev.* (forthcoming 2022) (manuscript at 31–38) (on file with the *Columbia Law Review*) (detailing additional Article V problems “unique” to the Fifteenth Amendment).

166. Harrison, supra note 14, at 379.

167. See Amar, *America’s Constitution*, supra note 49, at 370–80.

168. See Michael Les Benedict, *Constitutional History and Constitutional Theory: Reflections on Ackerman, Reconstruction, and the Transformation of the American Constitution*, 108 *Yale L.J.* 2011, 2027–31 (1999).

169. See, e.g., Kyvig, supra note 141, at 156; Colby, supra note 150, at 1629; Greenawalt, *Rule of Recognition*, supra note 11, at 640; Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 *Yale*

“[a]ll those who participated in reconstruction, including those who were paying attention to the process of constitutional amendment, knew that something very unusual and legally doubtful was going on.”<sup>170</sup> “The Republicans . . . got away with something Article V probably was supposed to prevent.”<sup>171</sup>

And yet, no one in their right mind would deny that the Reconstruction Amendments are part of the Constitution today (though the Georgia General Assembly denied this as late as 1957<sup>172</sup>), which illustrates our thesis in an especially dramatic fashion. The sociological legitimacy of the Reconstruction Amendments is not a function of their original legal legitimacy; it does not derive from a judgment about whether Article V’s rules were followed.<sup>173</sup> Rather, it derives from the fact that these amendments have been accepted by most officials since the 1860s and have become deeply embedded in the nation’s laws, practices, and ethos.<sup>174</sup> Their authoritative legal status is quite literally beyond dispute in our political culture, just like the status of the Constitution itself.<sup>175</sup>

#### E. *The Sixteenth Amendment*

After a long period of disuse, the machinery of Article V creaked back into motion in the early twentieth century, yielding a spurt of four amendments in a decade. The first of these was the Sixteenth Amendment, which overruled the Supreme Court’s decision in *Pollock v. Farmers’ Loan & Trust*

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L.J. 1711, 1729 (1990) (book review); see also *supra* note 20 (explaining this paper’s use of the term “legal legitimacy”).

170. Harrison, *supra* note 14, at 409.

171. *Id.* at 458.

172. S. Res. 39, 129th Gen. Assemb., 2d Reg. Sess. (Ga. 1957); see also Colby, *supra* note 150, at 1661 n.209.

173. See Greenawalt, Rule of Recognition, *supra* note 11, at 641 (“The *present* authority of these amendments may depend more on their acceptance for over a century than on their actual adoption by a process that may or may not now be thought to conform to what article V prescribes.”).

174. In this respect, the addition of the Reconstruction Amendments to the Constitution resembles the addition of Texas to the Union. Both acts were constitutionally dubious at the time—there is a plausible constitutional argument that new territory must be annexed through the treaty power, not through congressional resolution—but are now politically and practically settled. See Mark A. Graber, Settling the West: The Annexation of Texas, the Louisiana Purchase, and *Bush v. Gore*, in *The Louisiana Purchase and American Expansion, 1803–1898*, at 83, 83–103 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

175. Cf. Henry Paul Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 383 (1981) (“The authoritative status of the written constitution is . . . an incontestable first principle for theorizing about American constitutional law.”); David E. Pozen, Constitutional Bad Faith, 129 Harv. L. Rev. 885, 941–43 (2016) (explaining that mainstream U.S. political culture effectively prohibits constitutional “atheism,” or a professed lack of faith in and commitment to the Constitution).

Co. and expressly authorized a federal income tax.<sup>176</sup> The amendment “sailed through both houses of Congress” in 1909.<sup>177</sup> After hitting a few speedbumps in the states, including the opposition of New York Governor and future Chief Justice of the United States Charles Evan Hughes, it was deemed ratified four years later.<sup>178</sup>

The most persistent, but by no means the only,<sup>179</sup> set of legal challenges to the Sixteenth Amendment involves discrepancies among the state ratification instruments. When Secretary of State Philander Knox certified the amendment in 1913, just four states had sent him instruments of ratification with the language of the amendment exactly as Congress had approved it.<sup>180</sup> The rest had variations in capitalization and punctuation, and some even had differences in wording. The instrument from Oklahoma, for instance, said “*from* any census or enumeration” instead of “*without regard to* any census or enumeration,” Illinois’s said “remuneration” instead of “enumeration,” and Missouri’s said “levy” instead of “lay.”<sup>181</sup>

The Office of the Solicitor of the Department of State prepared a memorandum for Secretary Knox addressing these discrepancies. The Solicitor’s Office concluded that they were “probably inadvertent” and that the legislatures in question had “intended . . . to ratify the amendment proposed by Congress.”<sup>182</sup> The Office also noted that similar discrepancies had existed with earlier amendments.<sup>183</sup> It therefore recommended that Knox certify the amendment.<sup>184</sup> A spate of “tax protester” lawsuits in the 1980s placed heavy emphasis on this memorandum in challenging the validity of the Sixteenth Amendment. Courts uniformly rejected these

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176. 158 U.S. 601 (1895); see U.S. Const. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

177. Amar, *America’s Constitution*, supra note 49, at 409.

178. See Kyvig, supra note 141, at 204–07.

179. See generally Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 *BYU L. Rev.* 1515, 1537–40 (cataloging common tax protester arguments that the Sixteenth Amendment was not properly ratified); Christopher S. Jackson, Note, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 *Gonz. L. Rev.* 291, 301–07 (1996–1997) (same). Some argued, for instance, that the amendment was invalid because certain state legislatures lacked authority under their state constitutions to ratify such a taxation measure, or because the amendment transgressed federalism-based substantive limits on Article V. See, e.g., Raymond G. Brown, *The Sixteenth Amendment to the United States Constitution*, 54 *Am. L. Rev.* 843, 847–53 (1920).

180. Memorandum from Off. of the Solic., Dep’t of State, *Ratification of the 16th Amendment to the Constitution of the United States 6* (Feb. 15, 1913) (on file with the *Columbia Law Review*).

181. *Id.* at 7–8 (emphasis added).

182. *Id.* at 15.

183. *Id.* at 8–15.

184. *Id.* at 16.

claims,<sup>185</sup> often imposing sanctions along the way.<sup>186</sup> By and large, these courts relied on the political question doctrine and some version of the enrolled bill rule, without reaching the merits of the plaintiffs' Article V arguments.<sup>187</sup>

We agree that this litigation is frivolous. The interesting question is why. The basic answer, in our view, is that the long acceptance and sociological legitimacy of the Sixteenth Amendment make it unthinkable that a court in the 1980s would or should entertain a challenge to the amendment's validity—not because the merits of the underlying Article V questions are obvious.<sup>188</sup>

#### F. *The Seventeenth Amendment*

Throughout the 1890s, "Congress was deluged with petitions and published appeals for direct popular election of senators."<sup>189</sup> Many senators were wary of reforming their own institution, and Southern senators were especially wary of increased federal involvement in elections.<sup>190</sup> But the public pressure continued to mount. Thirty-one states petitioned Congress for change (one short of the number required to trigger a convention);<sup>191</sup> and in 1910, after the Senate voted down a popular election amendment, ten senators who had opposed the measure lost reelection.<sup>192</sup> The Senate approved the amendment in 1911. The text approved by the Senate, however, was different from the text that the House had already approved. A conference committee wrangled for nearly

185. See, e.g., *United States v. Sitka*, 845 F.2d 43, 47 (2d Cir. 1988); *United States v. Stahl*, 792 F.2d 1438, 1441 (9th Cir. 1986); *Sisk v. Comm'r*, 791 F.2d 58, 61 (6th Cir. 1986); *United States v. Thomas*, 788 F.2d 1250, 1253–54 (7th Cir. 1986); *United States v. Foster*, 789 F.2d 457, 463 (7th Cir. 1986); *United States v. Wojtas*, 611 F. Supp. 118, 121 (N.D. Ill. 1985).

186. See, e.g., *Miller v. United States*, 868 F.2d 236, 242 (7th Cir. 1989); *Lysiak v. Comm'r*, 816 F.2d 311, 313 (7th Cir. 1987). This wave of tax protester litigation was fomented by a popular book, Bill Benson & M.J. Beckman, *The Law That Never Was: The Fraud of the 16th Amendment and Personal Income Tax* (1985). See, e.g., *Wojtas*, 611 F. Supp. at 119 (describing how the plaintiff's attorney submitted the book to the court in support of the plaintiff's motion). One of the book's authors was subsequently found to have engaged in fraud. See *United States v. Benson*, 561 F.3d 718, 724 (7th Cir. 2009).

187. The enrolled bill rule holds that when "the presiding officers' of the House and Senate sign an enrolled bill (and the President 'approve[s]' it), 'its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.'" *NLRB v. Noel Canning*, 573 U.S. 513, 551 (2014) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892)). While the enrolled bill rule limits the types of challenges "the judicial department" may entertain, *Clark*, 143 U.S. at 672, it does not bear on what is required by Article V.

188. See *supra* notes 102–112 and accompanying text (explaining why it is at least plausible to believe that states must ratify an identical text).

189. Kyvig, *supra* note 141, at 209.

190. *Id.* at 209–12.

191. Not all of the states formally requested a convention; some only asked that Congress propose an amendment. See Caplan, *supra* note 63, at 63–65.

192. See Kyvig, *supra* note 141, at 212.

a year, until the House finally caved and voted to send the Senate version of the amendment to the states.<sup>193</sup>

This intercameral wrangling led to a thorny Article V question. The Seventeenth Amendment is one of only two recognized amendments to have been passed by the House and the Senate in different legislative sessions. Is that permissible? In a recent article, Saikrishna Prakash argues that, as a matter of constitutional text and structure, it is not, as Article V implicitly requires that amendments be proposed by both chambers of Congress in the same legislative session.<sup>194</sup> “This reading of the Constitution,” Prakash notes, “would suggest the rather immodest conclusion that the Thirteenth and Seventeenth Amendments, neither of which passed in a single session, failed to satisfy the standards of Article V.”<sup>195</sup>

### G. *The Eighteenth Amendment*

The Eighteenth Amendment, on Prohibition, raised many more legal questions and led to some of the Supreme Court’s most significant pronouncements on Article V. First, the amendment included a novel provision stating that it would “be inoperative unless it shall have been ratified . . . within seven years.”<sup>196</sup> Opponents argued vigorously that Congress could not impose a time limit on ratification when Article V says nothing about the matter. In *Dillon v. Gloss*, however, the Court rejected a challenge on this ground in concluding “that the fair inference or implication from Article V is that the ratification must be within some reasonable time after the proposal.”<sup>197</sup> The Court continued:

Whether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification.<sup>198</sup>

In other words, Congress’s power to impose a time limit is either implicit in Article V or perhaps grounded in the Necessary and Proper Clause.

Second, a wide range of scholars, states, and alcohol-industry groups argued that the Eighteenth Amendment violated inherent individual-

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193. See *id.* at 213. As Kyvig relates, the “racially fraught issue of state or federal control of elections blocked agreement” in the conference committee. *Id.*

194. Prakash, *Of Synchronicity*, *supra* note 16, at 1268–71. “As a matter of constitutional structure,” Prakash explains, “I believe that whatever the rule for the bicameral passage of statutes, the same period ought to apply to bicameral proposal of an amendment.” *Id.* at 1270. And “[t]he Constitution, by incorporating the concept of ‘session,’ provided that bills must be perfected into law in a single session.” *Id.* at 1264.

195. *Id.* at 1270.

196. U.S. Const. amend. XVIII, § 3.

197. 256 U.S. 368, 375 (1921).

198. *Id.* at 376.

rights and federalism limitations on Article V.<sup>199</sup> A district court in 1930 endorsed a procedural variant on the federalism objection, holding that the amendment should have been ratified by state conventions rather than state legislatures given the extent to which it transferred power to the federal government.<sup>200</sup> As far as we are aware, this is the only instance in which a federal court has invalidated an Article V amendment. The Supreme Court reversed.<sup>201</sup>

Third, the Eighteenth Amendment raised the question whether referenda may play a part in the process of state ratification. In Ohio, citizens concerned about malapportionment in the state legislature decided to amend the state constitution to require that controversial federal amendments be submitted to a popular referendum after approval by the legislature.<sup>202</sup> Soon afterward, the Ohio legislature approved the Eighteenth Amendment by a wide margin, and the U.S. Secretary of State included Ohio's ratification in the official count when he proclaimed the Eighteenth Amendment adopted.<sup>203</sup> The people of Ohio, however, narrowly *rejected* the Eighteenth Amendment in a referendum after this proclamation.<sup>204</sup> The Supreme Court held that this referendum was a constitutional nullity in *Hawke v. Smith (No. 1)*.<sup>205</sup> The Court said that the "legislature," as used in Article V, is "the representative body which ma[kes] the laws of the people."<sup>206</sup> The decision was excoriated in the press,<sup>207</sup> and both its reasoning and its "elitist anti-populis[t]" tone continue to garner criticism.<sup>208</sup>

Shortly after *Hawke*, the Court rejected an array of other challenges to the Eighteenth Amendment, including that Congress had not properly found the amendment "necessary"; that "two thirds" means two-thirds of

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199. See Jason Mazzone, Unamendments, 90 Iowa L. Rev. 1747, 1815 n.364 (2005) (collecting scholarly sources arguing that the Eighteenth Amendment violated inherent substantive limits on the amending power); Roznai, *supra* note 79, at 673 n.107 (same).

200. *United States v. Sprague*, 44 F.2d 967, 981 (D.N.J. 1930), *rev'd*, 282 U.S. 716 (1931).

201. *Sprague*, 282 U.S. at 734.

202. See Kyvig, *supra* note 141, at 242. Specifically, a ratification by the legislature would not be effective for ninety days. *Id.* If, during that period, six percent of voters signed a petition for a referendum, the legislature's action would not be effective unless approved by a majority of voters in the referendum. *Id.*

203. *Id.*

204. *Id.* at 243.

205. 253 U.S. 221, 230–31 (1920).

206. *Id.* at 227.

207. See Kyvig, *supra* note 141, at 246 (collecting prominent criticisms); see also *id.* at 245 ("*Hawke v. Smith* left a large and lasting impression that the Article V amending process denied democratic choice in the case of national prohibition.").

208. 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, 1077–78 (2000).

the whole membership of Congress, not a quorum; and that the amendment transgressed substantive limits on the amending power.<sup>209</sup> The Court heard an extraordinary five days of oral argument on these questions and related ones involving the scope of the amendment and the National Prohibition Act.<sup>210</sup> But the Court issued only a brief per curiam opinion, stating its conclusions “without an exposition of the reasoning by which they ha[d] been reached.”<sup>211</sup>

#### H. *The Nineteenth Amendment*

The women’s suffrage amendment was ratified on the heels of Prohibition and raised similar procedural issues. A companion case decided the same day as *Hawke* held that the Ohio legislature’s ratification of the Nineteenth Amendment could not be overturned by referendum.<sup>212</sup> When the case was argued, thirty-five of the thirty-six states needed to ratify the amendment had done so. If *Hawke* had come out the other way, it would have been a significant setback for the amendment effort, as there were movements afoot to hold referenda in several states.<sup>213</sup>

*Hawke* also led indirectly to the final ratification of the Nineteenth Amendment, which unfolded in a dramatic scene in Tennessee.<sup>214</sup> The Tennessee Constitution contained (and still contains) a provision prohibiting the legislature from acting on a federal constitutional amendment without an intervening election following Congress’s proposal of the amendment.<sup>215</sup> Governor Albert Roberts refused to call a special session of the legislature to consider the Nineteenth Amendment before election day, thinking himself constrained by this provision. But after *Hawke* and some arm twisting by President Woodrow Wilson, he

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209. Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920).

210. See Kyvig, *supra* note 141, at 246. Edward Corwin opined at the time that “[n]ot since the Milligan case was argued in 1866 has a more notable array of counsel stood up before the court.” Edward S. Corwin, *Constitutional Law in 1919–1920. I: The Constitutional Decisions of the Supreme Court of the United States in the October Term, 1919*, 14 *Am. Pol. Sci. Rev.* 635, 651 (1920). For a colorful eyewitness account, see 2 Philip C. Jessup, *Elihu Root* 479–80 (1938).

