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## OF SYNCHRONICITY AND SUPREME LAW

*Saikrishna Bangalore Prakash*

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*Saikrishna Bangalore Prakash\**

*The Constitution identifies three forms of supreme law — the Constitution, laws, and treaties — and specifies procedures for their adoption. Yet it says little about timing. It does not seem to address whether the chambers of Congress must act on bills in close proximity to each other, whether amendments may be proposed across eras or ratified across centuries, or whether a President may make a treaty decades after the Senate consents to its ratification. This Article is the first to offer a comprehensive account of existing federal lawmaking practices as they relate to time. It also considers how those timing practices have evolved over our nation's history. The Article argues that the Constitution requires some measure of synchronicity within each form of lawmaking. For statutes, all the steps requisite for a bill to become law must occur within a single congressional session, a rule immanent in the Constitution's concept of a "session." If all steps do not occur within one session, the slate is wiped clean. For constitutional amendments, the constraints are more complicated and less definite. Both chambers of Congress must pass a proposed amendment within one session. Moreover, once Congress sends an amendment to the states, it lapses if the requisite number of states does not ratify it within a reasonable period. If the proposal is to become an amendment, it must go back to square one and recommence its journey. Treaties are similarly constrained by a synchronicity requirement. In particular, Presidents must make treaties within a reasonable time after the Senate consents to their ratification. If widely accepted, these assertions would have far-reaching implications for how institutions currently make supreme law. The Article further contends that while the Constitution itself adopts a synchronicity constraint on the three forms of supreme law, the participants in each process also can impose their own more stringent limits on each. Finally, the Article uses this framework to comment on the Equal Rights Amendment and the vexing issues posed by attempts to revive that proposal.*

### INTRODUCTION

Once they leave Congress, proposed constitutional amendments are like diamonds; evidently, they are forever, meaning that states may ratify them centuries after Congress first recommended them. In contrast, bills seem to have a shelf life no longer than jelly or white rice; if both chambers do not pass a bill within a two-year Congress, the legislative process must begin anew in the next Congress. Though treaties occupy the same lexical plane as statutes,<sup>1</sup> proposed treaties might be more like

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<sup>1</sup> See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by

diamonds than jelly or white rice, for it seems that a President might make them supreme law years or decades after the Senate consents.

The Constitution's text never directly addresses how long pending lawmaking proposals remain viable, ready to be perfected into law by the completion of the remaining steps. Article I, section 7 lays out "a single, finely wrought[,] and exhaustively considered[] procedure"<sup>2</sup> for making federal statutes.<sup>3</sup> Under the Presentment Clause, if a bill is to become law it must pass both chambers and then be presented to the President.<sup>4</sup> The clause further provides that the President may sign the bill or return it with objections; if he does neither within ten days, the bill automatically becomes law.<sup>5</sup> Should the President return the bill with objections, the two chambers, by a two-thirds vote in each, may overrule his veto and make the bill a law.<sup>6</sup> To ensure that Congress does not evade presentment, the very next clause specifies that other texts — orders, resolutions, and votes — must also be sent to the President.<sup>7</sup>

Article II, section 2 sketches a far less "finely wrought" procedure for treaties. Under the Treaty Clause, Presidents can make treaties, "by and with the Advice and Consent of the Senate."<sup>8</sup> The modern Executive negotiates treaties with relatively little Senate input.<sup>9</sup> After international negotiations conclude, the Executive submits a treaty to the Senate. If two-thirds of the senators present approve the treaty, the President may then complete the process of making the treaty in conjunction with the other nation(s).<sup>10</sup>

Article V creates two paths for proposing amendments and two tracks for ratifying them.<sup>11</sup> Congress must send an amendment to the states if each chamber approves it by a two-thirds supermajority.<sup>12</sup> Alternatively, if two-thirds of the state legislatures apply for a constitutional convention, Congress shall call a convention that may generate proposed amendments.<sup>13</sup> However proposed amendments originate,

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that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.".)

<sup>2</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>3</sup> *See* U.S. CONST. art. I, § 7, cl. 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* cl. 3.

<sup>8</sup> *Id.* art. II, § 2, cl. 2.

<sup>9</sup> It was not always so. *See* SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 136–37* (2015) (describing how President Washington propounded questions to the Senate before beginning treaty negotiations with other nations).

<sup>10</sup> *See id.* at 136.

<sup>11</sup> U.S. CONST. art. V.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Congress chooses whether to send them to popular conventions or legislatures.<sup>14</sup> If three-fourths of the relevant bodies (conventions or legislatures) ratify the amendment, it becomes part of the Constitution.<sup>15</sup>

As detailed as these provisions appear to be, they say almost nothing about time. The Treaty Clause seems silent about the period in which treaties must be made supreme law.<sup>16</sup> Article V appears mum about the time frames for proposing or ratifying amendments.<sup>17</sup> The only express temporal constraint is found in the Presentment Clause's ten-day limit on the President's consideration of bills.<sup>18</sup> That clause never directly addresses whether the chambers must pass bills contemporaneously, how long after bicameral passage Congress may present bills to the President, or when, after receiving objections, Congress may override them.<sup>19</sup> Time seems not to have been on the minds of the Constitution's Framers.<sup>20</sup>

The absence of express time constraints in Articles I, II, and V raises largely unexplored questions about the making of supreme law. For instance, can a treaty be made into supreme law decades after it was negotiated, as was the case with the Genocide Convention?<sup>21</sup> Can states ratify an amendment more than two centuries after Congress proposed it, as occurred with the Twenty-Seventh Amendment? What, if anything, prevents the House from passing a bill approved by the Senate two decades ago and then, without renewed Senate passage, presenting it to the President? The more general question relates to synchronicity. Must the required steps in these forms of federal lawmaking be completed within a relatively short period of time, that is to say synchronously? Or can the steps stretch out over years, decades, or centuries, with laws going into effect via votes, consent, passage, and ratifications from different epochs? The time is ripe to consider these questions.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* art. II, § 2, cl. 2.

<sup>17</sup> *See id.* art. V.

<sup>18</sup> *Id.* art. I, § 7, cl. 2.

<sup>19</sup> *See id.*

<sup>20</sup> Indeed, the Framers did not impose an express time frame within which the requisite states had to ratify the proposed Constitution. *See id.* art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

<sup>21</sup> The Convention was sent to the Senate in 1949. *See* S. COMM. ON FOREIGN RELATIONS, INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, REPORT ON EXECUTIVE O, 81ST CONGRESS, 1ST SESSION, S. EXEC. DOC. NO. 93-5, at 2 (1973) [hereinafter SENATE REPORT ON THE GENOCIDE CONVENTION]. The Senate belatedly gave its consent, with some modifications, in 1986. *See* 132 CONG. REC. 2352 (1986). The President ratified the Convention in 1988. *See* President Ronald Reagan, Remarks on Signing the Genocide Convention Implementation Act of 1987 (the Proxmire Act) in Chicago, Illinois (Nov. 4, 1988), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1988-89, at 1443-44 (1991).

The appeal of synchronous lawmaking is perhaps obvious. Democracy rests upon majority rule.<sup>22</sup> Philosophers speculate about the requisites of a just or defensible understanding of majority rule. Some believe that the majority should be barred from violating minority rights.<sup>23</sup> Others argue that free speech is a prerequisite to a justifiable theory of majority rule.<sup>24</sup> Regardless of such constraints, majority rule surely demands that the putative majority actually demonstrate that it *is a majority*. For each law, we must perceive that a real majority exists, lest a phantom majority rule over us.

One crucial element of majority rule is the requirement that those in favor of some proposition — be it a bill, constitutional amendment, or some candidate — actually constitute a majority at a *given moment in time*. In other words, within the concept of majority rule is the implicit condition that a majority must manifest itself within a limited period.<sup>25</sup>

The period in which the majority must manifest itself has varied across time and contexts. At some points in our past, when the people voted, they did so on a particular day — an “Election day.”<sup>26</sup> Modern voting often stretches out over weeks or months as states have permitted early balloting via absentee ballots or otherwise.<sup>27</sup> Typically, each chamber of Congress conducts electronic votes on a bill or a motion within a

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<sup>22</sup> See, e.g., RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 122 (2002) (describing majority rule as a “bedrock” of democracy); IAN SHAPIRO, *THE REAL WORLD OF DEMOCRATIC THEORY* 19 (2010) (equating the two).

<sup>23</sup> See, e.g., *ENCYCLOPEDIA OF DEMOCRATIC THOUGHT* 427 (Paul Barry Clarke & Joe Foweraker eds., 2001).

<sup>24</sup> See, e.g., Amy Gutmann, *The Disharmony of Democracy*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV*, 126, 129–30 (John W. Chapman & Ian Shapiro eds., 1993).

<sup>25</sup> There is a separate but related dead-hand problem when a previous majority or supermajority continues to rule us today because they chose to include no sunset clause in their enactment and because we continue to honor their enactment. This majoritarianism from the grave can occur even when it is absolutely clear that no current majority or supermajority favors the enactment. For instance, a law passed in 1968 by both chambers of Congress may no longer have majority support in one or both chambers in 2019. But because of the multicameral nature of federal lawmaking (House, Senate, and President), a repeal or change to the 1968 law may prove impossible. This problem is ubiquitous and serious. Gratitude to Michael Thomas for bringing it to my attention.

Though we should honor our past, Thomas Jefferson had a point when he said “the earth belongs in usufruct to the living.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 392 (Julian P. Boyd ed., 1958) (emphasis omitted). While I favor the routine use of sunset clauses to mitigate this ever-present problem, I will not discuss this issue. This Article discusses the antecedent question, namely over what period must the majority (or supermajority) manifest itself in order to pass legislation and potentially raise the distinct dead-hand problem. Put another way, there can be no dead-hand problem in a majoritarian system without an initial majority making a law.

<sup>26</sup> See JOHN F. HOADLEY, *ORIGINS OF AMERICAN POLITICAL PARTIES: 1789–1803*, at 42 (1986).

<sup>27</sup> *Absentee and Early Voting*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [https://perma.cc/C6S3-C7KX]. The only states that do not allow early voting whilst also requiring an excuse for absentee voting

fifteen-minute frame.<sup>28</sup> Yet in rare cases, chamber voting occurs over an hour or two, a relatively lengthy period that enables leaders to whip errant members in order to pass a divisive measure.<sup>29</sup>

When a majority of voters back some politician by voting over a single day, it is fair to say that the majority has spoken. After all, the voters have acted, if not exactly simultaneously, at least contemporaneously in a rather brief period. When legislators vote within the space of minutes to form a majority, we can likewise confidently conclude that the majority has expressed itself in the relevant way. This is especially true for legislatures, because legislators often may change their votes until the vote is gavelled closed.<sup>30</sup>

But sometimes it is harder to perceive whether a majority exists. As the process stretches out, the possibility of a dubious majority increases. In 2017, Montana voters selected a candidate who, the day before voting at the polls, assaulted a reporter.<sup>31</sup> The assault was the talk of the nation, at least for a day or two. But the incident could not affect the votes of many Montanans because more than two hundred thousand (some thirty-seven percent of the final tally) had cast their votes via absentee ballots before the assault.<sup>32</sup> It is no flight of fancy to suppose that the declared winner actually lacked majority support among all those who voted, at least if judged by their actual preferences as of Election Day itself.

Despite the sense that majoritarian and supermajoritarian processes implicitly require a synchronous manifestation of preferences, existing federal practice is in some tension with that intuition. Reconsider treaties. Current practice suggests that a President may delay signing the instrument of ratification because the Senate's consent to ratification

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are Alabama, Connecticut, Delaware, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia. *Id.*

<sup>28</sup> See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 225 (9th ed. 2014). Before electronic voting, the vote time was typically thirty minutes. *Id.*

<sup>29</sup> In one extraordinary instance, a vote scheduled for fifteen minutes lasted almost three hours as the Republican leadership twisted arms in the wee hours of the morning. See Jake Tapper & Dan Morris, *Just How Did Medicare Bill Get Passed?*, ABC NEWS (Mar. 27, 2004), <https://abcnews.go.com/Nightline/story?id=128998> [<https://perma.cc/P32J-VGNF>]; see also THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 4 (2006) (describing it as “the longest roll call in modern House history”).

<sup>30</sup> See, e.g., Cristina Marcos & Mike Lillis, *Chaos in House After GOP Votes Down LGBT Measure*, THE HILL (May 19, 2016, 12:19 PM), <http://thehill.com/blogs/floor-action/house/280542-dems-cry-foul-after-house-gop-votes-down-lgbt-measure> [<https://perma.cc/4JR7-3YX6>] (describing controversial last-minute changes in votes).

<sup>31</sup> Jonathan Martin, *Montana Republican Greg Gianforte, Charged with Assault, Awaits Fate in Vote*, N.Y. TIMES (May 24, 2017), <https://nyti.ms/2qjFlc4> [<https://perma.cc/EGS6-FTGD>].

<sup>32</sup> Lauren Fox & Kyung Lah, *Montana's Absentee Vote Turnout in the Spotlight After Gianforte "Body Slam"*, CNN (May 25, 2017, 12:39 PM), <http://www.cnn.com/2017/05/25/politics/montana-special-election-turnout> [<https://perma.cc/2CMC-2NK3>].

apparently does not automatically limit *when* the President may ratify. Further, since treaties are contracts, they are not binding on the United States without ratification by another nation. After all, there can be no unilateral treaty. For multilateral treaties involving hundreds of nations, the necessary accessions may take decades to secure. All things considered, the process of federal treaty making apparently may last a generation or more.

By comparison, the making of federal statutes is always far more synchronous. Established practice seems to limit the time in which a bill may be perfected into law. For more than a century, the relevant actors (legislators and the President) have perfected bills into law by using something like a two-year and two-week period.<sup>33</sup> If a pending bill is not made into law within that frame, the chambers begin from square one in a new Congress, meaning that both chambers must repass the bill in a single Congress. At first blush, this regime seems rather synchronous, certainly as compared to the treaty-making process. Compare it to the constrained regime it supplanted, however, and the modern practice seems positively lax. For almost sixty years from the Constitution's inception, legislators faced a far more restrictive condition because pending bills had to be perfected *within a single congressional session*.<sup>34</sup> All lawmaking steps — bicameral passage, presentment, presidential consideration, and potential veto override — had to transpire within a session. Any bill not so perfected had to start from the beginning in the next session. Because sessions often lasted no more than a few weeks or months,<sup>35</sup> all the steps necessary to make federal statutes had to occur in an extremely tight window. Rather than a little over two years, federal lawmakers might have had but two weeks to commence and complete the process.

Constitutional amendments feature an incongruous mix of asynchronicity and synchronicity. While the Supreme Court once claimed that the states had to ratify proposed amendments within a reasonable period of time after their receipt,<sup>36</sup> the political branches later decided otherwise. In 1992, the executive and legislative branches concluded that a proposed amendment Congress sent to the states in 1789, what we now call the Twenty-Seventh Amendment, had belatedly received the requisite state approval, thereby denying that proposed amendments must

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<sup>33</sup> See *infra* section I.A, pp. 1231–36.

<sup>34</sup> See *infra* section II.A, pp. 1256–68.

<sup>35</sup> See *Dates of Sessions of the Congress*, U.S. SENATE, <https://www.senate.gov/reference/Sessions/sessionDates.htm> [<https://perma.cc/ECY6-67B4>] (listing session dates for all Congresses).

<sup>36</sup> See *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

become stale at some point.<sup>37</sup> Yet while states apparently may ratify amendments centuries after first receiving them, members of Congress have long acted as if the chambers must approve amendments within a particular Congress.<sup>38</sup> In other words, if the House passes a proposed amendment at the beginning of a two-year Congress and the Senate fails to pass the amendment during that Congress, the House's passage becomes stale at the end of the Congress. In a subsequent Congress both chambers must repass the amendment in order to send it to the states.<sup>39</sup> Hence, Congress cannot send a proposed amendment to the states if the Senate passed it on January 2, 2019, and the House on January 4, 2019, because the Senate's action occurred in the expired 115th Congress while the House acted in the 116th Congress. The two days, because they straddle two Congresses, apparently make all the difference.

These practices are fascinating in part because the Constitution says absolutely nothing about them. Indeed, as discussed later, the widespread notion that we have had one hundred and sixteen Congresses and that each Congress lasts two years *has no foundation in the Constitution*.<sup>40</sup> It is an artificial and useful construct, but not one with any constitutional implications. Yet our political actors imbue it with tremendous import. Indeed, our practices for proposing amendments and passing bills rest on the construct.

This Article explores time as a constraint on federal lawmaking.<sup>41</sup> It sheds light on federal lawmaking practices, current and past. It considers whether the Constitution establishes time frames for lawmaking and

<sup>37</sup> See Congressional Pay Amendment, 16 Op. O.L.C. 85, 87–88 (1992); Richard L. Berke, *Congress Backs 27th Amendment*, N.Y. TIMES (May 21, 1992), <https://nyti.ms/1OOnVeR> [<https://perma.cc/94KQ-EL6G>].

<sup>38</sup> See *infra* section I.B, pp. 1237–43.

<sup>39</sup> See *infra* notes 103–111 and accompanying text.

<sup>40</sup> See *infra* section II.A, pp. 1256–68.

<sup>41</sup> This Article focuses on questions of timing and the three forms of federal lawmaking contemplated by the Constitution itself. While I understand that statute making may be less common due to gridlock and that treaty making has slowed to a trickle, a focus on the three most prominent forms of lawmaking is still useful and instructive.

The Article does not consider questions of timing relating to lawmaking embedded in interstate and international compacts made by the states. See U.S. CONST. art. I, § 10, cl. 3. Nor does it take up rulemakings under the Administrative Procedure Act, a more important species of lawmaking. Finally, the Article eschews questions of timing regarding other constitutional processes. For instance, may the House impeach in one Congress and the Senate conduct a trial in a subsequent Congress? In the wake of the Clinton impeachment process, which straddled two Congresses, Professor Bruce Ackerman argued “no.” See BRUCE ACKERMAN, *THE CASE AGAINST LAMEDUCK IMPEACHMENT* 45–46 (Greg Ruggiero & Stuart Sahulka eds., 1999) (arguing that impeachment and trial had to occur in a single Congress).

As an aside, parliamentary practice allowed the House of Lords to proceed upon an impeachment or appeals from an expired session. See SIR THOMAS RAYMOND, KNIGHT, *REPORTS OF DIVERS SPECIAL CASES, ADJUDGED IN THE COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER, IN THE REIGN OF KING CHARLES II* 382–83 (3rd ed. 1793). Apparently, then—Vice President Jefferson thought the understanding carried over, for his Senate Manual says as much. See THOMAS JEFFERSON, *A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES* 96 (U.S. Gov't Printing Office 1993) (1801).



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whether the relevant actors may impose their own constraints on the continuing validity of their votes, consents, passages, and ratifications.

Save for a remark on possible judicial review of the continued viability of the Equal Rights Amendment (the ERA), the Article says little about judicial review of synchronicity. I believe that each species of supreme lawmaking requires synchronicity regardless of whether the Constitution authorizes judicial review of allegedly unconstitutional asynchronous lawmaking. Whether or not synchronicity is a political question in the jurisdictional sense, it is certainly a constitutional question that merits exploration.

Likewise, the Article takes no position on the question of whether, as a matter of constitutional law, the relevant actors may rescind their votes, consents, passages, or ratifications. This issue has surfaced in the context of constitutional amendments, but it also arises in other contexts. For instance, can a chamber rescind its passage of a bill (or an amendment) before (or even after) the other chamber acts? Likewise, can individual legislators change their votes before a cameral vote becomes final? Can the Senate rescind (or modify) its advice and consent to a treaty before the treaty is made? If an entity may effortlessly rescind or annul its previous decisions, it makes it easier to suppose that, even with the passage of significant time, the entity continues to favor those decisions or acts. The claims made herein about synchronicity are thought to be true irrespective of whether the relevant actors may retract or set aside their prior votes, consents, passages, or ratifications.

Finally, I fully recognize that statutes, treaties, and amendments may be regarded as valid by most or all members of society even if the processes that generated them did not conform with the best reading of the Constitution's synchronicity rules. Hence when I discuss rules of synchronicity and particular enactments that failed to satisfy those rules, I do not imagine that officials (or society) will come to view those purported enactments in a different light. For instance, I do not envision that officials will scour the Statutes at Large or the U.S. Code and cleanse either of provisions that were passed asynchronously.