211. Nat’l Prohibition Cases, 253 U.S. at 388 (White, C.J., concurring); see also *id.* (expressing “profound[] regret” over this absence of explanation). Justice Oliver Wendell Holmes wrote elliptically in a letter to then-Professor Felix Frankfurter that there were “good reasons” for “not giving reasons,” but he did not elaborate. Alexander M. Bickel & Benno C. Schmidt, Jr., *The Judiciary and Responsible Government 1910–21*, at 546 (1984) (quoting Letter from Oliver W. Holmes to Felix Frankfurter (June 22, 1920)). To this day, the “reasons for not giving reasons that Holmes alluded to remain obscure.” *Id.* at 546–47.

212. *Hawke v. Smith* (No. 2), 253 U.S. 231, 232 (1920).

213. See Kyvig, *supra* note 141, at 244.

214. On this scene, see generally Robert B. Jones & Mark E. Byrnes, *The “Bitterest Fight”: The Tennessee General Assembly and the Nineteenth Amendment*, 68 *Tenn. Hist. Q.* 270 (2009).

215. *Tenn. Const. art. II, § 32.*



convened the legislature, which voted to ratify by a razor-thin margin.<sup>216</sup> Opponents of the amendment immediately filed a motion to reconsider, only to realize that their motion would fail unless they could buy time to persuade more colleagues. Thirty-seven antisuffrage legislators therefore decamped to Decatur, Alabama, to deprive the House of a quorum.<sup>217</sup> Governor Roberts certified that Tennessee had ratified the amendment, and President Wilson's Secretary of State in turn certified the Nineteenth Amendment.<sup>218</sup> But that did not stop the Decatur contingent from returning; ordering the sergeant-at-arms to amass a quorum; and, with many prosuffrage members absent from the hall, voting to grant reconsideration and reject ratification.<sup>219</sup>

This mess came before the U.S. Supreme Court in *Leser v. Garnett*.<sup>220</sup> The Court held that the ratification by Tennessee (and several other states) could be treated as valid even if obtained in violation of the state constitution or state rules of legislative procedure.<sup>221</sup> Once a state legislature has transmitted a "duly authenticated" ratification resolution to the U.S. Secretary of State, the Court suggested, federal judges should not look behind the curtain.<sup>222</sup> Separately, the Court also rejected a claim that the Nineteenth Amendment was invalid because "so great an addition to the electorate, if made without the State's consent, destroys its autonomy as a political body."<sup>223</sup> The Court noted that this theory, if accepted, would also invalidate the Fifteenth Amendment, which "ha[d] been recognized and acted on for half a century."<sup>224</sup> And that proposition, whatever its legal merits, simply "cannot be entertained."<sup>225</sup>

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216. See Kyvig, *supra* note 141, at 238, 245.

217. A trial court also granted an injunction prohibiting the governor from certifying the ratification vote to Washington, but the injunction was quashed by the Tennessee Supreme Court. See *Clements v. Roberts*, 230 S.W. 30, 36 (Tenn. 1921).

218. See Kyvig, *supra* note 141, at 238.

219. Jones & Byrnes, *supra* note 214, at 286.

220. 258 U.S. 130 (1922).

221. *Id.* at 137.

222. *Id.*

223. *Id.* at 136. For a comprehensive summary of arguments made against the substantive validity of the Nineteenth Amendment, which the Court briskly brushed aside in *Leser*, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *Harv. L. Rev.* 947, 997–1006 (2002).

224. *Leser*, 258 U.S. at 136.

225. *Id.*

### I. *The Twenty-First Amendment*<sup>226</sup>

The Twenty-First Amendment, “repeal[ing]” Prohibition,<sup>227</sup> is the only amendment in U.S. history ratified by state conventions rather than state legislatures. That choice sprang from a lingering feeling, intensified by *Hawke*, that ratification of the Eighteenth Amendment had not accurately reflected public opinion.<sup>228</sup> Conventions would allow for a more direct appeal to the people. As a result, the Twenty-First Amendment brought up a host of new legal questions that have never been definitively resolved or adjudicated.

The threshold question was whether Congress or the states should set the rules governing the formation and operation of the conventions. Many members of Congress, the bar, and the academy expressed the view that Congress had the power to set these rules if it wished, although this view was by no means unanimous.<sup>229</sup> But Congress never really had to bother.

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226. We are not aware of any novel challenges to the validity of the Twentieth Amendment, which moved up the dates of the presidential inauguration and the beginning of the congressional term to shorten the lame-duck period. Presumably, this reflects the larger lack of controversy over the amendment: Within about a year after being proposed by Congress, it became the first amendment to be unanimously ratified by the states on the first pass. See Kyvig, *supra* note 141, at 274 (“To say that the states welcomed the lame duck amendment would be an understatement.”); Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 *Utah L. Rev.* 707, 734 (“Because the states acted so quickly and with virtually no dissent, there was often little debate in the state legislatures.”). The House’s proposed version of the amendment included a provision requiring that “ratification shall be by legislatures, the entire membership of at least one branch of which shall have been elected subsequent to [the] date of submission.” 75 *Cong. Rec.* 4059 (1932). That provision was removed by the conference committee when the House and Senate versions of the amendment were reconciled, but it serves as an interesting precedent for building novel conditions of ratification (beyond deadlines) into the text of proposed amendments. See *infra* notes 377–380 and accompanying text.

227. U.S. Const. amend. XXI, § 1.

228. See *Ratification of the Twenty-First Amendment to the Constitution of the United States: State Convention Records and Laws 3* (Everett Somerville Brown ed., 1938) [hereinafter *Ratification of the Twenty-First Amendment*] (“Much of the criticism of the Eighteenth Amendment was based on the claim that its ratification had not properly reflected the opinion of the people of the country.”). Defiance of Prohibition was widespread. As Pauline Sabin, the head of a Prohibition reform organization, put it: Proponents “thought they could make prohibition as strong as the Constitution, but instead they have made the Constitution as weak as prohibition.” Sean Beienburg, *Prohibition, the Constitution, and States’ Rights* 229 (2019).

229. For summaries of these debates, see Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900*, at 111–12 (1972) [hereinafter *Vose, Constitutional Change*]; Abraham C. Weinfeld, *Power of Congress Over State Ratifying Conventions*, 51 *Harv. L. Rev.* 473, 474–75 (1938). The states themselves were also in disagreement. California petitioned Congress to pass a law regulating the conventions. See *Ratification of the Twenty-First Amendment*, *supra* note 228, at 515. New Mexico, on the other hand, declared that any rules from Congress would be “null and void” and that state officers were “authorized and required to resist to the utmost any attempt to execute any and all such congressional dictation and usurpation.” *Id.* In the end, twenty-one states

By the time Congress proposed the amendment, twenty-nine states were already in the process of legislating how their conventions would take place.<sup>230</sup>

Many of the choices made by states in establishing these conventions were contentious and challenged at the time.<sup>231</sup> “The widespread use of at-large districts,” for instance, “disregarded both historical precedent and the advice of legal and constitutional experts commissioned to make recommendations.”<sup>232</sup> Indeed, even though more than half the states used at-large elections, the Maine Supreme Judicial Court held that this practice violated Article V.<sup>233</sup> A number of states required delegates to vote in accord with whatever position they had pledged to support when elected or in accord with the result of a statewide referendum.<sup>234</sup> This, too, was controversial, because it broke with the historical understanding of a convention as an authentically deliberative body. As one leading scholar put it, “a delegate must be free to decide how he individually will vote, to ratify or not to ratify,” and “he must not be subject to any legal process either to compel him to vote in a given way or to punish him if he does not so vote.”<sup>235</sup> The Maine high court agreed.<sup>236</sup> The Alabama Supreme Court came out the opposite way, upholding a law requiring delegates to pledge that they would abide by the result of a statewide referendum on the ground that a convention is “more truly representative when expressing the known will of the people.”<sup>237</sup>

In the end, the lawsuits challenging the ratification process did not carry the day. But the U.S. Supreme Court never weighed in.<sup>238</sup> And the

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included “escape hatch” provisions in their state convention laws, providing that any federal law would take precedence if passed. *Id.*

230. Clement E. Vose, *Repeal as a Political Achievement*, in *Law, Alcohol, and Order: Perspectives on National Prohibition* 97, 112 (David E. Kyvig ed., 1985).

231. See Vose, *Constitutional Change*, *supra* note 229, at 121–26 (describing litigation filed by opponents of repeal).

232. Thomas F. Schaller, *Democracy at Rest: Strategic Ratification of the Twenty-First Amendment*, *Publius*, Spring 1998, at 81, 88; see also Noel T. Dowling, *A New Experiment in Ratification*, 19 *A.B.A. J.* 383, 384 (1933) (“Election at large, for all delegates, involves a break-away from prior notions concerning the composition of conventions. The idea of local representation permeates our political thinking and possibly is to some extent imported into the Constitution by the term ‘convention.’”).

233. *In re Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (“[W]e do not deem it permissible for the state, under the terms of article 5 of the Federal Constitution, to organize a convention wherein the delegates entitled to participate are all elected at large.”).

234. Everett S. Brown, *The Ratification of the Twenty-First Amendment*, 29 *Am. Pol. Sci. Rev.* 1005, 1013–14 (1935).

235. Dowling, *supra* note 232, at 385.

236. *In re Opinion of the Justices*, 167 A. at 180 (“A convention is a body or assembly representative of all the people of the state. The convention must be free to exercise the essential and characteristic function of rational deliberation.”).

237. *In re Opinion of the Justices*, 148 So. 107, 111 (Ala. 1933).

238. See Vose, *Constitutional Change*, *supra* note 229, at 121 (“No great cases resulted and none ever reached the United States Supreme Court.”). In addition to the Alabama

litigation did little to settle or clarify what constraints Article V might impose on the process of ratification by state conventions.<sup>239</sup>

J. *The Twenty-Second Amendment*

The Twenty-Second Amendment codified the unwritten norm, which President Franklin Roosevelt had transgressed, against presidents serving more than two terms.<sup>240</sup> From a procedural point of view, the most striking thing about the amendment is the final vote tally in the House of Representatives: 81 to 29.<sup>241</sup> The size of the House, then as now, was 435 members.<sup>242</sup> A quorum therefore required at least 218 members, and two-thirds of a quorum required at least 146 members. How was the Twenty-Second Amendment sent to the states with so few “yeas”—less than a fifth of the total House membership?

The answer comes from the House Rules. As the Supreme Court has observed, the “Constitution has prescribed no method” for determining the presence of a quorum, “and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.”<sup>243</sup> The “method” the House has settled on is to *presume* the presence of a quorum unless the fact is challenged.<sup>244</sup> Furthermore, the Speaker of the House determined in 1890 that all members present in the House would count toward a quorum, even if they did not vote.<sup>245</sup> The

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and Maine cases discussed above, the high courts of Missouri and Ohio held that acts establishing their convention procedures did not have to be submitted to a referendum like other laws. See *State ex rel. Tate v. Sevier*, 62 S.W.2d 895, 898 (Mo. 1933); *State ex rel. Donnelly v. Myers*, 186 N.E. 918, 918–19 (Ohio 1933).

239. Cf. *Recent Cases*, 47 Harv. L. Rev. 126, 130 (1933) (observing that “[t]he opposing views of [the Alabama and Maine] decisions indicate the lack of both authority and satisfactory analogies” regarding how ratification of Article V amendments by convention is supposed to work).

240. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. Rev. 1430, 1435–37 (2018) (describing the Twenty-Second Amendment as a classic example of an imperiled norm being “displaced by law”).

241. 93 Cong. Rec. 2392 (1947).

242. See *Determining Apportionment*, U.S. House of Representatives Hist., Art & Archives, <https://history.house.gov/Institution/Appportionment/Determining-Apportionment/> [<https://perma.cc/S94V-XW4X>] (last visited Aug. 5, 2021).

243. *United States v. Ballin*, 144 U.S. 1, 6 (1892).

244. See Charles W. Johnson, John V. Sullivan & Thomas J. Wickham, Jr., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 756 (2017) (“A quorum is presumed to be present unless a point of no quorum is entertained and the Chair announces that a quorum is in fact not present or unless the absence of a quorum is disclosed by a vote or by a call of the House.”). The Court has implicitly blessed this method in a separate context. See *NLRB v. Noel Canning*, 573 U.S. 513, 553 (2014) (“Senate rules presume that a quorum is present unless a present Senator questions it.”).

245. See Johnson et al., *supra* note 244, at 760. The Speaker made this change to defeat the obstructionist “disappearing quorum” tactic, by which minority-party members would prevent a quorum by refusing to vote. See Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 Harv. L. Rev. 96, 112–14 (2017).

upshot is that the House can pass a bill—or apparently an amendment—with fewer than half of its members voting, as long as no one questions whether a quorum is present.<sup>246</sup>

That is what happened with the Twenty-Second Amendment. The House passed by a vote of 285 to 121 an initial version of the proposed amendment that would have prevented anyone from being elected President who had served any part of two terms.<sup>247</sup> The amendment was then reworked in the Senate into its current form, which provides that someone who serves as President for less than two years of another’s term may still be elected twice.<sup>248</sup> This was clearly a “material change,”<sup>249</sup> requiring a new vote in the House. The new vote, approving the Senate version, was 81 to 29.<sup>250</sup> One representative “object[ed] to the vote on the ground a quorum is not present.”<sup>251</sup> But he subsequently withdrew his objection without explanation, and a count never took place.<sup>252</sup>

While the final vote seems to have been effective under House rules, there is reason to be skeptical. Even if one is willing to accept that a bare quorum may vote on a constitutional amendment, the idea that a handful of representatives could propose an amendment in the absence of an actual quorum may be a bridge too far. The final House vote on the Twenty-Second Amendment severely strained both the text (“two thirds of both Houses”) and the supermajoritarian spirit of Article V. Moreover, the Supreme Court has given added reason for skepticism. In the *National Prohibition Cases*, the Court approved the application of the general quorum rule to constitutional amendments, but it advised: “The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present—assuming the presence of a quorum.”<sup>253</sup> The Court did not say two-thirds of the members *present and voting*. Perhaps this was a slip-up by the Court, but the Twenty-Second

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246. See Thomas J. Wickham, Constitution, Jefferson’s Manual, and Rules of the House of Representatives 83 (2019) (“The majority required to pass a constitutional amendment . . . is two-thirds of those Members voting either in the affirmative or negative, a quorum being present, and Members who only indicate that they are ‘present’ are not counted in this computation.”).

247. See Stephen W. Stathis, The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?, 7 Const. Comment. 61, 67 (1990).

248. Id. at 68; see U.S. Const. amend. XXII.

249. 93 Cong. Rec. 2389 (1947) (statement of Rep. Michener).

250. Id. at 2392.

251. Id. (statement of Rep. Forand).

252. See Corwin & Ramsey, *supra* note 96, at 192–94.

253. 253 U.S. 350, 386 (1920). A half-century earlier, Senator Lyman Trumbull had put the point similarly on the floor of Congress: “[I]t was decided” during debates on the Corwin Amendment, he said, that “two thirds of the Senators *present*, a quorum being present, was sufficient to carry a constitutional amendment.” Cong. Globe, 40th Cong., 3d Sess. 1642 (1869) (emphasis added).

Amendment emphatically did not receive a vote of two-thirds of a present quorum.<sup>254</sup>

To be clear, we are not suggesting that judges (or anyone else) today could or should disregard the Twenty-Second Amendment, which has been an entrenched feature of our constitutional order for more than seventy years. As with the Sixteenth Amendment, courts would almost certainly dismiss any lawsuit challenging the Twenty-Second Amendment without reaching the merits.<sup>255</sup> But the amendment's current status as part of the Constitution is not due to painstaking, or even particularly conscientious, adherence to the rules of Article V.

K. *The Twenty-Seventh Amendment?*<sup>256</sup>

The Twenty-Seventh Amendment brings this story full circle. It was proposed by Congress in the early days of the republic, but it is the most recent amendment to have gained entry to the Constitution . . . if indeed it did gain entry. The fact that leading constitutional scholars still refer to

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254. We have not been able to ascertain whether those who voted on the Twenty-Second Amendment were the only members present in the House, in which case there was not a quorum, or whether there was in fact a quorum present in the House (in keeping with the presumption in the House Rules) and the amendment failed to obtain a "vote of two-thirds of the members present." Nat'l Prohibition Cases, 253 U.S. at 386. Either way, Article V would not be satisfied per the rule announced by the Court in 1920.