For ease of explication, I will use the phrase "perfection period" to refer to the time period in which federal institutions must complete the constitutive lawmaking steps. If a lawmaking process has a perfection period, it follows that the failure to complete all lawmaking steps within that period means that the process must begin anew in a subsequent period. I will use "lawmaking steps" to refer to the stages of each form of federal lawmaking. Finally, because each lawmaking process has multiple steps, there are questions not only about the time constraints for the entire process but also about the intervals between the lawmaking steps. I will use "proximity period" to encompass the notion that a subsequent actor must act within some period after a previous actor.

To illustrate, the prevailing statutory process seems to employ a perfection period of about two years plus two weeks, but may not require

much more in the way of proximity between the Article I, section 7 steps. For example, the process may permit the chambers of Congress to pass a gun control bill in January 2019 and delay its presentation to the President until December 2020. In contrast, though the modern amendment process does not have a finite perfection period, it does seem to have a proximity period. Recall that under prevailing practices amendments may be ratified across centuries. Nonetheless, the process of proposing an amendment in Congress does seem to be subject to a proximity constraint because, under extant practices, both chambers must propose an amendment within one Congress. The existing amendment process thus apparently requires a proximity period covering the interval between House and Senate action but imposes no overall perfection period.

Part I describes the prevailing perfection and proximity periods for the making of federal statutes, amendments, and treaties. Because these issues have received rather little attention<sup>42</sup> and because the actors themselves typically do not carefully consider questions of timing, some of the claims about existing practices are unavoidably speculative.

Part II considers whether the Constitution contains rules regarding perfection and proximity periods and, if so, their contours for each form of federal lawmaking. I argue that each system of federal lawmaking

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<sup>42</sup> There is some work on the perfection period of statutes, much of it from the turn of the twentieth century and focused on whether the President may sign bills after Congress has adjourned. See E.I. Renick, *The Power of the President to Sign Bills After the Adjournment of Congress*, 32 AM. L. REV. 208, 208 (1898); Lindsay Rogers, *The Power of the President to Sign Bills After Congress Has Adjourned*, 30 YALE L.J. 1, 3 (1920); Note, *Constitutional Law: Approval of Bill After Adjournment of Congress*, 8 HARV. L. REV. 114, 114 (1894). Two modern treatments focus on whether the chambers may act across Congresses to pass legislation. 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, 334–37 (2007) (arguing that bicameral passage need not occur within the space of a single two-year Congress but may stretch out for years or decades); Aaron-Andrew P. Bruhl, Response, *Against Mix-and-Match Lawmaking*, 16 CORNELL J.L. & PUB. POL'Y 349, 350 (2007) (arguing that turning a bill into a law does require passage by both houses of the same two-year Congress).

There are also articles examining whether the states may ratify amendments centuries after Congress first proposed them. See, e.g., Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 498–99 (1992); Stewart Dalzell & Eric J. Beste, *Is the Twenty-Seventh Amendment 200 Years Too Late?*, 62 GEO. WASH. L. REV. 501, 504–05 (1994); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENT. 101, 101–08 (1994); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 681 (1993); William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 CONST. COMMENT. 9, 13–14 (1993); JoAnne D. Spotts, Note, *The Twenty-Seventh Amendment: A Late Bloomer or a Dead Horse*, 10 GA. ST. U. L. REV. 337, 339 (1994).

To my knowledge, there are no works discussing when Congress may present bills after passage, when Congress may override bills after receipt of objections, whether the chambers may vote on proposed amendments asynchronously, or whether there is a perfection period for treaties. Moreover, I am unaware of any articles that consider the question of synchronicity across all forms of federal lawmaking.

imposes a perfection period. In the case of statutes, that limitation is linked to the idea of a “session,” a concept the Constitution references in a number of places.<sup>43</sup> Under Founding-era understandings, the end of a session terminated all unfinished legislative business, thereby requiring the process to begin anew in the next session.<sup>44</sup> This practice, maintained by the political branches for decades, reflected an original understanding that a legislative session is the perfection period for federal legislation. With respect to constitutional amendments and treaties, the argument for synchronicity is less textual and more structural. Nonetheless, the procedure described in Article V and the elaborate process only hinted at in the Treaty Clause implicitly require synchronicity. Neither provision should be read as merely establishing a checklist, where neither sequence nor timing matters.

Part III argues that participants in each lawmaking process have some authority to establish perfection and proximity periods for each species of federal lawmaking. In particular, most participants in the lawmaking process may stipulate that their consent to the passage of a proposed law extends for a certain period of time and no more. For instance, the House could specify that its approval of a bill lapses after one month, meaning that if the Senate passes the bill more than a year later, the House must repass that bill if Congress is to present it to the President. In an advice and consent resolution, the Senate could stipulate that its consent to a treaty expires if the treaty is not made within two years of the Senate’s consent. For their part, individual states could specify that their consent to an amendment expires after three years, thereby preventing consent given decades in the past from having lingering validity. Part III concludes by discussing the ERA and the recent moves by states to belatedly ratify it.

## I. PREVAILING PRACTICES

Practices can sometimes be so habitual that few notice them, much less question their legitimacy or provenance. Some of the perfection periods discussed here suffer from this obscuring familiarity, particularly the practice that presentment to the President cannot occur unless a bill passes both chambers in a single Congress. In contrast, disputes about whether there was a finite period for ratification of amendments came to the fore in the wake of the putative Twenty-Seventh Amendment, raising perplexing questions about the legitimacy of constitutional amendments ratified by the states across the centuries. A full-fledged controversy never erupted, likely because the stakes were low. No one

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<sup>43</sup> Twice in Article I, once in Article II, and twice in the Twenty-Fifth Amendment. U.S. CONST. art. I, § 5, cl. 4; *id.* § 6, cl. 1; *id.* art. II, § 2, cl. 3; *id.* amend. XXV, § 4.

<sup>44</sup> See *infra* section II.A, pp. 1256–68.

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opposed the amendment's regulation of congressional pay, making it difficult for objections to the cross-century ratification process to gain traction.<sup>45</sup> If the amendment had concerned abortion or speech, the protracted process would have been condemned (and defended) *ad nauseam*.

This Part describes the prevailing perfection and proximity periods for the three forms of federal lawmaking — statutes, constitutional amendments, and treaties. Of necessity, the claims are somewhat speculative. Given the paucity of scholarly consideration and institutional attention to these matters, this Part occasionally must rely upon educated guesses and speculative leaps regarding how best to describe current practices. Discussions about proximity periods are especially conjectural, for virtually no attention has been paid to whether particular lawmaking steps should occur within close proximity to each other, whatever the length of any perfection period.

The discussion below naturally invites questions about whether current practices reflect legally binding rules, whether they are mere conventions that institutions might breach (or alter) and yet still make supreme law, and whether our modern practices are actually unconstitutional. In this Part, I will describe them as practices, reserving for Part II the question of whether current practices are required, optional, or unconstitutional.

#### A. *Statutes*

Suppose the Senate passes a contentious immigration reform bill in early 2019 and the House refuses to take it up during the less than two years remaining in the 116th Congress. But imagine that in mid-2021, in the 117th Congress, the House belatedly passes the same bill. Under current practices, can Congress present the bill to the President in 2021 because both chambers have enacted the same bill? More to the point, can the bill become law even though the chambers acted across Congresses?

Or imagine that the House and Senate pass gun control legislation in early 2019 during the 116th Congress. Suppose further that the occupant of 1600 Pennsylvania Avenue — the forty-fifth President of the United States, Donald J. Trump — has tweeted that he will veto the bill “so fast that your head will spin.” Seeing little point in sending the bill to a President who will veto it, can the chambers engage in “strategic presentment” — that is, delay presentment to the President until a more propitious moment? Specifically, under existing practices could the chambers defer presentment of the 2019 bill until a new President, more favorably disposed, comes to power in 2021, 2025, or beyond?

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<sup>45</sup> See *supra* note 37 and accompanying text.

To begin to consider such questions — to discern the prevailing perfection period for federal statutes and any proximity periods that might apply — we must start by detailing the lawmaking steps necessary to make statutes. First, one chamber must pass a bill, meaning that there must be a vote within that chamber.<sup>46</sup> This vote may be by voice or by recorded “roll call” vote.<sup>47</sup> Second, the other chamber must pass an identical bill, again by a vote of its members.<sup>48</sup> Third, the bill must be presented to the President.<sup>49</sup> At the fourth stage, the President has choices. To make the bill law, he may sign it into law or he may allow it to become law via the lapse of ten days.<sup>50</sup> Alternatively, he can dispatch the bill to the originating chamber with his objections,<sup>51</sup> what we call a “veto.” Exercise of this option generates a fifth stage. That returned bill will become law if both chambers subsequently repass it by a two-thirds majority.<sup>52</sup> In sum, for federal statutes, we have either a four- or five-stage process for perfection.

In the modern era, the perfection period for statutes has been something akin to two years and two weeks. The period always begins with the inauguration of a Congress on January 3 of an odd-numbered year and ends a little over two years later.<sup>53</sup> Reconsider the lawmaking steps.

First, both chambers must pass the bill within a single Congress.<sup>54</sup> If, within a single two-year Congress, only one chamber passes a bill, the bill must start from square one in the next Congress. Hence, if the House passed a bill unanimously, but the Senate did not pass the bill in the same Congress, both chambers must pass the bill in a subsequent Congress if they are to present it to the President. This practice admits of no known exceptions.

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<sup>46</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>47</sup> Legislators can ask for a roll call vote if one-fifth of those present demand a recorded “Journal” vote. *See id.* § 5, cl. 3. Though the Constitution does not mention the voice vote, voice voting is a standard parliamentary practice, primarily because many votes are relatively uncontroversial. It is the default rule in most assemblies, with roll call votes only used when necessary or where members ask for such a vote. *See, e.g.*, JEFFERSON, *supra* note 41, at 73 (noting that a presiding officer calls for “Yeas or Nays” and decides “by the sound” and that a roll call only occurs when there is uncertainty or a request).

<sup>48</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.* amend. XX, § 2.

<sup>54</sup> *See, e.g.*, AKHIL REED AMAR, *THE CONSTITUTION TODAY: TIMELESS LESSONS FOR THE ISSUES OF OUR ERA* 107–08 (2016) (claiming that all bills die when Congress ends and that this has been the rule since the Founding); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE* 27 (1989) (“[A]s a formal matter, all bills either receive enactment in a Congress, or lapse at the Congress’s end.”); Paulsen, *supra* note 42, at 689 (“To become laws, [bills] must be passed by both houses and not vetoed by the President within the same term of Congress.”).