255. See *supra* notes 185–188 and accompanying text.

256. We are not aware of significant novel challenges to the Twenty-Third through Twenty-Sixth Amendments. These "modest" amendments were "narrowly drawn reforms that produced only marginal change." Kyvig, *supra* note 141, at 349. The Twenty-Third Amendment contained, for the first time, a ratification time limit in the resolution proposing the amendment rather than in the text of the amendment itself. 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, 126 (1997). The validity of this time limit was never tested, however, because the amendment (which authorized presidential electors for the District of Columbia) was ratified within a year. See Michael J. Garcia, Caitlain Devereaux Lewis, Andrew Nolan, Meghan Totten & Ashley Tyson, *Cong. Rsch. Serv., The Constitution of the United States of America*, S. Doc. No. 112-9, at 40 n.15 (2017). When the Twenty-Fifth Amendment was certified as part of the Constitution, President Lyndon Johnson signed the certification, although apparently only as a witness. See *Certification of Amendment to Constitution of the United States*, 32 *Fed. Reg.* 3287, 3287–88 (Feb. 25, 1967); *Remarks at Ceremony Marking the Ratification of the Presidential Inability (25th) Amendment to the Constitution*, 1 *Pub. Papers* 217–18 (Feb. 23, 1967); Stephen W. Stathis, *Presidential Disability Agreements Prior to the 25th Amendment*, 12 *Pres. Stud. Q.* 208, 212 (1982). The Twenty-Sixth Amendment, which was the "most quickly ratified constitutional amendment in our history," *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 186 (5th Cir. 2020), featured a reprise of the debate in Tennessee over whether a state constitution could validly require an intervening election before the legislature ratified the amendment. The Tennessee Supreme Court held this state constitutional limitation invalid. See *Walker v. Dunn*, 498 S.W.2d 102, 106 (Tenn. 1972); *supra* notes 214–225 and accompanying text.

it as the “purported”<sup>257</sup> or “alleged”<sup>258</sup> Twenty-Seventh Amendment highlights how many questions about Article V have remained open in the two centuries between its proposal and ratification.

What is now regarded as the Twenty-Seventh Amendment, which prohibits a congressional salary increase from taking effect before an intervening election, was proposed as the second of twelve amendments sent to the states in 1789 (the third through twelfth were the Bill of Rights). By the time the Bill of Rights was ratified in 1791, only six states had ratified the so-called Congressional Pay Amendment, and it fell into a long state of dormancy.<sup>259</sup> About a hundred years later, the Ohio legislature voted to ratify the amendment to protest the “Salary Grab” Act of 1873, in which Congress gave itself a large and retroactive salary increase.<sup>260</sup> But that was an isolated maneuver, and the concomitant introduction in Congress of numerous proposals for a *new* congressional pay amendment suggests that many regarded the original version as dead.<sup>261</sup> Nonetheless, the Congressional Pay Amendment was resurrected a century later, owing to the dogged efforts of a University of Texas undergraduate and public displeasure at congressional salary increases.<sup>262</sup>

Maine and Colorado ratified the amendment in 1983 and 1984. News coverage of those ratifications prompted a Wyoming legislator to report that his state had also ratified the amendment in 1977—a fact that had somehow escaped notice in the nation’s capital.<sup>263</sup> After that, it was off to the races. By 1992, forty-one states had ratified.<sup>264</sup>

Since 1984, the Archivist of the United States has been assigned the statutory responsibility to “publish[]” new amendments.<sup>265</sup> The Archivist sought the advice of the Justice Department’s Office of Legal Counsel (OLC). OLC opined that there was no time limit on ratification, brushing aside the Supreme Court’s contrary language in *Dillon* as “dictum,” and

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257. E.g., Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 *Const. Comment.* 101, 101 (1994) [hereinafter Levinson, *Authorizing Constitutional Text*]; Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *Colum. L. Rev.* 606, 636 (2008).

258. E.g., Amar, *Philadelphia Revisited*, supra note 4, at 1046 n.3; Michael J. Perry, *What Is “the Constitution”?* (And Other Fundamental Questions), in *Constitutionalism: Philosophical Foundations* 99, 133 n.1 (Larry Alexander ed., 2001).

259. See Bernstein, supra note 25, at 532–33.

260. *Id.* at 534.

261. *Id.*

262. See Kyvig, supra note 141, at 464–65; Bernstein, supra note 25, at 536–39.

263. Kyvig, supra note 141, at 465; Bernstein, supra note 25, at 537.

264. Bernstein, supra note 25, at 539. The ratification of Idaho raised a variant of an old problem: whether the state could require that a proposed amendment be submitted to the people in a referendum prior to ratification. The Idaho Attorney General opined that such a requirement was unconstitutional, but following a favorable referendum vote, the legislature ratified anyway. *Id.*

265. Pub. L. No. 98-497, § 107(d), 98 Stat. 2280, 2291 (1984) (codified at 1 U.S.C. § 106b (2018)).

that the Congressional Pay Amendment had been validly ratified.<sup>266</sup> OLC also opined that Congress has no role in proclaiming an amendment part of the Constitution, despite the contrary views of seven Justices in *Coleman*.<sup>267</sup> In keeping with OLC's advice, the Archivist "certif[ied]" in the *Federal Register* that the "Amendment has become valid, to all intents and purposes, as a part of the Constitution of the United States."<sup>268</sup>

Congressional leadership was "stunned."<sup>269</sup> Several members took to the floor to reassert Congress's primacy in judging the validity of an amendment. Senator Robert Byrd, for instance, invoked the "firm historical understanding . . . that the Executive's function with regard to certifying constitutional amendments is purely ministerial" and insisted that "Congress should have the opportunity to decide substantive questions" of amendment validity.<sup>270</sup> Numerous members of Congress expressed concern about whether ratification of the Twenty-Seventh Amendment would furnish a precedent for reviving other seemingly lapsed amendments.<sup>271</sup> Nevertheless, in the end Congress voted overwhelmingly for a resolution validating the Twenty-Seventh Amendment.<sup>272</sup>

Yet even as countless pocket Constitutions and textbooks have flown off the presses since 1992 with the Twenty-Seventh Amendment included, "there is, at least at this time, no consensually agreed-upon, positivistic 'given' that allows us to say that we are simply engaging in description when granting the amendment the status of 'law.'"<sup>273</sup> Two of the foremost

266. Cong. Pay Amendment, 16 Op. O.L.C. 85, 97 (1992). The Court in *Dillon*, recall, had unanimously described the idea that the Congressional Pay Amendment might still be ratified "quite untenable." *Dillon v. Gloss*, 256 U.S. 368, 375 (1921); see *supra* note 23.

267. *Cong. Pay Amendment*, 16 Op. O.L.C. at 99.

268. Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21,187, 21,188 (May 19, 1992).

269. Bernstein, *supra* note 25, at 540.

270. 138 Cong. Rec. 11,654 (1992) (statement of Sen. Byrd); see also, e.g., *id.* at 11,779 (statement of Rep. Fish) ("Where . . . there may be lingering concerns as to the validity of the amendment, it is appropriate for Congress to resolve such doubts . . ."); *id.* at 11,860 (statement of Sen. Grassley) ("[T]he Supreme Court made clear in 1939 in the *Coleman* decision that Congress has the authority to say whether the timeliness standard has been met."); *id.* at 11,871 (statement of Sen. Roth) (stating that "the functions of" the Archivist "are ministerial only: To count the number of ratifications of an amendment and not to act as a constitutional tribunal to 'decide doubtful questions' of law").

271. See, e.g., *id.* at 11,655 (statement of Sen. Byrd) ("I do not intend our action with regard to this amendment to serve as a precedent or model for any other amendment . . ."); *id.* at 11,780 (statement of Rep. Edwards) ("The House . . . should be clear that this is an exception, not a precedent."). Although one senator stated that the Senate had "decided to declare that four [sic] other proposed and pending amendments . . . were to be considered to have lapsed," *id.* at 11,870 (statement of Sen. Sanford), neither the Senate nor the House took formal action on that question. Senator Jesse Helms provided the more accurate assessment: "I regret that some questions are left unanswered." *Id.* at 11,871.

272. *Id.* at 11,869 (Senate); *id.* at 12,052 (House).

273. Levinson, *Authorizing Constitutional Text*, *supra* note 257, at 113.



academic authorities on the amendment process, Dellinger and Prakash, maintain that the amendment is not part of the Constitution.<sup>274</sup> Justice Scalia stated at a public event that he is inclined to agree.<sup>275</sup> Ackerman has written that “the so-called twenty-seventh amendment should be treated as a bad joke by sensible citizens.”<sup>276</sup> A unanimous Supreme Court, including Justices Oliver Wendell Holmes and Louis Brandeis, suggested that the amendment was unrevivable a century ago.<sup>277</sup> On the other hand, eminent constitutional scholars such as Amar, Michael Stokes Paulsen, and Laurence Tribe have taken the opposite position.<sup>278</sup> Perhaps the best an editor of the Constitution can do is to adopt the approach suggested by William Van Alstyne: Include the Twenty-Seventh Amendment, but with an asterisk.<sup>279</sup>

In light of the history of legal contestation and confusion recounted above, an asterisk would be a fitting way for the written Constitution to end.

#### L. *The Twenty-Eighth Amendment?*

Or maybe that is not quite the end. Supporters of other amendments proposed by Congress over the years claim that these amendments, too, have already become part of the canonical document. As a matter of Article V law, it is not clear that all of these claims are wrong.

1. *Article the First*. — The very first amendment proposed by Congress, denominated “Article the First” in the same package of amendments that contained the Bill of Rights and the putative Twenty-Seventh, involved the size of the House of Representatives.<sup>280</sup> The ratification history is obscure,

274. See Prakash, *Of Synchronicity*, supra note 16, at 1283; Paul M. Barrett & David Rogers, *A Timely Measure Gains Ratification After Two Centuries*, *Wall St. J.*, May 8, 1992, at A10 (quoting Dellinger).

275. Tribe, *The Invisible Constitution*, supra note 10, at 4.

276. Ackerman, *We the People*, supra note 7, at 490 n.1.

277. See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

278. See Amar, *America’s Constitution*, supra note 49, at 457; Paulsen, *A General Theory*, supra note 50, at 682–83; Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, *Wall St. J.*, May 13, 1992, at A15.

279. William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 *Const. Comment.* 9, 15 (1993).

280. See *Resolution of Congress Proposing Amendatory Articles to the Several States*, in *Documentary History*, supra note 103, at 321, 321–22. Article the First would have set an initial minimum number of representatives based on population, until the national population reached a certain number, at which point it would have mandated a minimum of 200 representatives and a maximum of one per fifty thousand. *Id.*; see also Amar, *The Bill of Rights*, supra note 94, at 1143–45. The language is convoluted enough that unless one adopts some sort of “scrivener’s error” theory, its meaning is misrepresented on the Senate’s official website. See *Congress Submits the First Constitutional Amendments to the States*, U.S. Senate, [https://www.senate.gov/artandhistory/history/minute/Congress\\_Submits\\_1st\\_Amendments\\_to\\_States.htm](https://www.senate.gov/artandhistory/history/minute/Congress_Submits_1st_Amendments_to_States.htm) [<https://perma.cc/8TNE-QG55>] (last visited Aug. 5, 2021) (claiming that if Article the First were adopted, the House “would today have more than 6,000 members”). A possible source of confusion is that a congressional

but it appears to have fallen just short.<sup>281</sup> Of the states that voted to add the Bill of Rights to the Constitution, only Delaware declined to ratify Article the First, probably because, as a small state, its power would shrink in a larger House.<sup>282</sup> This left the amendment one state shy of ratification. And the failure of Massachusetts and Connecticut to ratify not only this amendment but also the Bill of Rights “poses something of a mystery.”<sup>283</sup> In Massachusetts, the two houses of the legislature approved slightly different sets of amendments, and a joint committee never reconciled the differences.<sup>284</sup> In Connecticut, the lower house of the legislature apparently approved eleven of twelve proposed amendments in 1789, including Article the First, but the upper house tabled the issue until the next session.<sup>285</sup> At the next session, the upper house approved all twelve amendments, but the lower house only approved the Bill of Rights (and maybe the Congressional Pay Amendment—the journal contradicts itself).<sup>286</sup> The two houses could not reconcile their resolutions, so no notice of ratification was ever sent to the capital.

A recent pair of lawsuits, however, alleges that Connecticut *did* ratify Article the First. The basic claim is that the ratification was effective

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conference committee at the eleventh hour “inexplicably” changed “less” to “more” in the final clause, converting a minimum to a maximum and introducing a “technical glitch[]” into the formula. Amar, *The Bill of Rights*, supra note 94, at 1143.

281. See Amar, *The Bill of Rights*, supra note 94, at 1143. As Amar explains, numerous historians have bungled this ratification count in a variety of ways. *Id.* at 1143 n.52.

282. For the ratifying states, see Virginia Ratification Resolution (Nov. 4, 1791), *in* *Documentary History*, supra note 103, at 377, 385; Vermont Ratification Resolution (Oct. 27, 1790), *in* *Documentary History*, supra note 103, at 371, 373–74; New Jersey Ratification Resolution (Aug. 3, 1790), *in* *Documentary History*, supra note 103, at 325, 327; Rhode Island Ratification Resolution (June 15, 1790), *in* *Documentary History*, supra note 103, at 363, 364; New York Ratification Resolution (Mar. 27, 1790), *in* *Documentary History*, supra note 103, at 357, 358; New Hampshire Ratification Resolution (Jan. 25, 1790), *in* *Documentary History*, supra note 103, at 345, 346; South Carolina Ratification Resolution (Jan. 19, 1790), *in* *Documentary History*, supra note 103, at 340, 341; North Carolina Ratification Resolution (Dec. 22, 1789), *in* *Documentary History*, supra note 103, at 335, 337; Maryland Ratification Resolution (Dec. 19, 1789), *in* *Documentary History*, supra note 103, at 330, 331. Pennsylvania first rejected the amendment, Pennsylvania Ratification Resolution (Mar. 11, 1790), *in* *Documentary History*, supra note 103, at 352, 353, but then ratified on September 21, 1791, Pennsylvania Ratification Resolution (Sept. 21, 1791), *in* *Documentary History*, supra note 103, at 367, 369. “The files of the Department of State contain no notices of ratification from the legislatures of Connecticut, Georgia, or Massachusetts.” Denys P. Myers, *Massachusetts and the First Ten Amendments to the Constitution*, S. Doc. No. 74-181, at 7 (1936) [hereinafter Myers, *Massachusetts and the First Ten Amendments*]; see also Ames, supra note 55, at 320.

283. Alan P. Grimes, *Democracy and the Amendments to the Constitution* 28 n.40 (1978).

284. *Id.*; Myers, *Massachusetts and the First Ten Amendments*, supra note 282, at 11–12.

285. Thomas H. Le Duc, *Connecticut and the First Ten Amendments to the Federal Constitution*, S. Doc. No. 75-96, at 3 (1937).

286. *Id.*; see also Grimes, supra note 283, at 28 n.40.

because both houses approved Article the First, albeit during two different legislative sessions, and that any state rule requiring approval by both chambers during a single session is superseded by Article V.<sup>287</sup> Both lawsuits, unsurprisingly, were dismissed on standing and political question grounds.<sup>288</sup> But the legal arguments they press are by no means untenable on the merits.

2. *The Titles of Nobility Amendment.* — The so-called Titles of Nobility Amendment, proposed by Congress in 1810, has had a similarly checkered legal history.<sup>289</sup> It fell short of the necessary number of state ratifications. But confusion about its status persisted for years. In an official 1815 compilation of the laws of the United States, published with the authorization of Congress, the Titles of Nobility Amendment appeared in the Constitution as the Thirteenth Amendment.<sup>290</sup> The editors of the compilation explained that there had “been some difficulty in ascertaining” whether it had been ratified, because the “evidence to be found in the office” of the Secretary of State was “defective.”<sup>291</sup> The editors “considered [it] best” to include the supposed “thirteenth” amendment with that prefatory note.<sup>292</sup> The official edition of the Constitution printed for the Fifteenth Congress also contained the amendment.<sup>293</sup> Secretary of State John Quincy Adams, in a letter from 1817, seemed to be under the impression that the amendment was part of the Constitution.<sup>294</sup> Even today, historians give conflicting accounts of how close the amendment was to ratification.<sup>295</sup>

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287. See *LaVergne v. House of Representatives*, 392 F. Supp. 3d 108 (D.D.C. 2019) (three-judge court).

288. *LaVergne v. Bryson*, 497 F. App'x 219, 221–23 (3d Cir. 2012); *LaVergne*, 392 F. Supp. 3d at 117–19.

289. This proposed amendment provides in full:

If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

Resolution Proposing an Amendment to the Constitution of the United States (Nov. 27, 1809), in *Documentary History*, supra note 103, at 452, 452.