Second, Congress typically presents bills to the President within days after passage in the second chamber.<sup>55</sup> The Constitution, though it requires presentment, never specifies *how or when* Congress must present.<sup>56</sup> Congressional functionaries examine the bill for correctness and enroll it for signature.<sup>57</sup> By statute, the presiding officers of both chambers must sign the enrolled bill, after which the bill is sent to the President.<sup>58</sup>

There is invariably a minor delay between passage in the second chamber and presentment to the President. A study from 2010 by the Congressional Research Service found that average delays for the previous eleven Congresses ranged from 2.7 days to 10.26 days.<sup>59</sup> Most delays stem from the procedures mentioned above. Enrolling, proofing, signing, and presenting take time. But occasionally the delays have been quite long, with one mysterious delay in presentment lasting 176 days in the 105th Congress.<sup>60</sup>

Some delays clearly do not relate to the process of preparing a bill for presentation and are absolutely deliberate. A segment of these purposeful delays might be said to benefit the President. When the President is out of the country, the congressional leadership might delay delivery until the President returns. In part, this courtesy arises from congressional acquiescence to the Executive's view that presentment occurs only when the President actually receives the bill.<sup>61</sup> At least one time, the Executive's "double agent" — the Vice President — delayed to benefit the President. Vice President Spiro Agnew, colluding with President Nixon, agreed to delay signing an enrolled bill for a few days in order to ensure that presentation occurred right before an adjournment.<sup>62</sup> The tactic enabled President Nixon to pocket veto the bill.<sup>63</sup> By guaranteeing that he received the bill close to an adjournment, and by refusing to sign it, President Nixon made it impossible for the bill to

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<sup>55</sup> See OLESZEK, *supra* note 28, at 365.

<sup>56</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>57</sup> VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL34480, ENROLLMENT OF LEGISLATION: RELEVANT CONGRESSIONAL PROCEDURES 1–2 (2015); see 1 U.S.C. § 106 (2012).

<sup>58</sup> 1 U.S.C. § 106. Neither the Constitution nor the statute specifies who may or must deliver the bill to the President.

<sup>59</sup> CONG. RESEARCH SERV., RL41217, PRESENTING MEASURES TO THE PRESIDENT FOR APPROVAL: POSSIBLE DELAYS 12 (2010).

<sup>60</sup> *Id.* at 4.

<sup>61</sup> See HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 930 (Charles W. Johnson et al. eds., 2017).

<sup>62</sup> ERIC REDMAN, THE DANCE OF LEGISLATION 258–59 (1973).

<sup>63</sup> *Id.* at 259.

become law.<sup>64</sup> In other words, because Congress, “by their [a]djourment prevent[ed] its [r]eturn”<sup>65</sup> by the President, the bill could not become law. The entire process would have to begin from square one in the next Congress.

Other delays are designed to aid the congressional majorities.<sup>66</sup> Sometimes a bill passed before an adjournment is deliberately delayed, in order to prevent a pocket veto.<sup>67</sup> If Congress delays presentment to ensure that it will be in session on the tenth day after presentment, the President cannot pocket veto the bill. Instead, he faces the normal option of signing, vetoing, or allowing the bill to become law via the passage of time. Other presentment delays are designed to alter the President’s calculus. In 1991, when it seemed clear that President George H.W. Bush would veto an extension of unemployment benefits, presentment was delayed for a little over a week with the hope that public pressure would convince the President to sign the bill and, if necessary, persuade senators to override his expected veto.<sup>68</sup> On another occasion, a bill was likewise delayed because congressional leadership suspected that, while the President might sign the bill later, he was surely going to veto if it was presented right away.<sup>69</sup>

Third, the President may sign a bill into law after a Congress has ended so long as the ten-day deliberation period has not expired. On its last day, the Seventy-First Congress sent 184 bills to President Hoover.<sup>70</sup> He signed one of them on the first day of the Seventy-Second Congress.<sup>71</sup> While some denied that the bill had become a law because they supposed that all lawmaking steps had to occur in a single Congress, the Supreme Court concluded otherwise. In *Edwards v. United States*,<sup>72</sup> the Court stressed that the Constitution expressly grants the President ten days to consider a bill, with nothing indicating that the end of a Congress truncates that period.<sup>73</sup> Hence, the President could sign a bill into law after a Congress ended.

In sum, current practice suggests that pending bills generally become law within something like a two-year and two-week window. All bills must be passed within a single two-year Congress. The perfection pe-

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<sup>64</sup> See *id.*

<sup>65</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>66</sup> See OLESZEK, *supra* note 28, at 365–66 (noting that sometimes controversial bills are presented after Election Day).

<sup>67</sup> See CONG. RESEARCH SERV., *supra* note 59, at 3.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> *Id.* In this case, the President wanted other legislation passed first and was willing to sign the bill if his timing preferences were met. *Id.*

<sup>70</sup> LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 175 (2014).

<sup>71</sup> See *Edwards v. United States*, 286 U.S. 482, 485 (1932).

<sup>72</sup> 286 U.S. 482.

<sup>73</sup> *Id.* at 492–93.

riod is slightly longer than two years because preparing the bills for presentment takes some time, and because the President has ten days after presentment to decide whether to sign the bill.

While existing practices may appear somewhat defined, there are latent uncertainties, where customs do not generate anything like confident answers. Though Congress has only rarely delayed presentment for lengthy periods (recall the singular 176-day gap), is there warrant for concluding that Congress may, by virtue of practice, routinely delay presentment for a year or more, so long as the bill is presented in the same Congress? Recall that if Congress may strategically present a bill, the leadership can select a propitious moment, meant to maximize the chances of approval, much in the way that the British Prime Minister may call snap elections at an opportune time hoping to increase her majority. The Constitution does not directly address this issue of presentment timing. Instead, it merely mentions a sequence. Likewise, the federal statute does not require speedy presentment.<sup>74</sup> It too speaks of a series of actions, but not the period over which they must occur.

Another uncertainty is whether a President can sign into law a bill that was passed before he entered office. The *Edwards* Court inadequately addressed this issue, claiming that an “incoming President” could not approve a bill never presented to him.<sup>75</sup> But this framing assumes away the issue. Imagine that a bill initially delivered to a lame duck was left for the new Chief Executive in an inbox on the Resolute Desk in the Oval Office. This act would seem to be presentment, of a sort, to the new President. Alternatively, picture agents of Congress handing a bill passed in the previous Congress directly to a freshly inaugurated President. That would certainly constitute presentment, making it impossible to avoid the question of whether a new President can sign a bill into law even though Congress passed it during a previous presidency.

Moreover, what happens if a President fails to sign the bill into law and the tenth day after presentment falls on a day in which a new Congress is in session? The logic of *Edwards* — the President has ten days to sign a bill without regard to whether we have transitioned to a new Congress — strongly suggests that the bill has become law. After all, if the President can sign a bill into law after a Congress expires, as *Edwards* held, his prolonged inaction on a bill should be jurigenerative, at least when Congress is in session on the tenth day after presentment.

Relatedly, can a new Congress receive presidential objections to a bill passed by a previous Congress and, just as importantly, may it override the veto? Again, the reasoning of *Edwards* suggests affirmative answers. Congress’s ability to receive a veto and override it does not seem to turn on whether the bill was passed in a previous Congress. If

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<sup>74</sup> See 1 U.S.C. § 106 (2012).

<sup>75</sup> 286 U.S. at 493.



there is no bar to presidential signature of a bill passed in a previous Congress, there would seem to be no bar to a presidential veto of such a bill or a congressional override of such veto.

Finally, we face questions about the timing of override votes. Specifically, may the chambers override weeks, months, or even years after a President returns a bill with his objections?<sup>76</sup> If the chambers can delay, Congress can engage in “strategic overriding,” waiting for the political winds to shift. For instance, the President’s political standing may happen to be at a high point when he returns a bill with objections. In such conditions, Congress might expect (or hope) that his popularity will eventually wane, thereby increasing the chances of an override. This counsels patience with respect to an override attempt. Alternatively, congressional leadership may suppose that a bill’s popularity will wax with time. This too counsels delaying the override vote.

The longest delay in overriding a veto may have occurred during the second term of President Cleveland. On May 19, 1896, the President vetoed a bill granting a pension to “Caroline D. Mowatt.” The override vote in the Senate took place on March 3, 1897, almost ten months later.<sup>77</sup> Whatever the reason for the long delay, the episode certainly raises the possibility of veto overrides after the seating of a new Congress or a new President.

If the leadership of a new Congress could present bills to the President years after they passed or if the chambers could vote to override presidential objections to a bill passed in a previous Congress, the perfection period for statutes would be indefinite rather than a simple two-year, two-week period. Although it seems rather fanciful, if there were no proximity period between presentment and passage, the 120th Congress could present a bill to the President passed by the 116th Congress. Likewise, if there were no proximity period for legislative overrides (that is, if Congress may override any time after a veto), the 116th Congress might override vetoes issued by Presidents long dead, including President Grant’s unchallenged vetoes of several relief bills.<sup>78</sup> Section II.A returns to these issues.

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<sup>76</sup> In the *Pocket Veto Case*, 279 U.S. 655 (1929), the Supreme Court spoke of the Presentment Clause as having as its “object” the “timely return” of a bill by the President and the speedy congressional “reconsideration” of a vetoed bill. *Id.* at 684–85. Hence, that Court seemed to suppose that there was an implicit requirement of prompt reconsideration.

<sup>77</sup> See PRESIDENTIAL VETOES, 1789–1988, S. PUB. NO. 102-12, at 163 (1992).

<sup>78</sup> For a list of vetoed bills through 1988, including a description of all those that Congress “overrode,” “sustained,” or left “unchallenged,” see *id.* If there is no time constraint on overriding, the category of “unchallenged” is actually a list of vetoed bills that Congress might yet override.

### B. Constitutional Amendments

In 1992, a long-dormant proposal erupted. “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”<sup>79</sup> One supposes the text embodied the view that, while legislators occasionally might grant themselves pay raises, these increases should not take effect immediately. By delaying the effective date until after the next election, some members of Congress would be voting behind something of a veil of ignorance<sup>80</sup> as to whether they would ever receive the increased compensation.<sup>81</sup>

But the amendment’s postponement of pay raises was far from the most significant question of timing. The weightier matter was whether We the People could engage in intergenerational lawmaking across two centuries. The amendment was one of the twelve proposed amendments sent by Congress to the states in 1789.<sup>82</sup> Within three years, six states had ratified the amendment.<sup>83</sup> But following the initial burst of activity, the measure stalled and seemingly died. In 1873, almost a century later, Ohio ratified the amendment, apparently to protest a controversial congressional pay raise.<sup>84</sup> After a full century passed, Wyoming ratified in the 1970s, followed by many more in the next decade.<sup>85</sup> By the early 1990s, over three-quarters of the states had ratified, with the vast majority doing so during the last quarter of the twentieth century.<sup>86</sup>

Article V provides:

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

<sup>79</sup> U.S. CONST. amend. XXVII.

<sup>80</sup> For a discussion of the Constitution’s veil of ignorance rules, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

<sup>81</sup> Technically, the amendment delays the effective date of any statute varying Congress’s compensation. Hence, salary decreases (perhaps necessitated by budget retrenchment or deflation) likewise must wait until the election of new members.

It should be noted that as a matter of text the amendment appears to turn on the timing of elections, not the seating of new members. If so, the amendment permits sitting members of Congress to grant themselves extra compensation so long as the law takes effect after an election, say, during a lame duck session. Furthermore, if elections are held in the midst of a Congress (say, to fill vacancies), the amendment seemingly permits pay increases to take effect once those elections occur. Such readings would seem to be in tension with what one supposes is the amendment’s underlying spirit.

<sup>82</sup> RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 240 (2006).

<sup>83</sup> See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 44 n.19 (2004) (listing six states ratifying by 1792).

<sup>84</sup> Bernstein, *supra* note 42, at 534; Spotts, *supra* note 42, at 342 n.41.

<sup>85</sup> Spotts, *supra* note 42, at 342 n.41.

<sup>86</sup> *Id.*

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 . . . .<sup>87</sup>

Under federal law, the Archivist of the United States must publish and certify any amendment that “has been adopted.”<sup>88</sup> Unsure of what to make of the ostensible ratification over the course of two centuries, the Archivist sought legal advice. No other amendment had been ratified over a decade, much less two centuries.<sup>89</sup> In fact, prior amendments had been ratified over a range of one hundred days to four years.<sup>90</sup> Given the average period of about twenty months,<sup>91</sup> it is little wonder that the Archivist was hesitant.

In response to the Archivist’s request for clarification, the Office of Legal Counsel (OLC) in the Department of Justice concluded that Article V lacked a requirement of synchronicity: “Article V contains no time limits for ratification. It provides simply that amendments ‘shall be valid to all Intents and Purposes . . . *when ratified.*’”<sup>92</sup> Shortly after the OLC opined that the Congressional Pay Amendment was part of the Constitution, the House and Senate passed resolutions declaring the same.<sup>93</sup> In so doing, all three political branches (the Executive, the House, and the Senate) had opined that the ancient proposal was now part of the supreme law of the land. The amendment rapidly made its

<sup>87</sup> U.S. CONST. art. V.

<sup>88</sup> 1 U.S.C. § 106b (2012) (“Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Archivist of the United States shall forthwith cause the amendment to be published, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.”).

The executive branch has interpreted this language to suggest that the Archivist must decide whether enough states have ratified and, if so, publish and certify that the amendment has passed. Congressional Pay Amendment, 16 Op. O.L.C. 85, 98–99 (1992). This makes the executive branch the initial decisionmaker regarding the passage of an amendment. But the language perhaps is more naturally read as indicating that some other entity is to decide that an amendment has passed and provide “official notice” of that fact to the Archivist. While states notify the Archivist that they have passed an amendment, no state would ever provide “official notice” of an amendment’s incorporation into the Constitution. If someone is to tell the Archivist that an amendment has passed, one candidate is Congress.

<sup>89</sup> See DAVID C. HUCKABEE, CONG. RESEARCH SERV., 97-922, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 4 (1997).

<sup>90</sup> See *id.* at 5.

<sup>91</sup> See *id.* at 1.

<sup>92</sup> Congressional Pay Amendment, 16 Op. O.L.C. at 88 (quoting U.S. CONST. art. V (emphasis added)).

<sup>93</sup> 138 CONG. REC. 11,869 (1992) (Senate vote); *id.* at 12,051–52 (House vote).

way into printed constitutions, in pamphlet form and otherwise, with little in the way of political dissent.<sup>94</sup>

Hence, when it comes to amendments sent to the state legislatures, practice suggests that while Congress may impose a time constraint on state ratification,<sup>95</sup> the Constitution itself imposes no such limit. Though Congress has sent but one amendment to popular conventions (the Twenty-First Amendment's repeal of the Eighteenth<sup>96</sup>), similar arguments likely would persuade the political branches that the Constitution itself imposes no time limit on the consideration of an amendment by state conventions. In sum, under current practice, once Congress sends proposals to the states, whether channeled to conventions or legislatures, the states may be able to ratify those proposals, and thus amend the Constitution, across centuries.

While scholars have considered when, if ever, an amendment before the states becomes stale,<sup>97</sup> there seems to be absolutely no commentary on when proposed amendments pending within the chambers lapse. Given that Congress has thus far enjoyed a monopoly on formal amendments, the absence of scholarly attention is curious.

In 1789, the House sent seventeen amendments to the Senate.<sup>98</sup> One provided:

The powers delegated by the Constitution to the government of the United States, shall be exercised as therein appropriated, so that the Legislative shall never exercise the powers vested in the Executive or Judicial; nor the Executive the powers vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.<sup>99</sup>

The Senate never adopted the House proposal in 1789 or thereafter. But suppose that modern Presidents routinely waged war without first securing a congressional declaration of it. Suppose further that dozens of contemporary senators believed that this constituted an improper executive exercise of "the powers vested in the Legislative."<sup>100</sup> Imagine that, disturbed by the perceived usurpation, two-thirds of the Senate in

<sup>94</sup> There was some scholarly dissent. See, e.g., Van Alstyne, *supra* note 42, at 15–16 (noting that the Supreme Court had previously opined that Article V contains a synchronicity requirement).

<sup>95</sup> Congress has repeatedly imposed time limits on the ratification of some proposed amendments. See, e.g., U.S. CONST. amend. XX, § 6 (imposing a time frame for ratification); *id.* amend. XXI, § 3 (same).

<sup>96</sup> See U.S. CONST. amend. XXI, § 3 (requiring ratification by popular conventions).

<sup>97</sup> See, e.g., sources cited *supra* note 42.

<sup>98</sup> FOUNDING THE REPUBLIC: A DOCUMENTARY HISTORY 262 (John J. Patrick ed., 1995).

<sup>99</sup> HOUSE RESOLUTION, AUGUST 24, 1789, ARTICLE THE SIXTEENTH, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 1070 (Neil H. Cogan ed., 2d ed. 2015).

<sup>100</sup> *Id.* There would be ample originalist evidence for the conclusion that to wage war is to declare it and for the proposition that the President cannot wage or declare war. See Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 48–51 (2007).

2019 approved the 1789 House proposal as a means of buttressing implied limits on the Executive. Could Congress send it to the states without a new and contemporaneous House vote? If this separation of powers example seems insignificant, consider that the Senate passed a balanced budget amendment in 1982<sup>101</sup> and the House passed its variant in 1995.<sup>102</sup> Imagine the repercussions if either chamber could belatedly endorse its counterpart's version and immediately send it to the states.

In practice, Congress has referred amendments to the states only when both chambers have acted within a single Congress. In other words, each of the twenty-seven formal amendments was generated in processes that lasted less than two years.<sup>103</sup> This practice suggests that if the House approved an amendment at the end of the 115th Congress, say January 2, 2019, and the Senate approved it at the beginning of the 116th Congress, say January 4, 2019, Congress likely would not forward the amendment to the states unless the House repassed it during the 116th Congress.

The first twelve amendments (the Bill of Rights and the Eleventh and Twelfth Amendments) were adopted over single sessions of Congress.<sup>104</sup> Indeed, almost all amendments that are part of our Constitution were passed in the space of a single session. Two amendments are outliers: the Thirteenth and Seventeenth Amendments. The Senate passed the Thirteenth Amendment in the first session of the Thirty-Eighth Congress. Though the proposal failed in the House during the first session,<sup>105</sup> the House passed it during the second session, some eight months after Senate passage.<sup>106</sup> Congress sent the amendment to the states without renewed Senate approval in the second session. Similarly, the Senate passed the Seventeenth Amendment in 1911

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<sup>101</sup> See Joint Resolution Proposing an Amendment to the Constitution Altering Federal Budget Procedures, S.J. Res. 58, 97th Cong. (1982).

<sup>102</sup> See Joint Resolution Proposing a Balanced Budget Amendment to the Constitution of the United States, H.R.J. Res. 1, 104th Cong. (1995).

<sup>103</sup> See 2 JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2010*, at 564 (3d ed. 2010) (supplying dates of House and Senate passage).

<sup>104</sup> *Id.*

<sup>105</sup> See STAFF OF SUBCOMM. ON THE CONSTITUTION OF THE S. COMM. ON THE JUDICIARY, 99TH CONG., *AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY* 27 (Comm. Print 1985) [hereinafter *AMENDMENTS TO THE CONSTITUTION*] (noting Senate passage on April 8, 1864, and initial House failure on June 15, 1864). Senate passage occurred during the first session of the Thirty-Eighth Congress. See SCOT SCHRAUFNAGEL, *HISTORICAL DICTIONARY OF THE U.S. CONGRESS* 253 (2011) (noting session dates for Thirty-Eighth Congress).

<sup>106</sup> See *AMENDMENTS TO THE CONSTITUTION*, *supra* note 105, at 27 (noting subsequent House passage the next year on January 31, 1865). By this date, the Thirty-Eighth Congress was in its second session. See SCHRAUFNAGEL, *supra* note 105, at 253.

during the first session of the Sixty-Second Congress, with House approval delayed until the second session in 1912.<sup>107</sup>

A telltale practice suggests that, at least in the past, members of Congress have believed that proposed amendments must pass both chambers within a single Congress.<sup>108</sup> At the turn of the twentieth century, on five separate occasions (each in a different Congress), the House passed proposals to have senators popularly elected.<sup>109</sup> One supposes that the multiple votes in the House reflected a view that, unless both chambers passed the amendment within one Congress, the amendment could not be sent to the states. More recently, across several Congresses, the House repeatedly passed an amendment authorizing Congress to bar desecration of the American flag.<sup>110</sup> It seems likely that in both cases representatives supposed that both chambers had to vote for the proposal in a single Congress in order to send the amendment to the states. After all, if the House's passage remained valid for a prolonged period, say five or ten years, then there would have been no legal reason to vote anew on the same text every two years.<sup>111</sup>

Beyond this seeming consensus about the generation and ratification of amendments, there are some questions that have received little attention. Recall that two-thirds of the state legislatures may call for a convention that may propose amendments. Do state calls for a constitutional convention become stale with the passage of time?