290. See 1 *Laws of the United States of America* 74 (John Bioren & W. John Duane eds., 1815).

291. *Id.* at ix.

292. *Id.*

293. See Ames, supra note 55, at 188; Silversmith, supra note 100, at 587 (citing 31 *Annals of Cong.* 530–31 (1817)).

294. Silversmith, supra note 100, at 587 n.62. Adams later corrected himself. *Id.*

295. Compare, e.g., Bernstein with Agel, supra note 16, at 176 (“one state short”), and Kyvig, supra note 141, at 117 (one state short), with Silversmith, supra note 100, at 595–96 (“[I]t was never a single ratification short . . .”). Silversmith appears to have the better of the argument.

Throughout the early to mid-1800s, “the general public continued to think that [the Titles of Nobility] amendment had been adopted.”<sup>296</sup> The amendment frequently appeared in official state codes, in printed editions of the Constitution, and in textbooks.<sup>297</sup> By the end of the nineteenth century, it was “commonly recognized” that the Titles of Nobility Amendment had failed.<sup>298</sup> But the whole episode confirms once again that the constitutional text is constituted to a significant extent by public attitudes and that those attitudes can become detached from Article V.

3. *The Equal Rights Amendment.* — The final, and in our view strongest, contender to be the twenty-eighth amendment is the ERA, which would prohibit the denial or abridgement of “[e]quality of rights under the law . . . by the United States or by any State on account of sex.”<sup>299</sup> The odyssey of the ERA recapitulates many of the uncertainties already canvassed above.<sup>300</sup> It was proposed by Congress in 1972, and the accompanying resolution set a ratification deadline of seven years.<sup>301</sup> As that deadline approached, only thirty-five states (of thirty-eight needed) had ratified, and several of those had purported to rescind their ratifications,<sup>302</sup> so Congress voted by simple majority to extend the ratification deadline by three years.<sup>303</sup> President Jimmy Carter signed the resolution extending the deadline while disclaiming that it was constitutionally necessary.<sup>304</sup> No

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296. Ames, *supra* note 55, at 188–89.

297. See Gideon M. Hart, The “Original” Thirteenth Amendment: The Misunderstood Titles of Nobility Amendment, 94 Marq. L. Rev. 311, 366–67 & nn.302–316 (2010) (collecting sources).

298. Silversmith, *supra* note 100, at 593; accord Hart, *supra* note 297, at 367. This has not stopped certain “extremist” groups from claiming that the amendment was ratified and then suppressed by unscrupulous lawyers. Silversmith, *supra* note 100, at 580–81.

299. Proposed Amendment to the United States Constitution, 92 H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

300. For a broad overview of the legal and political fight for the ERA from the early 1900s to the present, see Julie C. Suk, *We the Women: The Unstoppable Mothers of the Equal Rights Amendment* (2020) [hereinafter Suk, *We the Women*].

301. Joint Resolution Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women, H.R.J. Res. 208, 92d Cong., 86 Stat. 1523 (1972).

302. Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. at 6–7 & nn.6–8 (Jan. 6, 2020). Four state legislatures voted to rescind their ratifications, and one passed a resolution providing that its ratification would be withdrawn if the ERA was not ratified during the seven-year period. *Id.* at 7 & n.8. Further complicating matters, the acting governor of Kentucky vetoed the state’s purported rescission while the governor was on vacation. Acting Governor Vetoes Kentucky Rights Reversal, N.Y. Times, Mar. 21, 1978, at 20. A sixth state, North Dakota, recently passed a joint resolution “clarifying” that its initial ratification expired in 1979. S. Con. Res. 4010, 67th Legis. Assemb., Reg. Sess. (N.D. 2021).

303. Joint Resolution Extending the Deadline for the Ratification of the Equal Rights Amendment, H.R.J. Res. 638, 95th Cong., 92 Stat. 3799 (1978).

304. Jimmy Carter, U.S. President, Speech at a Ceremony Commemorating the Extension of the Ratification Deadline of the Equal Rights Amendment: Remarks on Signing H.J. Res. 638, 2 Pub. Papers 1800 (Oct. 20, 1978).

additional states ratified before the expiration of the new deadline. Beginning in 2017, however, Nevada, Illinois, and Virginia each ratified, pushing the total number of ratifications over the three-fourths line if one counts the states that later rescinded.<sup>305</sup> OLC opined in January 2020 that the ERA had expired and was no longer pending before the states.<sup>306</sup> But the House of Representatives passed a resolution the next month eliminating the deadline, and Senators Ben Cardin and Lisa Murkowski have introduced a similar measure in the Senate.<sup>307</sup> Meanwhile, a number of lawsuits regarding the status of the ERA are pending at this writing.<sup>308</sup>

There is a credible argument that the ERA is already part of the Constitution based on Article V. To start, many officials and scholars have taken the view that purported rescissions are ineffective, given, among other things, the value of finality and the textual commitment to states of the power to “ratif[y]” only.<sup>309</sup> Several nineteenth-century treatise writers advised that rescissions were ineffective.<sup>310</sup> And “[e]very state legislature that passed a resolution rescinding a prior ratification of the ERA did so under the cloud of an express opinion that such an action would be a legal nullity.”<sup>311</sup> As for Congress’s attempt to impose a deadline, that too was arguably invalid. After all, as OLC observed in 1992, “the plain language of Article V contains no time limit on the ratification process.”<sup>312</sup> It is at least arguable, then, that Congress has no power to create a ratification time limit through a resolution that does not itself go through the Article V process.<sup>313</sup>

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305. See Timothy Williams, *Virginia Approves the E.R.A., Becoming the 38th State to Back It*, N.Y. Times (Jan. 16, 2020), <https://www.nytimes.com/2020/01/15/us/era-virginia-vote.html> (on file with the *Columbia Law Review*).

306. Ratification of the Equal Rights Amendment, 44 Op. O.L.C., slip op. at 1–2, 12–24.

307. See Patricia Sullivan, *U.S. House Removes ERA Ratification Deadline, One Obstacle to Enactment*, Wash. Post (Feb. 13, 2020), [https://www.washingtonpost.com/local/legal-issues/us-house-removes-era-ratification-deadline-one-obstacle-to-enactment/2020/02/13/e82aa802-4de5-11ea-b721-9f4cdc90bc1c\\_story.html](https://www.washingtonpost.com/local/legal-issues/us-house-removes-era-ratification-deadline-one-obstacle-to-enactment/2020/02/13/e82aa802-4de5-11ea-b721-9f4cdc90bc1c_story.html) (on file with the *Columbia Law Review*).

308. See, e.g., Complaint, *Alabama v. Ferriero*, No. 7:19-CV-02032-LSC (N.D. Ala. filed Dec. 17, 2019), 2019 WL 6894418; see also Kentiya Orange, *In the Know: Equal Rights Amendment Lawsuits*, League of Women Voters (Feb. 25, 2020), <https://www.lwv.org/blog/know-equal-rights-amendment-lawsuits> [<https://perma.cc/9BAS-PXJU>] (summarizing lawsuits).

309. See, e.g., Dellinger, *Legitimacy of Constitutional Change*, supra note 16, at 421–24; John R. Vile, *Permitting States to Rescind Ratifications of Pending Amendments to the U.S. Constitution*, *Publius*, Spring 1990, at 109, 115–20 (reviewing five “basic arguments . . . against a state’s right to rescind amendments”). But see Vile, supra, at 113–15 (reviewing counterarguments).

310. Dellinger, *Legitimacy of Constitutional Change*, supra note 16, at 423 & n.177.

311. *Id.* at 423.

312. Cong. Pay Amendment, 16 Op. O.L.C. 85, 88 (1992).

313. See, e.g., Danaya C. Wright, “Great Variety of Relevant Conditions, Political, Social and Economic”: The Constitutionality of Congressional Deadlines on Amendment Proposals Under Article V, 28 *Wm. & Mary Bill Rts. J.* 45, 77–92 (2019); Mason Kalfus,

The Supreme Court did state in *Dillon* that Congress has the power “to fix a definite period for” ratification.<sup>314</sup> But this statement rested (again, arguably) on the logically prior conclusion that Article V requires that “ratification must be within some reasonable time after the proposal.”<sup>315</sup> That conclusion did not survive the Twenty-Seventh Amendment, at least in the view of Congress and the executive branch.<sup>316</sup> Moreover, even if one believes that Congress has an implied power to control ratification deadlines and that the ERA’s deadline has expired, it may be that retroactively extending such a deadline is a permissible exercise of this power. Not only that, it may be Congress’s exclusive prerogative under *Coleman* to judge whether its extension of the deadline is valid.<sup>317</sup> For now, of course, the ERA does not appear in printed copies of the Constitution. But the story may not be over, especially given recent shifts in power in Washington.

#### M. *An Article V Convention?*

A brief coda: Our focus has been on the Article V “track” of congressionally initiated amendments, because that is how every amendment in U.S. history has been passed. There is also the separate and unused track of amendments proposed by a federal convention. Article V is “strikingly vague” on how such a convention would be triggered and how, if triggered, it would operate.<sup>318</sup> Over the years, the states have sent hundreds of

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Comment, Why Time Limits on the Ratification of Constitutional Amendments Violate Article V, 66 U. Chi. L. Rev. 437, 446–67 (1999); cf. *Clinton v. City of New York*, 524 U.S. 417, 445–46 (1998) (holding that Congress cannot change by statute the constitutional process for enacting legislation). It is also notable that the ERA’s time limit was worded differently than prior time limits. The resolution proposing the ERA stated that it would be valid “when ratified . . . within seven years,” whereas prior limits had stated that the proposed amendment would be “inoperative unless,” or valid “only if,” ratified within a certain time period. Suk, *We the Women*, supra note 300, at 177 (emphasis added). In light of this contrast, the ERA’s time limit was arguably just hortatory.

314. *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921). It is debatable whether this issue was properly before the Court in *Dillon*, given that the Eighteenth Amendment had been ratified well within the deadline set by Congress. In addition, the deadline was in the text of the proposed amendment itself, not in the accompanying resolution. *Dillon* is therefore “dubious” authority at best for the validity of the ERA’s limit. Robert Hajdu & Bruce E. Rosenblum, Note, The Process of Constitutional Amendment, 79 Colum. L. Rev. 106, 126 n.75 (1979); see also *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 57 (D.D.C. 2021) (noting that whether Congress may impose a deadline by resolution “is a question of first impression”).

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

316. See Prakash, Of Synchronicity, supra note 16, at 1226 (“While the Supreme Court once claimed that the states had to ratify proposed amendments within a reasonable period of time after their receipt, the political branches later decided otherwise.”).

317. See Daniel Hemel, Some Thoughts on the 28th Amendment, Medium (June 5, 2018), <https://medium.com/whatever-source-derived/some-thoughts-on-the-28th-amendment-fc4d8372ab14> (on file with the *Columbia Law Review*).

318. Laurence H. Tribe, Issues Raised by Requesting Congress to Call a Constitutional Convention to Propose a Balanced Budget Amendment, 10 Pac. L.J. 627, 632 (1979); see also Michael B. Rappaport, Reforming Article V: The Problems Created by the National

applications to Congress for an Article V convention. Some are limited to a particular subject; some are unrestricted or “general.”<sup>319</sup> Paulsen, after tabulating all of the applications that had arrived by 1993, concluded that “there are, at present, forty-five states with their lights ‘on’ for a general convention.”<sup>320</sup> In other words, “Congress is obliged to call a constitutional convention and has been for some time.”<sup>321</sup>

Paulsen’s conclusion rests on some questionable premises about how to count state applications. Based on his belief that Article V permits only unrestricted conventions for proposing amendments, he puts applications that are limited to a certain subject, but not *conditioned* on a convention adopting such a limit, into the “general” column.<sup>322</sup> Even so, the fact that there is a colorable argument that recent Congresses have been obliged to call a constitutional convention—all of the rules of which would have to be invented more or less from scratch—is another vivid illustration of how little is settled about the law of Article V.

#### IV. LIVING WITH ARTICLE V AMBIGUITY: JUDGING CONTESTED AMENDMENTS

The vast majority of Article V amendments, as Part III shows, have faced credible challenges to their validity.<sup>323</sup> This Part first explains why

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Convention Amendment Method and How to Fix Them, 96 Va. L. Rev. 1509, 1517 (2010) (“Although the Constitution specifies that an amendment may be drafted by a national convention, it unfortunately does not clearly answer various questions about this amendment method.”).

319. See Paulsen, A General Theory, *supra* note 50, at 765–89 (compiling convention applications as of 1993).

320. *Id.* at 756.

321. *Id.*; see also Robert G. Natelson, Counting to Two Thirds: How Close Are We to a Convention for Proposing Amendments to the Constitution?, 19 *Federalist Soc’y Rev.* 50, 53–60 (2018) (arguing that Congress is one state application short of being obliged to call a convention to propose a balanced budget amendment); Walker Hanson, Note, The States’ Power to Effectuate Constitutional Change: Is Congress Currently Required to Convene a National Convention for the Proposing of Amendments to the United States Constitution?, 9 *Geo. J.L. & Pub. Pol’y* 245, 258 (2011) (“Even when considering the rescissions of Oregon, North Dakota, and Wyoming as valid, those three rescissions combined with the rescissions of the other eight states since 1993 leave a total of thirty-four states with valid applications before Congress calling for an Article V convention . . .”). Colorado recently rescinded its outstanding applications for an Article V convention. H.J. Res. 21-1006 (Colo. Apr. 27, 2021).

322. See Michael Stokes Paulsen, How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention, 34 *Harv. J.L. & Pub. Pol’y* 837, 839–55 (2011) (detailing his methodology). In this 2011 essay, Paulsen concluded that the number of states with “lights on” for a general convention had dropped from forty-five to thirty-three—just below the two-thirds threshold—on account of post-1993 rescissions. *Id.* at 856–58.

323. More specifically, Part III shows that these challenges were credible in terms of the interpretive conventions used by mainstream constitutional lawyers. We take no position in this paper on the ultimate persuasiveness of the challenges in their day or on the appropriateness of the conventions. This synoptic approach means that we do not apply any particular interpretive method in depth; we have not, for example, attempted any sort of

such challenges are likely to keep arising, given this history and the extent of legal uncertainty that persists. It then asks how, as a matter of institutional design, disputes over Article V compliance might best be resolved in the future.

A. *The Highly Incomplete Liquidation of Article V*

The standard view of constitutional lawyers today is that at most a “handful” of amendments, above all the Reconstruction Amendments, have raised any meaningful legal difficulties.<sup>324</sup> And these difficulties can be dismissed as outliers, not only because of their statistical rarity but also because of the extraordinary upheaval wrought by the Civil War and the “fluky” circumstances of the Twenty-Seventh Amendment.<sup>325</sup> We hope we have turned this standard picture upside-down and shown that just about every recognized amendment suffers from a credible defect under Article V. Even the five relatively modest amendments that did not (as far as we know) face contemporaneous legal challenges built on questionable past practices such as quorum rules and the absence of presidential presentment.<sup>326</sup>

The fact that amendments have generated significant legal controversy in the past would not necessarily matter much in the present if, over time, the law of Article V had become progressively clearer. Many underdeterminate provisions of the Constitution have spawned rich bodies of case law interpreting their terms or otherwise had their meaning “liquidated” and settled by practice.<sup>327</sup> But for the most part, as Part III illustrates

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rigorous investigation into the original public meaning of Article V or into originalist theories of constitutional construction for resolving Article V underdeterminacies.

324. Prakash, *Of Synchronicity*, supra note 16, at 1270 n.267.

325. Strauss, *Irrelevance of Amendments*, supra note 42, at 1486.

326. Presidential presentment did not occur for the Twentieth Amendment or the Twenty-Third through Twenty-Sixth Amendments. See supra note 21. The House votes on the Twentieth Amendment, 75 Cong. Rec. 5027 (1932), Twenty-Third Amendment, 106 Cong. Rec. 12,570–71 (1960), and Twenty-Fifth Amendment, 111 Cong. Rec. 15,216 (1965), and the Senate vote on the Twenty-Third Amendment, 106 Cong. Rec. 12,858 (1960), were all taken without recording yeas and nays, so it is entirely possible that these amendments received only two-thirds of a quorum, not two-thirds of the whole membership of each chamber. In the case of the Twenty-Third Amendment, for example, the Congressional Record reports that, “[i]n the opinion of the Chair, two-thirds of the Senators present and voting . . . voted in the affirmative.” *Id.* at 12,858. The Congressional Record does not indicate how many senators were “present and voting.” Senator Everett Dirksen had “suggest[ed] the absence of a quorum” immediately before the vote, but the quorum call was rescinded by unanimous consent in response to a request from Senator Lyndon Johnson. *Id.* In the House, the Twenty-Third Amendment passed by “two-thirds,” but an earlier roll call had revealed that only 325 members were present. *Id.* at 12,562, 12,571. Two-thirds of 325 is well under the 290 members that would constitute two-thirds of the full membership. The lack of clarity on the final votes for these amendments reflects that the quorum rules were taken for granted.

327. See generally David A. Strauss, *The Living Constitution* (2010) [hereinafter Strauss, *The Living Constitution*] (describing the large role played throughout U.S. history



in detail, this has not happened with Article V. Recurring contestation over amendment validity has not yielded anything like a robust body of congressional, executive, or judicial precedent on the key questions raised by Article V. A large proportion of the interpretive puzzles that section II.A identifies—many of which go to the core of the amendment project—have never been resolved.

The Supreme Court has directly addressed the meaning of Article V only a handful of times. To recapitulate: In *Hollingsworth v. Virginia*, Justice Chase asserted during oral argument that the President “has nothing to do with the proposition, or adoption, of amendments to the Constitution.”<sup>328</sup> Over 120 years later,<sup>329</sup> in *Hawke v. Smith (No. 1)*, the

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by a “common law approach to constitutional interpretation”); William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1 (2019) (describing liquidation); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 547 (2003) (arguing that the Founding generation “expected subsequent practice to liquidate [constitutional] indeterminacy” and thereby “produce a fixed meaning for the future”).

328. 3 U.S. (3 Dall.) 378, 381 n.\* (1798); see also *Hawke v. Smith (No. 1)*, 253 U.S. 221, 229 (1920) (citing only *Hollingsworth* for the statement that “[a]t an early day this court settled that the submission of a constitutional amendment did not require the action of the President”); *supra* notes 117–130 and accompanying text.

329. We are not aware of any Supreme Court decisions about the amendment process in the long interval between *Hollingsworth* and *Hawke*. In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), which concerned the validity of a new purported state constitution in Rhode Island, the Court suggested in dicta that questions regarding the amendment process may be nonjusticiable. *Id.* at 53. In *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872), the Court likewise suggested that the validity of the Reconstruction Amendments was nonjusticiable. *Id.* at 649. In *Myers v. Anderson*, 238 U.S. 368 (1915), which concerned the constitutionality of Maryland’s “Grandfather Clause,” several parties raised constitutional objections to the Fifteenth Amendment. The attorney defending the state’s law—named, oddly enough, William Marbury—argued that the Fifteenth Amendment was unconstitutional as applied to Maryland under the Equal Suffrage Clause, because Maryland had never ratified the amendment. In openly racist terms, Marbury submitted that “compelling” states to expand the franchise to non-whites “would be in substance and effect depriving the original State . . . of all representation in the Senate.” Vose, *Constitutional Change*, *supra* note 229, at 39 (quoting Brief for Plaintiff in Error, *Myers v. Anderson*, 238 U.S. 368 (1915)). An amicus brief also rehearsed procedural objections to the passage of the Fourteenth and Fifteenth Amendments. *Id.* at 40–41. The Court did not address these arguments in its unanimous opinion in *Myers*, nor in another case decided the same day about Oklahoma’s Grandfather Clause, *Guinn v. United States*, 238 U.S. 347 (1915). There is an intriguing hint, however, that the arguments may have gotten some internal traction at the Court. Marbury’s son later recounted in a letter to Justice Felix Frankfurter that Justice James Clark McReynolds—an “intimate” of Marbury who joined the Court while *Myers* was pending—told Marbury that “the Fifteenth Amendment election cases had been the subject of a terrific controversy.” Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 3: Black Disfranchisement From the KKK to the Grandfather Clause*, 82 *Colum. L. Rev.* 835, 867 (1982) (quoting Letter from William L. Marbury, Jr. to Felix Frankfurter (Sept. 25, 1958)). Marbury’s son went on: “Apparently, Justice Lurton had prepared a dissenting opinion in which he followed my father’s argument in the *Myers* case. This so scandalized the Chief Justice that he suggested that Lurton resign. When Lurton refused to do this the majority of the court held up a decision until his death.” *Id.* Justice Frankfurter passed the letter on to Alexander Bickel, though

Court held in a “shocking[.]”<sup>330</sup> decision that a state could not require a proposed amendment to be submitted to a popular referendum after being ratified by the state legislature.<sup>331</sup> In the *National Prohibition Cases*, the Court concluded, in an unreasoned summary opinion, that Congress does not need to declare that an amendment is “necessary” when it proposes an amendment; that the two-thirds vote in each chamber “is a vote of two-thirds of the members present—assuming the presence of a quorum”; and that the Prohibition Amendment was “within the power to amend reserved by Article V of the Constitution.”<sup>332</sup> In *Dillon v. Gloss*, the Court stated in dicta that ratification of an amendment “must be within some reasonable time after its proposal” and that Congress could fix “a definite period for ratification . . . as an incident of its power to designate the mode of ratification.”<sup>333</sup> In *Leser v. Garnett*, the Court held that a state could not place limits on its legislature’s power to ratify a federal amendment in its state constitution and that “official notice” of ratification from a state to the U.S. Secretary of State “was conclusive upon him” and “upon the courts.”<sup>334</sup> In *United States v. Sprague*, the Court held that, as between state legislatures and state conventions, the “choice . . . of the mode of ratification, lies in the sole discretion of Congress.”<sup>335</sup> Finally, in *Coleman v. Miller*,<sup>336</sup> which the next section discusses in more detail, a splintered Court determined that “the effect both of previous rejection and of

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noting his “heavy doubts about its accuracy.” *Id.* (quoting Letter from Felix Frankfurter to Alexander Bickel (Sept. 23, 1959)).

330. The Amendment Stands, N.Y. Times, June 3, 1920, at 10.

331. 253 U.S. 221, 231 (1920); see *supra* notes 202–208 and accompanying text. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), the Court suggested in dicta that *Hawke* extended to the governor’s role in the amendment process. *Id.* at 808 (“In the context of ratifying constitutional amendments, in contrast, ‘the Legislature’ has a different identity, one that excludes the referendum and the Governor’s veto.”). On the other hand, Justice William Rehnquist, in a solo opinion denying a stay, wrote that the question whether the word “Legislatures” in Article V “encompasses the voters of a State who have power to enact laws by initiative” is “by no means settled.” *Uhler v. AFL-CIO*, 468 U.S. 1310, 1311 (1984) (Rehnquist, J., in chambers) (discussing the meaning of the word “Legislatures” in the Application Clause).

332. 253 U.S. 350, 386 (1920); see *supra* notes 210–211 and accompanying text.

333. 256 U.S. 368, 375–76 (1921); see *supra* notes 196–198 and accompanying text. On why this statement is dicta, see Cong. Pay Amendment, 16 Op. O.L.C. 85, 92–93 (1992).

334. 258 U.S. 130, 136–37 (1922); see *supra* notes 214–225 and accompanying text. The Court also rejected the argument that the Nineteenth Amendment was invalid because it made “so great an addition to the electorate . . . without the State’s consent.” *Leser*, 258 U.S. at 136. The Court did not explain its reasoning, other than to say that the argument would also render the Fifteenth Amendment invalid. *Id.*

335. 282 U.S. 716, 730 (1931); see *supra* notes 199–201 and accompanying text.

336. 307 U.S. 433 (1939). *Coleman* concerned the ratification of an amendment proposed by Congress in 1924 that would have empowered Congress to regulate “the labor of persons under eighteen years of age.” *Id.* at 435 n.1 (quoting Child Labor Amendment, 43 Stat. 670 (1924)). The proposed amendment fell short of ratification. See John R. Vile, Child Labor Amendment, in *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789–1995*, at 47, 48–49 (1996).

attempted withdrawal” and “whether [an] amendment had been adopted within a reasonable time” were political questions, “not subject to review by courts.”<sup>337</sup>

These opinions cover relevant ground, but not all that much ground—only a fraction of the landscape of interpretive puzzles canvassed in section II.A. And the extent to which the Court has settled even the questions it has purported to answer is far from clear. Nearly half of the above-listed statements on Article V are dicta, unreasoned ipse dixits, or both. Few if any of the opinions are widely respected by constitutional lawyers, and questions such as the President’s role in the amendment process and the meaning of *Hollingsworth* remain the subject of debate, at least in law reviews.<sup>338</sup> Several opinions have been blatantly contradicted by subsequent practice: The Twenty-Second Amendment was approved by the House without “a vote of two-thirds of the members present,” as was said to be necessary in the *National Prohibition Cases*;<sup>339</sup> the Twenty-Seventh Amendment mocks the *Dillon* Court’s contention that it was “quite untenable” to think an amendment proposed in 1789 was still pending in 1921;<sup>340</sup> and states have continued to experiment with direct democracy in the ratification process, *Leser* notwithstanding.<sup>341</sup> Among the uncontradicted opinions, most just label certain issues as political or nonjusticiable, casting no light on their merits.<sup>342</sup>

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337. 307 U.S. at 449, 454 (opinion of Hughes, C.J.). The quotations are taken from Chief Justice Hughes’s “Opinion of the Court,” which was joined by Justices Harlan Fiske Stone and Stanley Forman Reed. *Id.* at 435. Justice Hugo Black, writing for himself and three other Justices, would have ruled that “Congress has sole and complete control over the amending process, subject to no judicial review.” *Id.* at 459 (Black, J., concurring). The Court subsequently confirmed that in *Coleman* it had “held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp.” *Baker v. Carr*, 369 U.S. 186, 214 (1962). OLC has questioned the authoritativeness of both *Coleman* opinions. Cong. Pay Amendment, 16 Op. O.L.C. 85, 93 n.11, 99–102 (1992).

338. See generally, e.g., Black, On Article I, *supra* note 21; Tillman, A Textualist Defense, *supra* note 119; Joshi, *supra* note 130; Mike Rappaport, Does the Constitution Require Constitutional Amendments to Be Presented to the President?, *Law & Liberty* (Jan. 17, 2013), <https://lawliberty.org/more-on-lincoln-signing-the-13th-amendment> [<https://perma.cc/V3BQ-LAVY>].

339. 253 U.S. 350, 386 (1920) (citing *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919)); see *supra* section III.J.

340. *Dillon v. Gloss*, 256 U.S. 368, 375 (1921); see *supra* section III.K.

341. See, e.g., *Uhler v. AFL-CIO*, 468 U.S. 1310, 1311–12 (1984) (Rehnquist, J., in chambers); *Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., in chambers).

342. The case law in the lower federal courts is similarly sparse. And given the de facto repudiation of Article V principles announced by the Supreme Court, one would expect any lower court precedent to be even less stable. The two most significant lower court cases both involve the ERA. The first is *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court), an opinion authored by then-Judge John Paul Stevens about ratification of the ERA in Illinois. The court held that state legislatures were free to set their own voting and quorum rules for ratifying federal constitutional amendments, but that a state constitution

It would be fair, of course, to say that *some* questions have been resolved by a combination of Article V's text, judicial doctrine, and historical tradition. No amendment would be rejected at this point for lack of presidential presentment (although the rise of textualism and originalism as interpretive methods may make the practice of nonpresentment increasingly awkward).<sup>343</sup> Nor would an amendment be rejected for receiving only two-thirds of a quorum of both houses, rather than two-thirds of the entirety of both houses (although it is conceivable that a member of Congress could persuade colleagues with such an objection).<sup>344</sup> But few and far between are the Article V practices that have been "open, widespread, and unchallenged since the early days of the Republic,"<sup>345</sup> and it seems to us that the unsettled questions substantially exceed the settled ones in both number and significance.

Perhaps the simplest response to anyone who nonetheless maintains that history has resolved most of the important puzzles in Article V is to point to the two most prominent recent amendment efforts and the legal tumult each has occasioned. While the controversies over the Twenty-Seventh Amendment and the ERA have idiosyncratic elements, the procedural issues they raise are strikingly basic.<sup>346</sup> They highlight just how little the law of Article V has developed since the Founding. If controversy over the Twenty-Seventh Amendment has quieted a bit in recent years, this probably has more to do with the amendment's relative unimportance and the unlikelihood that Congress would ever contravene it than with considered acceptance of its validity.<sup>347</sup>

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In sum, the Supreme Court's unanimous pronouncement that a "mere reading demonstrates" that "Article V is clear in statement and in

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could not specify a supermajority requirement that would bind a state legislature acting on such an amendment. *Id.* at 1306–08. The second is a district court decision from Idaho holding that states could rescind prior ratifications and that Congress's attempt to extend the ERA ratification deadline was invalid. *Idaho v. Freeman*, 529 F. Supp. 1107, 1150–54 (D. Idaho 1981), vacated as moot sub nom. *Carmen v. Idaho*, 459 U.S. 809 (1982). The Supreme Court granted certiorari before judgment, but the new ratification deadline expired while the case was pending, so the Court vacated the district court's decision as moot.

343. See supra section III.B; supra note 21 and accompanying text (discussing the view that nonpresentment is incompatible with clear constitutional text).

344. See supra section III.C (discussing the plausibility of the view that a two-thirds vote of the full chamber is required).

345. *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) (describing the sorts of practices that "should guide [the Court's] interpretation of an ambiguous constitutional provision").

346. See supra sections III.K, III.L.3.

347. See Strauss, *Irrelevance of Amendments*, supra note 42, at 1486–87 (describing the Twenty-Seventh Amendment as having "no significant effect" and "remarkable for [its] relative lack of importance").

meaning, contains no ambiguity, and calls for no resort to rules of construction”<sup>348</sup> seems to us exactly backward. As Part II illustrates, a mere reading demonstrates that Article V is shot through with ambiguities and calls for constant resort to rules of construction. As Part III shows, this ambiguity is borne out by, and persists through, 230 years of history. Americans tend to take the text of the Constitution as a given and to regard constitutional interpretation as something that operates on that text. But if our descriptive arguments thus far have been sound, then there is no constitutional text that precedes interpretation. To identify what is or is not “in” the constitutional text is itself a complex act of constitutional interpretation. And given the amount of legal uncertainty that continues to enshroud the Article V process, one can expect all but the most uncontroversial new amendments to elicit credible challenges to their validity in the years ahead.

#### B. *Revisiting* Coleman

If we are right that controversy over the validity of amendments is likely to persist for the foreseeable future, then it behooves us to reflect on our system for resolving such disputes. When some groups in the polity insist that an attempted amendment has satisfied the rules of Article V and others disagree, with both sides advancing credible legal arguments, who should decide whether the amendment has become part of the Constitution? We submit that the degree of ongoing Article V ambiguity documented in this paper lends new support to the *Coleman* Court’s inclination to leave such matters to Congress, while also suggesting possible institutional innovations.

In *Coleman v. Miller*, a splintered Supreme Court determined in 1939 that Congress has the ultimate authority to promulgate or proclaim an amendment after ratification by the states.<sup>349</sup> Chief Justice Hughes, writing for himself and Justice Harlan Fiske Stone in what was styled the “Opinion of the Court,” found that Congress has “control over the promulgation of the adoption of [an] amendment.”<sup>350</sup> He further found that the two questions before the Court—the effect of a state’s prior rejection of an amendment on a subsequent ratification, and whether too long a period had elapsed between proposal and ratification—were political questions not fit for judicial review.<sup>351</sup> Justice Hugo Black penned a concurrence, joined by Justices Felix Frankfurter, Owen Roberts, and William O. Douglas. He similarly suggested that it was Congress’s role to “proclaim[.]” an amendment part of the Constitution, and he would have held that all

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348. *United States v. Sprague*, 282 U.S. 716, 730 (1931).

349. 307 U.S. 433, 450 (1939).

350. *Id.*

351. *Id.* at 450–54.

questions related to the amendment process were “political” and beyond the purview of the courts.<sup>352</sup>

*Coleman*’s reference to a congressional “promulgation” or “proclamation” power has been criticized on the ground that Article V makes no reference to any role for Congress after the initial proposal of an amendment. The text instructs that an amendment is “valid . . . when ratified by the Legislatures of three fourths of the several States,” not when promulgated by Congress following the final state ratification.<sup>353</sup> And the Supreme Court has in fact adjudicated a number of disputes about the amendment process, albeit infrequently, going all the way back to *Hollingsworth*,<sup>354</sup> which predates *Marbury*.<sup>355</sup>

These criticisms of *Coleman* have some force, but they slight a prudential rationale for the Court’s ruling that the Court itself did not articulate but that this paper’s historical account helps to reinforce.<sup>356</sup> On account of the underdeterminacy of Article V and the momentousness of formal constitutional change, there is a strong possibility that significant conflicts over the validity of amendments will arise and yield no clear answers, only “political questions.”<sup>357</sup> Partly for this reason, the Court has avoided reaching the merits of an Article V dispute for over ninety years.<sup>358</sup> There is a consequent interest in enabling some nonjudicial institution to resolve authoritatively whether the Constitution has been amended.