One respected scholar, Professor Michael Stokes Paulsen, has suggested that just as there is no limit on the time for state ratifications, there likewise is no temporal limit to the validity of state legislative applications for a convention.<sup>112</sup> Paulsen believes that such applications may remain valid forever, waiting for the constitutional threshold to be met. The segment of Article V that addresses calls for constitutional conventions merely notes that “on the Application of the Legislatures of

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<sup>107</sup> See AMENDMENTS TO THE CONSTITUTION, *supra* note 105, at 46 (noting Senate passage on June 12, 1911, and House approval of the Senate version of the resolution on May 13, 1912); SCHRAUFNAGEL, *supra* note 105, at 254 (noting dates for sessions of the Sixty-Second Congress).

<sup>108</sup> As noted earlier, each Congress is said to last two years. For a discussion of this custom, see *supra* section I.A, pp. 1231–36.

<sup>109</sup> See AMENDMENTS TO THE CONSTITUTION, *supra* note 105, at 45–46.

<sup>110</sup> See JOHN LUCKEY, CONG. RESEARCH SERV., 95-709, FLAG PROTECTION: A BRIEF HISTORY AND SUMMARY OF RECENT SUPREME COURT DECISIONS AND PROPOSED CONSTITUTIONAL AMENDMENT 4 (2001).

<sup>111</sup> One might suppose that repassage of proposed amendments by one house merely reflected a collective desire to ensure that the proposal remained in the public eye. But there are less costly ways of keeping an issue front and center, techniques that do not require the vote of the entire chamber and the accompanying floor debate and committee consideration. Moreover, I am unaware of situations where a chamber has passed a proposed amendment twice in one Congress, something that might be just as useful if the leadership wishes to pressure (or shame) the other chamber into acting.

<sup>112</sup> Paulsen, *supra* note 42, at 735.

two thirds of the several States,” Congress shall call a constitutional convention.<sup>113</sup> It never hints that applications become stale after some period.

Practice has yet to yield anything like a definitive answer. In part, there are differences of opinion over how to aggregate existing state applications given that they take rather different forms.<sup>114</sup> While some states have called for a general constitutional convention, one empowered to propose any amendment, other states have sought to limit the types of amendments a convention might propose.<sup>115</sup> Among those states that have attempted to limit a potential convention’s discretion, those curbs have varied, reflecting divergent priorities.<sup>116</sup> Moreover, some states have rescinded their calls for a convention, raising the question of whether rescindment is possible.<sup>117</sup> Given the diverse wording of state convention applications and the number of attempted rescissions, one might conclude that two-thirds of the state legislatures have not jointly demanded the same sort of convention and hence have not collectively called for a constitutional convention. Indeed, one might suppose that this is the dominant view given that, as of when this Article went to press in 2019, Congress had not yet called a convention. Yet one student, writing in 2011, claimed that thirty-four states had outstanding calls for a convention, enough to meet the threshold.<sup>118</sup>

There is also the question of how long a constitutional convention may function after it first convenes. Must such conventions necessarily be transitory bodies, dissolving after a relatively brief meeting? If a constitutional convention lasts but weeks or months, few would question its legitimacy or that of its proposed amendments. After all, the Philadelphia Convention met for almost four months.<sup>119</sup> But suppose a convention proposed amendments, sent them to Congress, and then declined to adjourn *sine die*, choosing instead to periodically meet, generate, and circulate amendments. Its members might prefer to prolong their labors because they believe both that the Constitution ought to be amended more frequently *and* that they may propose amendments years or decades later. This would be less of a runaway convention and more of a run-on convention. The Constitution does not speak to this question of convention longevity.

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<sup>113</sup> U.S. CONST. art. V.

<sup>114</sup> See Paulsen, *supra* note 42, at 736–37 (noting difficulties).

<sup>115</sup> *Id.* at 736.

<sup>116</sup> *Id.*

<sup>117</sup> Paulsen, for one, believes that the states may rescind their calls. *Id.* at 735.

<sup>118</sup> 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).

<sup>119</sup> The Convention met from May 25 to September 17, 1787. See K.M. KOSTYAL, FOUNDING FATHERS: THE FIGHT FOR FREEDOM AND THE BIRTH OF AMERICAN LIBERTY 338 (2014).

To recap, current practices suggest a number of conclusions. First, the states may ratify amendments generated centuries ago. Second, and relatedly, the states may approve amendments across generations, with some ratifying in the wake of a proposal and others approving centuries later. Third, the process of generating amendments has invariably been compressed within short periods, with almost all amendments passed not only in a single Congress but also within a single session. In sum, while ratification may be asynchronous, the process for generating amendments has always been the converse. Beyond these guideposts, there are uncertainties. We cannot say whether, under practice, state calls for a constitutional convention must be made synchronously in order to be efficacious. Nor can we say if practice imposes a maximum length for a constitutional convention meant to generate amendments, in large part because we have never had such a convention since the advent of the Constitution.

### C. *Treaties*

Because the Constitution says rather little about treaty making, it is perhaps the least understood form of federal lawmaking. Early practice was somewhat experimental, with the first President initially consulting with the Senate *prior* to negotiating a treaty. He would either meet with the Senate or seek their advice to written questions.<sup>120</sup> In either case, he was treating them as an executive council. This consultation made a good deal of sense, for President Washington wanted to ensure that his diplomats negotiated a treaty that the Senate would ultimately accept. Absent such prior advice, his diplomats might have spent months negotiating a treaty that had no realistic chance of Senate approval.

In the modern era, Presidents rarely seek advice from the Senate prior to negotiating. The bilateral treaty process begins when the President or his representatives negotiate a treaty with another nation.<sup>121</sup> After signing the treaty (thus signifying a hope and intent to eventually ratify), the President submits it to the Senate for its advice and consent.<sup>122</sup>

The Senate has four options. First, it can reject the treaty. That is, it can vote, fall short of the two-thirds threshold and thereby “reject” the treaty.<sup>123</sup> Second, the Senate may decline to vote, leaving the treaty in limbo.<sup>124</sup> Sometimes the President may prefer indecision to outright

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<sup>120</sup> For a brief discussion of the earlier practice, see PRAKASH, *supra* note 9, at 136–37.

<sup>121</sup> CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 33 (2013).

<sup>122</sup> *Id.*

<sup>123</sup> CONG. RESEARCH SERV., 106TH CONG., *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE* 3 (Comm. Print 2001) [hereinafter *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*].

<sup>124</sup> *Id.*



rejection, likely because the rebuff is less palpable and therefore less mortifying. Third, the Senate can consent to the treaty, as is<sup>125</sup> — the option most gratifying to the President. Finally, the Senate can conditionally consent to a variant of the proposed treaty, meaning that it consents to the ratification of a treaty that the Executive never negotiated.<sup>126</sup>

While Senate consent is a necessary condition for treaty making, it is not sufficient. Rather, such consent yields options for the President. The President decides whether to actually ratify the bilateral treaty to which the Senate gave its consent.<sup>127</sup> For its part, the other nation has choices as well. It too must decide whether to ratify the treaty, either the negotiated version or any modified version that emerges from the Senate. A bilateral treaty is made — goes into force — only once the two nations have expressed their “consent to be bound”<sup>128</sup> by “exchang[ing] instruments of ratification.”<sup>129</sup>

The multilateral treaty-making process shares some similarities. For the Senate and the President, the options remain much the same. The Senate may reject, unconditionally consent, or conditionally consent. It also may defer a vote in order to avoid a presidential humiliation. For his part, the President may accept or refuse whatever treaty emerges from the Senate.

But other facets are more complicated. First, in the multilateral process, there is no single text that all parties approve. Rather, each nation ratifies with its particular conditions and reservations, meaning that although there will be some common obligations, each nation’s set of treaty obligations may be different.<sup>130</sup> Second, neither the Senate nor the President knows which nations will eventually ratify the treaty. When the Senate consents, it may believe that the treaty will be worthless or counterproductive unless certain indispensable nations ratify. Yet it cannot be certain that such nations will ratify. Similarly, when the President ratifies early in the multilateral process, he may not know which states will ultimately join the treaty. Finally, the remainder of the treaty-making process after Senate consent may become quite drawn out. By their terms, many multilateral treaties will not take effect unless certain criteria are met.<sup>131</sup> For instance, a multilateral treaty might take effect only when fifty percent of the initial signatories ratify it.

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> BRADLEY, *supra* note 121, at 33.

<sup>128</sup> *Id.* at 34 (internal quotation marks omitted) (quoting Vienna Convention on the Law of Treaties art. 2(1)(b), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

<sup>129</sup> TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 123, at 12.

<sup>130</sup> *Id.* at 16–17.

<sup>131</sup> *Id.* at 12.

Given these complications, the terminus of a multilateral treaty-making process is rather uncertain. A multilateral treaty goes into force for the United States based on the later of two events, both of which must occur: when the United States deposits a ratification instrument and when the multilateral treaty's particular ratification conditions are satisfied.<sup>132</sup>

For our purposes, we may have to distinguish the treaty submitted to the Senate from the one that the Senate approves. If the treaty that emerges from the Senate is not the one that the President submitted, we essentially have two proposed treaties with different starting points. The negotiated treaty's perfection period commenced when the President submitted it to the Senate. If the Senate gave its consent to a modified treaty, however, that distinct treaty's perfection period began when the Senate consented.

In other words, though we habitually regard the President as the driver of the process, we should recognize that either the President or the Senate may trigger the commencement of the perfection period by proposing a treaty to the other. When the President submits a treaty, the Senate must decide what to do. If the Senate counters with modifications, the President must gauge the merits of the modified treaty. At that point, the treaty he submitted is likely irrelevant, in the same way that any bill the President might propose may be superseded by a related but different bill.