The ongoing saga of the ERA exemplifies this concern. At least three pending lawsuits allege, not at all frivolously, that the ERA is already part of the Constitution.<sup>359</sup> Meanwhile, proponents of the ERA are pressing Congress to retroactively extend the ratification deadline, which, if done,

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352. *Id.* at 457–58 (Black, J., concurring).

353. U.S. Const. amend. V.

354. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798); see also *supra* notes 328–337 and accompanying text (cataloging cases).

355. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). For prominent criticisms of *Coleman* along these lines, see Cong. Pay Amendment, 16 Op. O.L.C. 85, 99–105 (1992); Dellinger, *Legitimacy of Constitutional Change*, *supra* note 16, at 397–405; Paulsen, *A General Theory*, *supra* note 50, at 709–18.

356. Cf. Pozen & Samaha, *supra* note 69, at 732–33, 775–76 (explaining that “prudential” arguments in constitutional law tend to emphasize system-level considerations of administrability, workability, and the like).

357. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing factors that indicate the presence of a “political question”). In some Article V disputes, not just one or two but all six of the *Baker* factors may arguably be triggered. See Thomas E. Baker, *Towards a “More Perfect Union”: Some Thoughts on Amending the Constitution*, 10 *Widener J. Pub. L.* 1, 7–8 (2000) (“The Article V amendment power bears all the constitutional hallmarks of a nonjusticiable or political question . . .”); Thomas Millet, *The Supreme Court, Political Questions, and Article V—A Case for Judicial Restraint*, 23 *Santa Clara L. Rev.* 745, 763–66 (1983) (analyzing the applicability of the *Baker* factors to Article V cases).

358. The last such ruling was *United States v. Sprague*, 282 U.S. 716 (1931), issued in February 1931. See *supra* note 335 and accompanying text.

359. See *supra* note 308 and accompanying text.

would immediately raise a difficult new Article V question.<sup>360</sup> No one can predict with any confidence whether or how the constitutional fate of the ERA will be determined, as all three branches of government continue to vie for interpretive supremacy with regard to Article V<sup>361</sup> and many lawyers now flatly deny the precedential value of *Coleman*.<sup>362</sup>

The status quo of second-order uncertainty about how to resolve first-order Article V uncertainty does not necessarily reflect any sort of crisis in self-government or the rule of law. Policentric decisionmaking procedures can generate deliberative and participatory benefits as well as stable political equilibria under certain conditions, including on questions of constitutional interpretation.<sup>363</sup> In contrast to the “juricentrism” that characterizes much of contemporary constitutional culture,<sup>364</sup> a more fluid form of departmentalism has prevailed in the Article V context throughout U.S. history. We could keep muddling through.

Yet even if the status quo is defensible, it carries significant costs in terms of predictability, efficiency, and popular responsiveness. The ERA example is, again, instructive, as countless hours of legal and political mobilization have been devoted not only to the question whether we should have an ERA but also to the question whether we *do* have an ERA—with no clear end to the legal wrangling in sight and the very real possibil-

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360. See *supra* note 307 and accompanying text. On whether Article V allows Congress to retroactively extend the ERA’s deadline, compare Held et al., *supra* note 256, at 128–31 (yes), and Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 Rutgers U. L. Rev. 633, 644–50 (2019) (yes), with *Idaho v. Freeman*, 529 F. Supp. 1107, 1150–54 (D. Idaho 1981) (no), vacated sub nom. *Carmen v. Idaho*, 459 U.S. 809 (1982), and *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C., slip op. at 24–37 (Jan. 6, 2020) (no).

361. See *supra* notes 265–272 and accompanying text.

362. See Kalfus, *supra* note 313, at 445 (“Many scholars have concluded that the Court’s reformulation of political question analysis, coupled with *Coleman*’s conflict with Court precedent, render *Coleman* ‘dead.’”).

363. See, e.g., Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83, 103 (1998) (arguing that “judicial exclusivity” over constitutional decisionmaking “encourages acrimony, not cooperation”); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943, 2023–37 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*] (defending a model of “policentric constitutional interpretation” for Section 5 of the Fourteenth Amendment). The term “policentric” refers to “the distribution of constitutional interpretation . . . across multiple institutions, many of which are political in character,” and is distinct from the term “polycentric,” which describes “problems that contain multiple and interdependent solutions.” Post & Siegel, *Legislative Constitutionalism*, *supra*, at 2022–23.

364. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 Colum. L. Rev. 2047, 2055–56 (2010); see also Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 Yale L.J. (forthcoming 2022) (manuscript at 22–46) (on file with the *Columbia Law Review*) (discussing the “juristocratic” understanding of separation of powers disputes that has prevailed since Reconstruction).

ity that the ERA will fail without creating any precedent on Article V outside the executive branch.<sup>365</sup> Most worrisome, in a nation with one of the most demanding amendment criteria and lowest formal amendment rates in the world,<sup>366</sup> the absence of any clear Article V dispute-resolution mechanism makes it harder to revise the constitutional text by perpetuating legal uncertainty and proliferating institutional veto points. Even after supermajorities of both chambers of Congress and the state legislatures have approved a change to this text, legal objections from any one of the federal legislative, executive, or judicial branches may be enough to derail an attempted amendment. It is for these sorts of reasons that many theorists of constitutional design, from Madison in 1787 to the Venice Commission in 2009, have advised that confusion regarding the amendment rules themselves “ought to be as much as possible avoided.”<sup>367</sup>

If, in line with this view, one of the existing organs of government ought to be assigned primary responsibility for resolving disputes over amendment validity, Congress seems best suited to the task.<sup>368</sup> The basic reasons are straightforward. Unlike the judiciary, Congress is not bound by a case or controversy limitation. It can take years for a case to wend its way up to the Supreme Court, and many amendments do not give rise to

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365. Within the executive branch, OLC recently issued a substantial opinion concluding that the ERA is dead. See *Ratification of the Equal Rights Amendment*, 44 Op. O.L.C. (Jan. 6, 2020) (slip opinion). The opinion immediately drew fierce criticism and pledges of defiance. See, e.g., Garrett Epps, *Bill Barr Doesn't Get to Decide What's in the Constitution*, *Atlantic* (Jan. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/trump-doj-era-constitution/605047/> (on file with the *Columbia Law Review*) (noting that ERA advocates “reject [OLC's] arguments” and quoting Reva Siegel for the view that “[t]he Justice Department does not have authority to decide the legal validity of the ERA”); Press Release, Rep. Carolyn B. Maloney, *Maloney Statement on OLC Response to Archivist on ERA Ratification* (Jan. 8, 2020), <https://maloney.house.gov/media-center/press-releases/maloney-statement-on-olc-response-to-archivist-on-era-ratification> [<https://perma.cc/72WA-UQ96>] (“I do not believe that the OLC has the final word to dictate how Congress or the states proceed in amending the Constitution.”).

366. See Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 *Ark. L. Rev.* 217, 225–31 (2016) (reviewing comparative evidence and explaining that, among democracies, “the United States ranks in the three lowest average annual revision rates”); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *Responding to Imperfection*, supra note 1, at 237, 260–61 (finding that the U.S. Constitution has the world’s “second most difficult amendment process,” behind only the now-defunct Yugoslav Constitution).

367. 2 *The Records of the Federal Convention of 1787*, supra note 89, at 630 (James Madison); see also supra notes 89–90 and accompanying text.

368. To say that the validity of contested amendments is a “political question” entrusted primarily to Congress is not necessarily to deny any role for the judiciary. It may be that judicial review is appropriate for “plainly ultra vires action”—for instance, if Congress were to assert that thirty-five was three-fourths of fifty. Richard H. Fallon Jr., *Political Questions and the Ultra Vires Conundrum*, 87 *U. Chi. L. Rev.* 1481, 1490 n.36 (2020) (citing Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *Harv. L. Rev.* 433, 433 (1983)). In addition, the prudential argument for congressional primacy may be weaker in the case of an amendment proposed by an Article V convention or an amendment that reforms Congress itself.



justiciable controversies at all. Should an Article V controversy be entertained, the Court's precedents are sparse and not well ordered in this area. Congress, on the other hand, can act promptly to assess the validity of an amendment as soon as the final state has purportedly ratified. More important, questions about the Article V process will often involve highly charged, legally underdetermined judgments, which risk taxing the Court's institutional competence and compromising its institutional clout.<sup>369</sup> These separation of powers concerns become all the more acute when Article V has been activated in order to overturn the Court's own constitutional rulings.<sup>370</sup> The sociological legitimacy of amendments, this paper shows, has never had a tight relationship with their procedural propriety.<sup>371</sup> As the most geographically representative, deliberatively transparent, and electorally accountable branch, Congress will in general be best positioned to determine whether an amendment has gained broad social acceptance and to generate additional political support once such a determination has been made.<sup>372</sup>

Relative to the Court, the executive branch also has stronger democratic credentials and the ability to act with greater dispatch. But the text of Article V makes no mention of the executive. And one of the very few propositions of Article V law that historical practice *has* settled is that the President has no legal role in proposing an amendment to the states.<sup>373</sup> In light of this practice, which dates back to the Bill of Rights, it is odd to

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369. Cf. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 *Harv. L. Rev.* 2240, 2250–54 (2019) (book review) (explaining how politically divisive rulings can undermine the Court's sociological legitimacy). Of course, the Court could bring more determinacy to the law of Article V by weighing in on more Article V questions. But the history of widespread disapproval and even defiance of the Court's pronouncements on Article V, see *supra* notes 338–341 and accompanying text, gives reason to doubt that the Court could ever definitively clear up this body of law when motivated majorities object to its conclusions.

370. See Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *Harv. L. Rev.* 433, 444–45 (1983).

371. See *supra* Part III.

372. See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *Duke L.J.* 1335, 1363 (2001) (“Society needs a democratic mandate rather than a judicial one for some decisions . . . Impeachment, war powers, and the decision whether a constitutional amendment has been ratified are some examples.”); Post & Siegel, *Legislative Constitutionalism*, *supra* note 363, at 2030 (“If the Court has particular strengths in explicating the Constitution as a rule of law, Congress is especially well-situated to respond to changes in constitutional culture.”); see also Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359, 1377 n.80 (1997) (explaining that “a single national legislature” like the U.S. Congress may be best positioned to fulfill an “authoritative settlement function” for certain constitutional issues, including political questions). Insofar as Congress, in resolving specific Article V disputes, is more likely than the Court to leave some play in the joints of Article V law, we believe this is a virtue rather than a vice. See *infra* section V.C.

373. See *supra* sections III.A–B.

think that the President would play any sort of significant role at the conclusion of the Article V process.<sup>374</sup> It is odder still to think that such a role would be played by subordinate executive officers such as the Archivist of the United States, who currently has the statutory duty to “publish[]” an amendment upon receiving “official notice” that it has been adopted.<sup>375</sup>

That said, Congress is less than ideal as an arbiter of Article V validity in a number of respects. Rising levels of polarization within each chamber increase the risk of raw partisan conflict, gamesmanship, and perceptions of bias. Congress’s popular approval rating currently sits near a historic low.<sup>376</sup> And in some instances, a disputed amendment might affect Congress itself in ways that call into question its members’ ability to assess the amendment’s constitutional status in good faith, as when the Seventeenth Amendment fundamentally changed the Senate by introducing direct election of senators. This section has suggested that the *Coleman* Court was correct to conclude that, for settling whether an amendment has satisfied Article V, Congress will typically be the least bad option among the branches of government. Might there be any other options?

There are no silver bullets, but potentially useful subconstitutional moves can be made within the *Coleman* framework. One possibility is a national referendum. Beginning with the Eighteenth Amendment’s time limit,<sup>377</sup> Congress has on several occasions built a ratification condition into the text of an amendment. In a similar spirit, Congress could include a provision in future proposed amendments stating that they will be inoperative unless validated in a certain sort of post-ratification referendum, thereby effectively precommitting Congress to “proclaim” validated amendments despite any procedural objections that might arise along the

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374. One could perhaps argue, on some sort of division of power grounds, that the exclusion of the President from the “proposal” stage makes it all the more appropriate that the President be given a decisive role at the “promulgation” stage. Cf. Black, On Article I, supra note 21, at 899 (maintaining that *Hollingsworth* should not be extended “one inch”). But it would create a textually as well as functionally bizarre asymmetry to read Articles I and V to exclude presidential presentment on the front end of the amendment process while requiring it on the back end. And given the extraordinary amount of national consensus already required by the amendment process, there are powerful democratic reasons not to introduce yet another hard veto point.

375. See supra note 265 and accompanying text. This duty used to be performed by the Secretary of State. See Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439; Bernstein, supra note 25, at 540 n.218 (explaining that Congress transferred responsibility for certifying amendments from the Secretary of State to the Administrator of General Services in 1951 and then to the Archivist in 1984). We have not found any evidence suggesting that Congress intended to delegate to the Archivist the authority to resolve the status of contested amendments. It is perfectly consistent with the statutory text to regard a congressional proclamation of an amendment’s ratification as the relevant “official notice” that triggers the Archivist’s duty of publication.

376. See Harry Enten, Congress’ Approval Rating Hasn’t Hit 30% in 10 Years. That’s a Record., CNN (June 1, 2019), <https://www.cnn.com/2019/06/01/politics/poll-of-the-week-congress-approval-rating> [<https://perma.cc/QP8P-6BR7>].

377. See supra notes 196–198 and accompanying text.

way.<sup>378</sup> Alternatively, Congress could reserve for itself or for each chamber separately the authority, through a simple majority vote, to call for a national referendum on an amendment's validity after the amendment has—in the view of the members calling for the referendum—attained a sufficient number of ratifications.<sup>379</sup> Another possibility is for Congress to convene, either through the ordinary legislative process or through the Article V mechanism just described, a special commission to issue a non-binding opinion on the validity of a disputed amendment and the steps that would be required, if any, to cure legal defects. Congress could form such a commission today to help it assess the status of the ERA and build bipartisan buy-in for whatever position it ultimately adopts.<sup>380</sup>

The above discussion provides only a skeletal sketch of these options, which would take a whole other paper to elaborate in full. The key point, for present purposes, is that ongoing confusion over how to decide Article V disputes creates an opportunity to innovate in limited, pragmatic ways that honor *Coleman's* prudential wisdom while moderating some of the risks of relying on Congress. By enlisting the assistance of a referendum or commission, Congress can remain in the driver's seat when it comes to judging Article V amendments without necessarily serving as the exclusive or even the final decisionmaking body.

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378. See Amar, *America's Constitution*, supra note 49, at 418. Amar, recall, has argued that a national referendum may be used to bypass Article V altogether. See supra notes 4, 7, 58 and accompanying text. The proposal here could be seen as a hybrid between Amar's much bolder proposal and the existing Article V process. Any such referendum would add another step, and another effective veto point, to what is already an arduous amendment process. But we expect that a referendum would be very unlikely to fail if the amendment in question had already plausibly navigated the hurdles of Article V—and that a successful referendum would put immense, productive pressure on Congress to accept the result forthwith. Consider, by way of analogy, the pressure that the Brexit referendum exerted on the U.K. Parliament. See Meg Russell, *Brexit and Parliament: The Anatomy of a Perfect Storm*, 74 *Parliamentary Affs.* 443, 448 (2021) (“[T]he clear reservations of many parliamentarians about the Brexit decision were overshadowed by the referendum result, with most MPs on both the government and opposition side accepting that it must be respected. Parliament hence actively, if reluctantly, ceded its sovereignty to the public on the principle of Brexit.”). In moving to submit a potential amendment directly to the American people for an advisory referendum, one U.S. Senator argued to his colleagues in 1861 that the people's “sentiments and their opinions will be our safest guide upon this question, . . . disabled as we are by our own distractions and divisions in Congress from acting upon it.” *Cong. Globe*, 36th Cong., 2d Sess. 264 (1861) (statement of Sen. Crittenden).

379. This proposal might be challenged on *Chadha* grounds, see generally *INS v. Chadha*, 462 U.S. 919 (1983), but such a challenge would be undercut by building the option to call a referendum into the text of the amendment itself. By doing this, the referendum would already plausibly have navigated the Article V process by the time it is initiated. See Amar, *America's Constitution*, supra note 49, at 418.