Having identified the relevant markers in the process, we can try to discern whether practice yields a treaty perfection period. Perhaps because the Constitution's terse Treaty Clause says nothing about the period over which treaties can be made, scholarship has largely ignored this issue.<sup>133</sup> Much of the constitutional scholarship has tended to focus on the role the Senate may play in treaty making (for example, must the President consult with the Senate prior to negotiations?) or on the lexical relationship between statutes and treaties. In recent times, scholars have shifted focus to a range of treaty complements and substitutes — sole executive agreements, congressional-executive agreements, and other instruments.<sup>134</sup>

As discussed below, various elements of our current practice suggest that treaties are like constitutional amendments because there seem to

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<sup>132</sup> *Id.* at 9.

<sup>133</sup> Professor Curtis A. Bradley discusses the issue very quickly in his excellent book, noting that ratification may take place years after signing the treaty. See BRADLEY, *supra* note 121, at 35 & n.21.

<sup>134</sup> For a discussion of the change in practice, see Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1239–41 (2008).

be no time constraints on making treaties. In other words, because treaties apparently may be made over years or decades, they seem to lack a perfection period.

Reconsider the Senate's role. The Senate has a rule that once the President submits a treaty, it remains with the Senate until that body consents to its ratification, rejects it, or returns it to the President.<sup>135</sup> This rule evidently leaves open the possibility that the Senate will consent to treaties submitted many years or decades ago. Indeed, the Senate currently has forty-two treaties before it, sixteen of which Presidents submitted before the millennium.<sup>136</sup> One pending treaty dates from 1949 and another from 1962.<sup>137</sup>

Nothing in our practice prevents the Senate from consenting to these archaic treaties. We can infer this from the Senate's treatment of the Genocide Convention.<sup>138</sup> In 1986, the popular press reported that the Senate had "ratified" the Genocide Convention some thirty-seven years after President Truman had submitted it in 1949 and some thirty-five years after the treaty had first gone into force internationally.<sup>139</sup> This was mistaken on two counts. First, as noted, the President (and not the Senate) ratifies treaties. Second, and more to the point, the Senate's advice and consent resolution contained reservations, understandings, and declarations ("RUDs").<sup>140</sup> One reservation was quite significant because it declared that, before any case involving the United States could be submitted to the International Court of Justice (ICJ), the United States would have to specifically consent to the Court's exercise of jurisdiction.<sup>141</sup> This effectively meant that the portion of the Convention that obliged all the parties to submit to the ICJ's jurisdiction would not bind the United States. For purposes of determining the Genocide Convention's perfection period, the clock began once the Senate approved an amended treaty. The preceding thirty-seven years should not matter because the Senate essentially drafted a new treaty, albeit one that looked rather similar to the original.

Yet no one should doubt that the Senate, in 1986, could have consented to the Genocide Convention without any RUDs, meaning that the Senate could have consented to the treaty as originally submitted in

<sup>135</sup> TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 123, at 118–19.

<sup>136</sup> See *Treaties Pending in the Senate*, U.S. DEP'T ST., <https://www.state.gov/s/l/treaty/pending/> [<https://perma.cc/J4SX-W48Z>].

<sup>137</sup> *Id.*

<sup>138</sup> See SENATE REPORT ON THE GENOCIDE CONVENTION, *supra* note 21.

<sup>139</sup> Karen Tumulty, *Senate Ratifies Treaty that Outlaws Genocide*, L.A. TIMES (Feb. 20, 1986), [http://articles.latimes.com/1986-02-20/news/mn-9800\\_1\\_genocide-treaty](http://articles.latimes.com/1986-02-20/news/mn-9800_1_genocide-treaty) [<https://perma.cc/Z25L-SPNY>]; *Genocide Pact in Effect Today*, N.Y. TIMES (Jan. 12, 1951), <https://timesmachine.nytimes.com/timesmachine/1951/01/12/87049527.pdf> [<https://perma.cc/JDJ9-R5LD>].

<sup>140</sup> See 132 CONG. REC. 2349–50 (1986).

<sup>141</sup> *Id.* at 2349.

1949. If the Senate had done that, President Reagan could have signed and deposited an instrument of ratification without further delay. So, while the Senate did not actually ratify President Truman's treaty, it could have consented to the sitting President's ratification of it, thereby continuing the process of making an international contract over a period of nearly forty years.

As noted earlier, Senate consent, by itself, does not make a treaty. The President must ratify the treaty on behalf of the United States. Sometimes ratification occurs almost immediately. For instance, President Washington signed the instrument of ratification for the Treaty of Holston the day after the Senate consented.<sup>142</sup>

In other instances, presidential ratification may be delayed. The Jay Treaty<sup>143</sup> barely passed the Senate by a vote of twenty to ten on June 24, 1795.<sup>144</sup> To secure that two-thirds majority, the Senate advised that Article XII of the treaty be modified, meaning that the President could not ratify the treaty that John Jay had negotiated.<sup>145</sup> Initially, President Washington hesitated to proceed with the modified Jay Treaty because of his doubts about the treaty's merits and the considerable alarm it stirred within the country.<sup>146</sup> On August 18, after considering the arguments of opponents and judging the Jay Treaty to be marginally better than the status quo, President Washington belatedly signed the Senate's version of the treaty.<sup>147</sup>

The Jay Treaty episode signals that Senate *consent* to ratification should not be understood as a Senate *command* to ratify. Rather, as noted earlier, the President retains discretion with respect to ratification. Even when the Senate approves the treaty as submitted, the Senate debate may generate new information about the treaty or shed light on the depth of the opposition, either of which may cause the President to doubt the treaty's merits. Indeed, President Washington likely would have paused to reconsider the merits of the Jay Treaty even had the Senate not modified it because the Senate debate revealed new information about hostility to the treaty and shed light on its shortcomings.

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<sup>142</sup> GEORGE WASHINGTON, PROCLAMATION ON THE TREATY OF HOLSTON (1791), *reprinted in* 9 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 178, 178–79 (Mark A. Mastromarino & Jack D. Warren, Jr., eds., 2000).

<sup>143</sup> The "Jay Treaty" is the colloquial title for the Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America. 4 ANNALS OF CONG. 863 (1795).

<sup>144</sup> *Id.* at 862.

<sup>145</sup> *Id.* at 863.

<sup>146</sup> JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 161–67 (1970).

<sup>147</sup> See HOWARD JONES, CRUCIBLE OF POWER: A HISTORY OF AMERICAN FOREIGN RELATIONS TO 1913, at 41 (2009).

Moreover, when the Senate amends the treaty (as it did with the Jay Treaty), the President may delay final action in order to carefully gauge the advantages of the amended treaty. On the one hand, the Executive may reject the amended treaty, never acting on the Senate's consent.<sup>148</sup> He might do so because he does not approve of the amended treaty or because he doubts that the other nation will agree to it. On the other hand, if the President concludes that the amended treaty is better than the status quo and any substitute that might secure the Senate's approval, he may ratify the amended treaty, as President Washington did with the Jay Treaty.

Finally, raw politics may counsel a delay. Consider the slow process of considering the Keystone Pipeline application.<sup>149</sup> The Obama Administration delayed making a decision for six years because it wanted to avoid angering one of the opposing sides in a dispute over fossil fuels.<sup>150</sup> It belatedly said "no" in 2015.<sup>151</sup> The same sort of calculations that led the Obama Administration to delay a unilateral executive decision on the Pipeline could similarly lead a President to postpone acting on a Senate's consent to ratification. The general point is that even after Senate consent, the President may face political constraints and difficult policy choices, considerations that may counsel a delay in signing an instrument of ratification.

Although one cannot say for certain, it seems as if there is no limit on when, after Senate consent, the President may sign a ratification instrument. In the case of the Genocide Convention, the treaty became an international obligation of the United States in 1988, more than two years after the Senate gave its consent.<sup>152</sup> The delay reflected the Senate's condition that legislation implementing the Convention be enacted before ratification.<sup>153</sup> With the passage of the Genocide

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<sup>148</sup> TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 123, at 12.

<sup>149</sup> The Keystone Pipeline, technically called the Keystone XL (KXL) Project, "is a proposed 36-inch-diameter crude oil pipeline, beginning in Hardisty, Alberta, and extending south to Steele City, Nebraska." *Keystone XL Pipeline Project*, TRANSCANADA, <http://www.keystone-xl.com/> [<https://perma.cc/ZVV9-WPGP>]. It has generated heated debate. See, e.g., Steven Mufson & Juliet Eilperin, *Trump Seeks to Revive Dakota Access, Keystone XL Oil Pipelines*, WASH. POST (Jan. 24 2017), <https://wapo.st/2SKeDIn> [<https://perma.cc/XSU8-2JW5>].

<sup>150</sup> John M. Broder & Dan Frosch, *U.S. Delays Decision on Pipeline Until After Election*, N.Y. TIMES (Nov. 10, 2011), <https://nyti.ms/2zqnDcW> [<https://perma.cc/4KKG-65X7>].

<sup>151</sup> Gregory Korte & David Jackson, *Obama Administration Rejects Keystone Pipeline*, USA TODAY (Nov. 6, 2015, 2:30 PM), <https://www.usatoday.com/story/news/politics/2015/11/06/obama-reject-keystone-pipeline/75293270> [<https://perma.cc/Q7B4-VS34>]. The Trump Administration has tried to revive the pipeline. See Mufson & Eilperin, *supra* note 149.

<sup>152</sup> See PAUL R. BARTROP, A BIOGRAPHICAL ENCYCLOPEDIA OF CONTEMPORARY GENOCIDE: PORTRAITS OF EVIL AND GOOD 267 (2012).

<sup>153</sup> See 132 CONG. REC. 2350-51 (1986).

Convention Implementation Act of 1987,<sup>154</sup> President Reagan could finally deposit an instrument of ratification.<sup>155</sup>

The two-year delay could have been much longer. For instance, had Congress not passed an implementation act until 2017, the United States might not have joined the Genocide Convention for decades after the Senate granted its qualified consent. In any event, the point is that under current practice the Senate's consent to ratification apparently does not quickly expire and may not expire at all. Put another way, there may be no proximity period between Senate consent and presidential ratification.