380. Such a commission, in our view, would ideally be instructed by Congress to apply some version of the Article V Thayerianism proposed *infra* section V.C.

V. EMBRACING ARTICLE V AMBIGUITY: LESSONS FOR INTERPRETERS AND REFORMERS

The dispelling of any notion that Article V supplies a straightforward guide to amendment holds lessons for academics and advocates as well as government officials. That descriptive undertaking is, again, the heart of this paper, and space constraints require us to be brief in this final Part. Here, we first argue that our account of Article V ambiguity complicates two prominent debates in constitutional theory.<sup>381</sup> We then close by considering how it could open up new possibilities for constitutional change.

A. *Originalism and Textualism*

One of the most sweeping developments in constitutional law over the past several decades, as countless commentators have observed, has been the rise of originalism and its close cousin textualism as a preferred mode of interpretation.<sup>382</sup> With the confirmation of Justice Amy Coney Barrett, there are now multiple “self-avowed originalists” on the Court.<sup>383</sup> Scholarly interest in originalism shows no signs of abating.

Originalism is a complex phenomenon, more a cluster of related methodologies than a single, well-defined one.<sup>384</sup> But an important normative justification for all its variants has been the idea that it is the interpretive approach most consistent with a commitment to popular

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381. Our account also has potential implications for more general debates in legal theory. For instance, scholars “typically assume that bright-line rules are more constraining on judicial and administrative decisionmakers than context-saturated standards.” Connor N. Raso & William N. Eskridge, Jr., *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1812 (2010). The Article V ambiguity and flexibility documented in these pages challenge that assumption. As a formal matter, the key terms in Article V are much more rule-like than standard-like: There are no references in the text to reasonableness, equity, all-things-considered balancing, or anything of the sort. It is partly for this reason, we suspect, that Article V is believed by many to be more constraining than it really is.

382. See generally Jeremy K. Kessler & David E. Pozen, Working Themselves Impure: A Life Cycle Theory of Legal Theories, 83 U. Chi. L. Rev. 1819, 1844–47 & n.63 (2016) (summarizing originalism’s academic and political development since the 1970s and collecting citations to intellectual histories).

383. Ilan Wurman, What Is Originalism? Debunking the Myths, Conversation (Oct. 24, 2020), <https://theconversation.com/what-is-originalism-debunking-the-myths-148488> [<https://perma.cc/R7CD-W679>] (listing Justices Amy Coney Barrett, Neil Gorsuch, Clarence Thomas, and—more controversially—Brett Kavanaugh in this category).

384. See, e.g., Lawrence B. Solum, Cooley’s Constitutional Limitations and Constitutional Originalism, 18 Geo. J.L. & Pub. Pol’y 49, 54 (2020) (describing originalism as “a family of constitutional theories” united by certain ideas about the fixity and constraining force of the constitutional text).

sovereignty.<sup>385</sup> The original meaning of the constitutional text, on this view, “is both binding and uniquely legitimate” because of the way the text was ratified through the special supermajoritarian procedures laid out in the Constitution.<sup>386</sup> The rules of Article V play a crucial role in this picture. They not only determine which amendments have become part of the canonical document but also, once satisfied, endow the communicative content of these texts with a legal authority that never fades over time, unless and until a new Article V amendment comes along and overrides them.<sup>387</sup> “The Article V amendment process and originalism,” in John McGinnis’s words, “march under a single banner.”<sup>388</sup>

This paper’s descriptive account helps reveal a new sense in which this picture of Article V as arbiter and embodiment of the sovereign will may be too simple. The vast majority of recognized amendments have not been adopted in clear compliance with Article V.<sup>389</sup> All but one has been adopted in clear *defiance* of a requirement of presidential presentment that, as a textual matter, plausibly applies to the Article V process.<sup>390</sup> The single most transformative set of amendments, many believed at the time of their adoption and still believe today, amounted to a “naked violation[] of Article V.”<sup>391</sup> And ever since the Founding, the meaning of Article V has been continually contested without, on many significant questions, reaching any resolution. Nothing in the language or law of Article V tells us definitively, for instance, that the Twenty-Seventh Amendment is part of the Constitution while the ERA is not. In U.S. constitutional culture, the degree to which an attempted amendment has complied with a discrete set of legal rules has always had an attenuated connection to its ultimate constitutional fate. What is and is not “in” the Constitution is ultimately

385. See Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1440 (2007) (stating that “popular sovereignty and the judicially enforced will of the people” is “the most common and most influential justification for originalism”).

386. Lawrence B. Solum, *Communicative Content and Legal Content*, 89 Notre Dame L. Rev. 479, 514 (2013); see also Colby, *supra* note 150, at 1631–38 (summarizing the standard “popular sovereignty” argument for originalism).

387. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L.J. 541, 551 (1994) (“The central premise of originalism . . . is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V.”); cf. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol’y 817, 820–21 (2015) (“What originalism requires of legal change is that it be, well, *legal*; that it be lawful, that it be done according to law. This is a requirement of procedure, not substance.”).

388. John O. McGinnis, *Protecting the Originalist Constitution*, 42 Harv. J.L. & Pub. Pol’y 81, 85 (2019). “And what does that banner read? It says, ‘We the People,’ and not ‘We the Elite Judges.’” *Id.*

389. See *supra* Part III.

390. See *supra* section III.B; *supra* note 21 and accompanying text.

391. Ackerman, *We the People*, *supra* note 7, at 111; cf. Colby, *supra* note 150, at 1630–31, 1662–66 (suggesting “the possibility that the shortcomings in the framing of the Fourteenth Amendment could seriously undermine the normative appeal of originalism more generally”).

determined by a complex, ongoing, and not especially predictable dialectic between formal government actions and popular and political beliefs and perceptions. Provocatively put, the Constitution is not so much a collection of texts that have passed through a unique legitimating process as a collection of texts that Americans agree to regard as the Constitution, despite wide variations in and serious questions about the manner in which they were added.<sup>392</sup>

If this is right, it calls into question the legal and empirical basis for the popular sovereignty justification of originalism. There are no clear rules to indicate, in many cases, whether an attempted act of sovereign constitutional authorship meets the criteria laid out in the Constitution. Nor do the details of how any given piece of purported constitutional text was created—including both the forms that were followed and the degree to which the overall process could be characterized as supermajoritarian—seem to determine its sociological legitimacy in any mechanical manner. The process of formal constitutional change has always been less legalistic and more chaotic than standard originalist narratives about Article V seem to presume.

None of this necessarily upends “the great debate” between originalism and living constitutionalism or indicates that originalism is less democratic than alternative approaches.<sup>393</sup> Critics have pointed out numerous other difficulties with the popular sovereignty case for originalism.<sup>394</sup> And proponents of originalism have offered numerous other justifications that do not depend on the character of the process that led to the text’s enactment. Prakash, for instance, defends originalism as a logical entailment of the hermeneutic enterprise while expressly “contest[ing] the interpretive assertion that . . . originalism is a legitimate means of making sense of the Constitution merely or primarily because of the manner in which the Constitution was ratified and amended.”<sup>395</sup> William Baude and Stephen Sachs have launched a defense of originalism as “our law” on openly presentist, positivist grounds, with no direct connection to Article V or VII.<sup>396</sup> Our intervention in the debate is simply to suggest that the popular sover-

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392. There is an interesting parallel, which we do not have space to pursue, to the historical processes through which certain texts are canonized as part of sacred scripture while others are denied that status in a given theological tradition. See Frank Kermode, *The Canon*, in *The Literary Guide to the Bible* 600 (Robert Alter & Frank Kermode eds., 1987). The Constitution itself can be thought of as a kind of canon in this sense.

393. See generally Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *Nw. U. L. Rev.* 1243 (2019).

394. See Colby, *supra* note 150, at 1662–63 (summarizing difficulties).

395. Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 *Harv. J.L. & Pub. Pol’y* 485, 486 (2008).

396. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455 (2019); William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349 (2015). For an elegant rebuttal, see Richard Primus, *Is Theocracy Our Politics?*, 116 *Colum. L. Rev. Sidebar* 44 (2016).

eignty case for originalism is subject not only to the standard counterarguments about the dubious democratic bona fides of an ancient text but also to a new counterargument about the dubious *legal* bona fides of nearly every provision of that text.

B. *Amendment Inside and Outside Article V*

A foundational debate in constitutional theory concerns whether and how the written or big-C Constitution may legitimately be updated outside the procedures specified in Article V.<sup>397</sup> The “outsider” position is most closely associated with Amar and Ackerman.<sup>398</sup> According to Amar, the Constitution is best read to preserve for the people an unenumerated right to amend its terms through something akin to a national referendum.<sup>399</sup> According to Ackerman, the Reconstruction Amendments were adopted in violation of Article V but were nonetheless legally legitimate because their adoption conformed to the true, unwritten criteria for higher lawmaking.<sup>400</sup> Conversely, the Twenty-Seventh Amendment was adopted in conformity with Article V but is nonetheless illegitimate because it violated those unwritten criteria.<sup>401</sup> The “insider” position is the conventional view—the view that Article V supplies the exclusive route to formal constitutional change, that “[n]othing new can be put into the Constitution except through the amendatory process.”<sup>402</sup>

Our account collapses some of the space between these two positions. Given the long history of procedural creativity and the pervasive legal uncertainty that we document, there is no clear line demarcating what is “inside” or “outside” Article V. Ackerman labors heroically to show that the Reconstruction Amendments were valid additions to the Constitution even though brought into existence in a manner that is very plausibly inconsistent with Article V. We do not disagree with Ackerman’s conclusion; we disagree with the premise that the Reconstruction Amendments were quite so extraordinary in this regard. Within broad boundaries, the degree to which an attempted amendment stays inside the four corners of Article V has not been decisive in determining whether it

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397. The unwritten or small-c constitution has been updated many times over by judicial decisions, framework statutes, and other developments that have little to do with Article V. See *supra* notes 42–43 and accompanying text. The focus here is on the more radical proposition that the constitutional text itself may be changed outside Article V.

398. Cf. James E. Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1540 (1998) (book review) (“In recent years, some constitutional scholars have noted the emergence of a ‘Yale school’ of constitutional theory, by which they refer to Ackerman’s and Amar’s theories of amending the Constitution outside Article V.”).

399. See Amar, *Consent of the Governed*, *supra* note 3, at 462–94; Amar, *Philadelphia Revisited*, *supra* note 4, at 1044–76.

400. See Ackerman, *We the People*, *supra* note 7, at 99–252.

401. *Id.* at 490 n.1.

402. *Ullmann v. United States*, 350 U.S. 422, 428 (1956); see also *supra* note 3 and accompanying text.

becomes accepted by Americans as part of the written Constitution. *All* constitutional amendment, in this sociological sense, takes place “outside” Article V.

That being the case, it is notable how little headway Amar’s relatively straightforward proposal has made in convincing Americans that they can amend the Constitution through a national referendum established by and employing a simple majority vote. Especially in light of the constitutional order’s steady shift toward greater nationalism and majoritarian democracy ever since the Civil War, his proposal strikes us as no less plausible as a matter of constitutional text, structure, and “spirit”<sup>403</sup> than the notion that an Article V amendment could (like the Twenty-Seventh Amendment) remain pending for more than two centuries before being ratified. Yet, even though the law of Article V is so unsettled and so many amendments have questionable Article V credentials, the assumption that all revisions to the written Constitution must be pursued through the Article V process continues to hold a powerful sway on the U.S. legal and political community, at least among elites.<sup>404</sup> This persistent combination of Article V obscurity and Article V exclusivity suggests that the two may reinforce one another: If determined majorities had not found Article V to have such play in the joints, its status as the exclusive gateway to the constitutional text may well have proved unsustainable long ago.<sup>405</sup>

These observations may also hold a clue as to how Article V exclusivity could unravel in the future. If Amar’s proposal is just as constitutionally coherent as numerous amendments that are accepted as part of the document, then the same sort of political mobilization that potentiated those amendments may be sufficient to potentiate amendment-by-referendum

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403. Amar, *Consent of the Governed*, *supra* note 3, at 460–61.

404. See Sanford Levinson, *The Political Implications of Amending Clauses*, 13 *Const. Comment.* 107, 114 (1996) (remarking that “Amar’s method” of amending the Constitution by popular referendum “is not only untried but also, for most Americans, I suspect unthinkable”).

405. Cf. Philippe Nonet & Philip Selznick, *Law and Society in Transition: Toward Responsive Law* 76–79 (Routledge 2d ed. 2017) (1978) (discussing the tension that all legal institutions face between the need to limit discretion and discipline decisionmaking, on the one hand, and the need to remain responsive to new pressures and contingencies, on the other). Article V’s status as the exclusive gateway to the constitutional text may also have proved unsustainable if the Court had not, over time, been so accommodating of legal and social change outside the Article V process. See Strauss, *The Living Constitution*, *supra* note 327, at 115–16 (arguing that “[s]ome form of living constitutionalism is inevitable” in light of the difficulty of formal amendment).



as well.<sup>406</sup> At least for those willing to look past its novelty,<sup>407</sup> Amar's proposal is not necessarily more legally outlandish than any number of things that have been done in the name of Article V. The constitutional text, accordingly, is not the principal problem for Amar; constitutional culture is.<sup>408</sup> Perhaps calling attention to just how fast and loose Americans historically have played with Article V, as this paper has done, will conduce to greater cultural openness to experimenting with other legally plausible (if unavoidably problematic) modes of updating the constitutional text in the service of deepening democracy. But in case Amar's argument is destined to remain off-the-wall in our lifetimes, we close with a more modest reform proposal of our own.

C. *Loosening the Constitutional Cage Through Article V Thayerianism*

For all of the ambiguities we have identified, the hard core of Article V remains. Unless a first-ever Article V convention is called, those who would revise the written Constitution need to convince others that two-thirds of both chambers of Congress have approved, and three-quarters of the states have ratified, an amendment. There are many different ways to count to two-thirds and three-fourths, as we emphasize throughout Parts II and III, but a plausible double-supermajoritarian showing of *some* sort must be made. In comparison with the approaches taken by other democracies, this is an exceptionally difficult amendment process. And the actual rate of amendment in the United States has been exceptionally low.<sup>409</sup> As many have argued, the practical difficulty of revising the written Constitution invites judges to update supreme law through creative

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406. See Schauer, *Amending the Presuppositions*, supra note 3, at 160–61 (“[C]onstitutions are always subject to amendment by changes—amendments—in the practices of a citizenry, in the practices of its officials, and in the practices of its judges.”). The precise mechanisms and pathways through which constitutional orthodoxies change over time remain “enigmatic,” Pozen & Samaha, supra note 69, at 792, but potential contributors presumably include social movements, partisan politics, and judicial appointments as well as academic argument.

407. Cf. Leah M. Litman, *Debunking Antinovelty*, 66 *Duke L.J.* 1407, 1427–65 (2017) (criticizing the view that “novelty” is evidence of a constitutional problem in the legislative context).

408. See 1 Laurence H. Tribe, *American Constitutional Law* 109–10 (3d ed. 2000) [hereinafter Tribe, *American Constitutional Law*] (observing that the sociological legitimacy of a non-Article V amendment would ultimately depend upon “social and cultural practices,” but expressing doubt that such an amendment could succeed anytime soon); see also Richard Albert, *The Case for Presidential Illegality in Constitutional Amendment*, 67 *Drake L. Rev.* 857, 873–75 (2019) (discussing, with reference to examples from other countries, how “the sociological and moral force” of a successful yet “illegal” constitutional referendum could compel “the legal and political elite to recognize the validity of this unconventional change to the U.S. Constitution”). See generally Peter Suber, *The Paradox of Self-Amendment: A Study of Law, Logic, Omnipotence, and Change* (1990) (describing various modes of amending an amendment process).

409. See supra note 366 and accompanying text.

readings and undermines even the possibility of genuine collective self-rule<sup>410</sup>—leaving our democracy “trapped inside the Article V cage.”<sup>411</sup>

Yet without exiting the cage altogether, as an Amarian referendum or a true revolution would have us do, perhaps we might loosen its bars. When one combines the classic democratic case against Article V’s “obduracy”<sup>412</sup> with this paper’s new account of Article V’s ambiguity, the promise of what could be called *Article V Thayerianism* comes into focus. The label refers to James Bradley Thayer’s famous proposal that judges should defer to a coordinate legislative branch on constitutional questions except when the latter has made a “very clear” mistake.<sup>413</sup> Thayerianism is typically advocated today as a means of respecting the constitutional judgment and authority of the legislature and thereby limiting the countermajoritarian character of constitutional law<sup>414</sup>—virtues that become all the more significant under conditions of high-level interpretive uncertainty.<sup>415</sup> This argument transposes readily to the Article V context, where countermajoritarian concerns are especially acute and legal uncertainty is especially rife. If it were to take hold, Article V Thayerianism would neutralize the potential chilling effects of this uncertainty and promote institutional innovation in the amendment process. Simply put, Article V Thayerianism would make it easier to amend the Constitution, at least at the margins.

Article V Thayerianism could be operationalized in more or less ambitious ways. A narrow version would have judges refrain from blocking amendment proposals by Congress or amendment ratifications by state legislatures on Article V grounds, unless the actions are seen as “clearly” inconsistent with Article V. Given *Coleman*’s nonjusticiability ruling, this version would not necessarily mark any observable advance on the status quo—though *Coleman*’s precedential status is far from secure and could

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410. See, e.g., John Ferejohn & Lawrence Sager, Commitment and Constitutionalism, 81 *Tex. L. Rev.* 1929, 1954 (2003) (discussing “the standard critique” that “the obduracy of Article V acts to suppress the people’s voice in our constitutional affairs, and thus is either flatly undemocratic, or at least more antidemocratic than we would like”); David Singh Grewal & Jedediah Purdy, The Original Theory of Constitutionalism, 127 *Yale L.J.* 664, 668, 679 (2018) (book review) (arguing that “the Article V amendment procedure [has come] perilously close to choking off further sovereign action by the people,” producing “a political community that is at once committed to ruling itself and unable to do so”).

411. Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* 20–21 (2006) [hereinafter Levinson, *Our Undemocratic Constitution*] (capitalization omitted).

412. Ferejohn & Sager, *supra* note 410, at 1954.

413. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 *Harv. L. Rev.* 129, 144, 154–55 (1893).

414. Cf. G. Edward White, Historicizing Judicial Scrutiny, 57 *S.C. L. Rev.* 1, 48–50 (2005) (explaining that Thayer himself did not defend the clear-mistake rule, as “[m]odern commentators tend to,” in terms of “countermajoritarian constraints”).

415. See Vermeule, *Judging Under Uncertainty*, *supra* note 14, at 230–88.

use buttressing.<sup>416</sup> A more expansive version, which we favor but which raises additional complications, would be internalized by legislative and executive officials as well as by judges. Members of Congress, on this approach, would likewise apply a rule of clear mistake when called on to resolve the validity of contested steps forward that are taken in the amending process. The hard core of Article V would not be affected. Aspiring amenders would still need to persuade two-thirds of Congress and three-fourths of the states in a constitutionally credible manner. But the fuzzy edges around that core would become more permeable, zones of permission and experimentation rather than additional vetogates on the path to constitutional change.

As with all versions of Thayerianism, just how permissive Article V Thayerianism would prove may vary depending on who is applying it. Those who see more clarity in the law of Article V will tend to find more clear mistakes in need of correction. In principle, however, the Thayerian proposal is potentially compatible with any interpretive approach, as it says nothing about the method of constitutional interpretation that is to be used—only about what is to be done when that method generates an uncertain legal conclusion. Originalism could lead to an especially permissive version of Article V Thayerianism, given how little light was shed on the workings of Article V during its drafting and ratification<sup>417</sup> and the growing recognition among originalists that constitutional decisionmakers must rely on normative judgment in situations where the communicative content of the constitutional text is too vague or ambiguous to fully determine a legal result.<sup>418</sup>

What would Article V Thayerianism look like in practice? Most immediately, the ERA would be recognized as part of the Constitution as soon as Congress so declares.<sup>419</sup> As Part III discusses, the Article V objections to the ERA are substantial but not “clearly” fatal, especially if Congress takes new action to extend the ratification deadline.<sup>420</sup> Accordingly, if Congress

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416. See *supra* section IV.B.

417. See *supra* note 17 and accompanying text.

418. See Pozen & Samaha, *supra* note 69, at 777–78; see also Lawrence B. Solum, *Originalist Methodology*, 84 *U. Chi. L. Rev.* 269, 295 (2017) (noting that one approach originalists might take in situations of textual underdeterminacy is to adopt “a Thayerian default rule of deference to democratic institutions”).

419. As Julie Suk details in a forthcoming article, Ruth Bader Ginsburg’s writings and testimony before becoming a judge support a primary role for Congress in resolving the current status of the ERA. See Julie C. Suk, *The Procedural Path of Constitutional Inclusion: Justice Ginsburg’s Cautious Legacy for the Equal Rights Amendment*, 110 *Geo. L.J.* (forthcoming 2022) (on file with the *Columbia Law Review*).

420. See *supra* section III.L. A recent district court opinion called the question whether Congress “may revive the ERA” a “difficult issue” and did not resolve it. *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 61 (D.D.C. 2021). In its 2020 opinion finding the ERA to be dead, OLC acknowledged that Congress’s authority to “modify” a ratification deadline presents a “difficult question.” *Ratification of the Equal Rights Amendment*, 44 *Op. O.L.C.*, slip op. at 3 (Jan. 6, 2020).

were to pass a joint resolution retroactively waiving the deadline and directing the Archivist of the United States to publish the ERA as the Twenty-Eighth Amendment, the Archivist should promptly do so.<sup>421</sup> More generally, Article V Thayerianism might empower aspiring amenders to take advantage of quorum rules, to consider amendments passed by one chamber in the other chamber during subsequent legislative sessions,<sup>422</sup> to demand a supermajority vote for rescissions of amendment proposals and ratifications, to hold binding or advisory state referenda on ratification,<sup>423</sup> and so on and so forth.<sup>424</sup>

Perhaps the most promising avenue of Thayerian experimentation would involve ratification through conventions. Congress could, for instance, propose an amendment and provide for at-large elections of state convention delegates on a single day. Doing so would effectively create an amendment “Election Day” and convert each state vote into a referendum

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421. A middle option, which we find appealing, would be for Congress to retroactively extend the deadline while at the same time providing that it will treat rescissions as effective. See Magliocca, *supra* note 360, at 635; Hemel, *supra* note 317. This would be a departure from strict Thayerianism, in the sense that it would not read Article V in the most permissive fashion possible. But such a departure may be prudentially warranted in light of the unique circumstances of the ERA (specifically, the multiple rescissions and twofold extension of the ratification deadline), and it would return the ratification process to the state legislative arena for a final push. Cf. *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (suggesting that the efficacy of rescission “‘might be answered in different ways for different amendments’” (quoting *Dyer v. Blair*, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975) (three-judge court))).

422. For an arguable limit case, the House in 1969 passed a constitutional amendment abolishing the Electoral College and providing for direct election of the President, but the Senate did not follow suit. See 115 Cong. Rec. 26,007–08 (1969). Is it clear, as a matter of Article V law, that the Senate could not revive this proposed amendment? See Seth Barrett Tillman, *Noncontemporaneous Lawmaking: Can the 110th Senate Enact a Bill Passed by the 109th House?*, 16 *Cornell J.L. & Pub. Pol’y* 331, 345 n.31 (2007) (arguing that the House and Senate need not act contemporaneously in the amendment process).

423. Unless it is overturned or defied, *Hawke v. Smith* (No. 1), 253 U.S. 221 (1920), would prevent a state from holding a referendum undercutting ratification after legislative approval. But a state could still, consistent with *Hawke*, hold a referendum prior to legislative consideration and choose to bind itself to the result.

424. Article V Thayerianism is a heuristic to adjudicate present and future disputes over the validity of amendment efforts, such as the ERA. For disputes about past amendment efforts, we believe it makes sense for systemic stare decisis reasons to defer to longstanding social and official consensus about the textual content of the Constitution. As William Baude has suggested to us, one might call this the “pocket constitution method”: Copies of the Constitution in general circulation and carried around by people are presumptively correct, absent a clear inconsistency with Article V. Hence, while there may be a colorable argument that Article the First, on congressional apportionment, satisfied the requirements of Article V, see *supra* section III.L.1, that argument is not so clearly correct as to upset the overwhelming consensus spanning more than two centuries that the amendment was never adopted. Conversely, while the Titles of Nobility Amendment appeared for a time in (some) pocket constitutions, see *supra* section III.L.2, its noncompliance with Article V was clear. The Twenty-Seventh Amendment is an intermediate case. Despite the controversy surrounding its initial promulgation, it has appeared in pocket constitutions for three decades now and is not clearly in violation of Article V. See *supra* section III.K.

on the proposed amendment. Congress could even include a provision in the proposed amendment stipulating that it will be inoperative unless approved by a majority of all voters on Election Day. In addition to increasing the democratic legitimacy of the resulting amendment, this maneuver would streamline the Article V process in two ways: It would require only a single electoral victory in each state, rather than a victory in both houses of bicameral state legislatures,<sup>425</sup> and it would circumvent partisan gerrymandering in those legislatures.

More radical possibilities are also imaginable. Consider the final clause in Article V providing “that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”<sup>426</sup> For those who believe the two-senators-per-state rule to be inconsistent with the value of political equality, this clause reflects “a truly extraordinary” and grossly undemocratic “instance of dead-hand control.”<sup>427</sup> As Robert Dahl once lamented, “those fifteen words end all possibility of amending the constitution in order to reduce the unequal representation of citizens in the Senate.”<sup>428</sup> But is this so clear? Many workarounds to the Equal Suffrage Clause have been proposed over the years, from an amendment repealing the clause paired with another amendment changing the Senate apportionment formula,<sup>429</sup> to an amendment preserving the Senate in name but “relocating” its powers to a new body,<sup>430</sup> to the proposition that the one-person-one-vote equal protection principle announced in *Reynolds v. Sims* should be understood to apply to the Senate,<sup>431</sup> to the centuries-old argument that the clause has never been legally operative.<sup>432</sup> These proposals vary in their degree of legal boldness; depending on one’s general approach to constitutional interpretation and one’s specific views on the Equal Suffrage

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425. Cf. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 *Am. Pol. Sci. Rev.* 355, 361 (1994) (assuming “that a unicameral legislative process is one half as difficult as a bicameral one”).

426. U.S. Const. art. V.

427. Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* 627 (2016).

428. Robert A. Dahl, *How Democratic Is the American Constitution?* 145 (2d ed. 2003).

429. See, e.g., Tribe, *American Constitutional Law*, *supra* note 408, at 111–12; Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone*, 13 *J.L. & Pol.* 21, 67–70 (1997).

430. Amar, *America’s Constitution*, *supra* note 49, at 293.

431. See, e.g., Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 *Am. U. L. Rev.* 1981, 1999–2009, 2071–75 (2019) (offering a detailed version of this proposal, implementable by statute). The *Reynolds* Court expressly declined to apply the one-person-one-vote principle to the Senate, citing the Senate apportionment formula’s “ingrained [status] in the Constitution” and the “unique historical circumstances” attending its creation. 377 U.S. 533, 574 (1964).

432. See *supra* note 61 and accompanying text.

Clause, some may seem clearly impermissible. But most are “at least thinkable” as a matter of orthodox constitutional interpretation.<sup>433</sup> For those who find such proposals not just legally thinkable but legally credible, Article V Thayerianism and the principle of popular sovereignty that underwrites it counsel openness to reform.

Even more important than its direct effects on the legal environment for attempted amendments, however, may be Article V Thayerianism’s indirect effects on the cultural environment. A striking finding from the comparative constitutional literature is that the procedural difficulty of a country’s formal amendment rule is *not* strongly correlated with its rate of amendment.<sup>434</sup> Some countries with stringent amendment rules rewrite their constitutions frequently; some countries with lax amendment rules rewrite their constitutions only rarely. More consequential than the amendment rule itself, it seems, is the prevailing “amendment culture.”<sup>435</sup> In the United States, Jackson suggests that perceptions of the difficulty of satisfying Article V not only tend to be “overstated” but also have become “self-fulfilling” by deterring political actors from trying to pursue amendments.<sup>436</sup> The determinants of amendment culture are enigmatic,<sup>437</sup> so we cannot say with any confidence what the precise effects of interpretive reform would be, in the United States or any other system. There is also an endogeneity complication because, just as the embrace of Article V Thayerianism might change U.S. amendment culture, a change in U.S. amendment culture might be needed for Article V Thayerianism to gain traction. Cultural change has to start somewhere, however, and it does not seem far-fetched to think that growing appreciation for just how many questions the law of Article V does not clearly resolve, combined with growing levels of scholarly support for Article V Thayerianism, could

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433. Sanford Levinson, *There Is a Way, but Will There Ever Be a Will?: Comments on Eric Orts’s Senate Democracy*, 69 *Am. U. L. Rev. Forum* 159, 164 (2020); see also David B. Froomkin & A. Michael Froomkin, *Fixing the Senate: A User’s Guide* 67 (Univ. of Mia., Legal Stud. Rsch. Paper No. 3797782, 2021), <https://ssrn.com/abstract=3797782> [<https://perma.cc/YG6R-B4ZC>] (“[T]he Entrenchment Clause presents a less substantial obstacle to reform than is sometimes imagined . . .”).

434. See Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 *Int’l J. Const. L.* 686, 711 (2015) (“[A]mendment culture is more important than institutional constraints in explaining amendment practices.”); Bjørn Erik Rasch, *Rigidity in Constitutional Amendment Procedures*, in *The Constitution as an Instrument of Change* 111, 121 (Eivind Smith ed., 2003) (noting that the “empirical relationship between rigidity and amendment is . . . not very robust”).

435. Ginsburg & Melton, *supra* note 434, at 699–701, 708–13.

436. Jackson, *The (Myth of Un)Amendability*, *supra* note 30, at 584–90, 602–05; see also Vicki C. Jackson, *Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman’s The Will of the People*, 13 *U. Pa. J. Const. L.* 413, 433–52 (2010) (book review) (discussing and critiquing “amendophobia” in contemporary U.S. constitutional culture).

437. See Ginsburg & Melton, *supra* note 434, at 687, 701.

nudge the U.S. “legal complex”<sup>438</sup> in a more amendment-friendly direction. Above and beyond any discrete arguments we have advanced, we hope this paper contributes to such a shift.

#### CONCLUSION

A written constitution’s rules for its own amendment help “define its very essence.”<sup>439</sup> Our ambition in this paper has been to explore the “essence” of the U.S. Constitution through a critical study of how the rules of Article V have been developed and applied over time. The standard account of Article V depicts it as all but freezing our constitutional text, if not our democracy as well.<sup>440</sup> Yet for all of Article’s V ostensible “clarity”<sup>441</sup> and “rigidity,”<sup>442</sup> the picture that emerges from this study is one of persistent legal contestation, confusion, and innovation.

Descriptively, we have tried to offer a robust empirical showing of the underdeterminacy of the American rule of recognition for constitutional enactments. Prescriptively, we have suggested that this showing holds untapped promise for those who wish to revise the Constitution. Ever since the Founding, the bars of “the Article V cage”<sup>443</sup> have been significantly looser than the conventional wisdom appreciates. And still to this day, the law of Article V remains remarkably unsettled not just on minor technicalities but on fundamental questions of substance and procedure. Recovering the full story of Article V adventurism, and recognizing the full scope of legal discretion left in its wake, are important tasks for enriching our understanding of constitutional history and theory. They may also be necessary first steps toward unfreezing the constitutional text today.

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438. See Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 *Ann. Rev. L. & Soc. Sci.* 217, 220, 233–34 (2011) (explaining that “constitutional politics invariably are embedded within a politics of the legal complex,” defined as “a cluster of legal actors,” including academics, “related to each other in dynamic structures and constituted and reconstituted through a variety of processes”).

439. Amar, *Philadelphia Revisited*, *supra* note 4, at 1102 n.208.

440. For the freezing metaphor, see Daniel Lazare, *The Frozen Republic: How the Constitution Is Paralyzing Democracy* (1997); see also Albert, *Constitutional Amendments*, *supra* note 113, at 96 (collecting similar statements by leading scholars).

441. E.g., Albert, *Constitutional Disuse or Desuetude*, *supra* note 14, at 1035; Harrison, *supra* note 14, at 459, 461; Paulsen, *A General Theory*, *supra* note 50, at 761.

442. E.g., Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *Drake L. Rev.* 925, 938 (2007); Aziz Z. Huq, *The Function of Article V*, 162 *U. Pa. L. Rev.* 1165, 1168–69 (2014).

443. Levinson, *Our Undemocratic Constitution*, *supra* note 411, at 20.