There is the related complication of when the other nation will ratify. This issue is crucial because the treaty is not made until the nations exchange instruments of ratification. With a bilateral treaty, the time might not ordinarily exceed a few months, even when the Senate has amended the treaty. The Jay Treaty, as amended by the Senate, actually went into force when the two nations exchanged instruments of ratification on October 28, 1795,<sup>156</sup> a few months after President Washington signed it on August 18, 1795.<sup>157</sup> But if Presidents are willing to wait indefinitely for the other nation's ratification,<sup>158</sup> another nation might delay the making of supreme law for quite a spell. For instance, had Great Britain balked at the changes to the Jay Treaty, it might have delayed the making of the treaty for many more months.

A more striking example is the pending Bilateral Investment Treaty with Russia.<sup>159</sup> The Senate received the treaty in July 1992 and quickly gave its consent.<sup>160</sup> That very year President George H.W. Bush signed the instrument of ratification.<sup>161</sup> Yet the treaty remains in limbo because Russia has yet to ratify it, more than twenty-five years after it was first

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<sup>154</sup> Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§ 1091-93 (2012)).

<sup>155</sup> See BARTROP, *supra* note 152, at 267.

<sup>156</sup> See Letter from George Washington to the Secretary of State (July 29, 1795), in 34 THE WRITINGS OF GEORGE WASHINGTON 254, 255 n.68 (John C. Fitzpatrick ed., 1940).

<sup>157</sup> JONES, *supra* note 147, at 41.

<sup>158</sup> International law appears to assume that nations may withdraw instruments of ratification prior to a treaty entering into force. ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 110 (3d ed. 2013). Because the treaty is not law merely because the President has deposited an instrument of ratification, it would seem that the President does no violence to the Constitution should he withdraw an instrument of ratification. His power to take this measure on the part of the United States rests on his implied power to *not* make treaties, which derives from his exclusive power to make treaties. When the President concludes that the proposed treaty is no longer in the interests of the nation, he may terminate the nation's participation in that treaty-making process.

<sup>159</sup> *United States Bilateral Investment Treaties*, U.S. DEP'T ST., <https://www.state.gov/e/eb/afd/bit/117402.htm> [<https://perma.cc/TNC2-HJ64>] (listing the treaty as not yet in force).

<sup>160</sup> 138 CONG. REC. 22,861 (1992); CHRISTIAN L. WIKTOR, TREATIES SUBMITTED TO THE UNITED STATES SENATE: LEGISLATIVE HISTORY, 1989-2004, at 93-94 (2006).

<sup>161</sup> See WIKTOR, *supra* note 160, at 94.

negotiated.<sup>162</sup> The Executive has said or done nothing suggesting that the Senate's consent has gone stale. Rather, the treaty apparently could be made as soon as Russia ratifies.

With respect to multilateral treaties, the period between American ratification and the ultimate consummation of the treaty may last years or decades. As noted earlier, multilateral treaties often provide that they will not go into force until certain conditions are met.<sup>163</sup> Frequently, a multilateral treaty requires that a sufficient number of signatories deposit instruments of ratification.<sup>164</sup> That threshold varies by treaty, with some treaties requiring a rather high threshold,<sup>165</sup> presumably because negotiators supposed that the treaty should take effect only if most of the signatories actually ratify. Other multilateral treaties state that they will not go into force unless specified nations ratify the treaty.<sup>166</sup> For instance, the Comprehensive Nuclear Test Ban Treaty goes into force only if all the so-called Annex 2 states deposit instruments of ratification.<sup>167</sup> In either scenario, a nation's deposit of the instruments of ratification is a necessary, but not sufficient, condition for the treaty's going into force for that nation. For all these reasons, a multilateral treaty may not go into force until years or decades after the United States deposits its instrument of ratification.

When we consider all the potential causes of delay, we can better perceive that the perfection period of a treaty is apparently indefinite. The Senate may take decades to consent to a treaty. In the case of bilateral treaties, years may separate Senate consent from the exchange of ratification instruments. For multilateral treaties, decades may elapse between United States ratification and the treaty going into force, especially if the treaty requires a high ratification threshold or insists that certain nations ratify.

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Discerning current practices with respect to perfection and proximity periods is difficult because we must infer (or speculate about) the existence of limitations when the participants in federal lawmaking processes often pay rather little attention to questions of timing. As best as can

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<sup>162</sup> Although Wiktor says the Russians ratified the same day the President did, *see id.*, the State Department indicates that the Russians never ratified. *See United States Bilateral Investment Treaties, supra* note 159, at n.5 ("Entry into force pending other Party's domestic ratification process and exchange of instruments of ratification by both Parties").

<sup>163</sup> *See* U.N. OFFICE OF LEGAL AFFAIRS, FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK 58 (2003).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 59–60.

<sup>167</sup> *See id.* at 60. Annex 2 states were those forty-four nations that had nuclear reactors and had participated in the negotiations. *Id.*

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be discerned from practice, perfection periods vary across the three most familiar instruments of federal lawmaking.

Statutes apparently must be passed within a two-year Congress, with some uncertain additional time for signature, veto, and override. Failure to complete the process of bicameral passage within a Congress requires a retracing of the required steps. In the case of amendments, there does not seem to be a perfection period, as states ratified the Twenty-Seventh Amendment over centuries. For treaties, it likewise seems as if there is no finite perfection period. Rather the process may stretch out across generations.

The existence of proximity periods is a bit harder to perceive. For statutes, presidential consideration after presentment lasts ten days, but only because the Constitution expressly requires as much. As for bicameral passage, there does not seem to be a proximity period, save for the overarching constraint that both chambers pass a bill in a single Congress. Regarding presentment to the President after bicameral passage and congressional override after a veto, the practices are less well defined and hence it is hard to say whether there is a proximity period for either. For amendments, there seems to be a proximity period. In particular, all constitutional amendments have emerged from a single Congress, with most emerging from a single session. State ratifications, however, need not be proximate to each other, much less to an amendment's emergence from Congress. For treaties, nothing in existing practice seems to tether the treaty-making steps — submission to the Senate, Senate consent, presidential ratification, and the making of the final treaty — closely to each other, suggesting that treaties lack proximity periods.

## II. IMPLIED PERFECTION AND PROXIMITY PERIODS

So much for modern practice. Does the Constitution implicitly establish perfection and proximity periods for the three species of federal law? At some points in our history, our federal institutions seemed to think so. But their former views are no longer as strongly reflected in prevailing practices. This constitutional drift away from previous conceptions raises the question of whether earlier eras were correct and the modern practices are mistaken. Alternatively, one might suppose that earlier generations were wrong. This conclusion might imply that modern practices reflect the Constitution's true meaning. Or it might suggest that the Constitution contains no implicit rules regarding synchronicity and that, while we might have various practices, some of which have changed over time, the Constitution does not command them or any other set we might envision. In other words, perhaps the Constitution leaves questions about synchronicity to the caprices of politicians.



Despite the absence of any express perfection or proximity periods (save for presidential consideration of bills), I believe the Constitution implicitly limits the continuing viability of bills, proposed amendments, and proposed treaties. But before trying to make specific cases, let me sketch out the plausibility of implied rules regulating the making of federal laws.

There are a number of unspoken rules that apply to lawmaking. Consider voting within Congress. The Constitution specifies that each senator has one vote,<sup>168</sup> thereby precluding any sense that each state's two senators must act as a unit and cast one "state" vote.<sup>169</sup> Yet, there is no similar rule providing that each representative gets one vote.<sup>170</sup> Despite its authority to create internal rules of procedure, I rather doubt that the House may grant some representatives two or more votes or, alternatively, provide that others may cast only a fraction of a vote. Further, there is also an implied rule that each legislator casts her single vote in her chamber: a senator cannot cast her single vote in the House, even if she wishes to do so. Finally, there is the related rule that outsiders do not get to cast votes in either chamber. Those not elected to serve in the House and Senate may not cast votes in either chamber even though they may, through their words and deeds, greatly influence the proceedings in both.

Here is another rule, widely acknowledged and followed, but without any textual warrant — majority vote within the chambers. Whenever the Constitution does not specify some other voting rule, it implicitly requires a simple majority. So, while the Senate must approve treaties by a two-thirds majority because the Constitution says as much,<sup>171</sup> approval of nominees is by simple majority precisely because the Constitution does not depart from the implicit default rule.<sup>172</sup> Whether majority rule in Congress is a floor *and* a ceiling is the subject of much debate.<sup>173</sup> But I think majority rule is at least a floor, meaning

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<sup>168</sup> U.S. CONST. art. I, § 3, cl. 1.

<sup>169</sup> Under the Articles of Confederation, though each state could send up to seven delegates to the Continental Congress, a state's delegates could collectively cast but one state vote. See Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797, 804 (2018).

<sup>170</sup> The rule about roll calls does not provide that each legislator get one vote. Rather, it simply says there shall be a recorded vote should one-fifth of the members request one. U.S. CONST. art. I, § 5, cl. 3.

<sup>171</sup> *Id.* art. II, § 2, cl. 2.

<sup>172</sup> The Vice President's power to break Senate ties assumes that majority rule is the norm in the Senate. See *id.* art. I, § 3, cl. 4 (noting that the Vice President may only vote when the vote is equally divided). There is no similar rule signaling that House action requires a majority. And there certainly is no express rule for either chamber.

<sup>173</sup> See John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 484, 490 n.38 (1995) (taking the position that majority rule is a default rule and is neither a floor nor a ceiling, meaning supermajority and submajority rules are possible).

that neither chamber can allow a submajority to pass legislation to be presented to the President. Submajorities are constitutionally authorized to take certain steps (for example, demand a roll call vote, adjourn, and compel a quorum<sup>174</sup>) and may be authorized by internal rule to do other things, like mark up bills and investigate public officers.<sup>175</sup> But neither Congress nor the chambers may authorize submajorities to pass legislation on behalf of a chamber.<sup>176</sup> Nor could either chamber punish its members by a submajority.<sup>177</sup> Finally, the House cannot, by submajority, impeach officers of the United States.

A related rule is the implied requirement of a quorum to enact legislation. The Constitution provides that “a Majority of each [chamber’s legislators] shall constitute a Quorum to do Business.”<sup>178</sup> This rule does not expressly state that without a quorum, no business shall be done. But that requirement is surely implicit. For instance, the House cannot pass legislation unless there is both a quorum and a majority that favors the bill. A majority without a quorum generally cannot take action in the same way that a quorum-less body generally cannot take action even if, within that group, there is a solid majority that wishes to act.<sup>179</sup>

The basic intuition is that the Constitution’s references to certain lawmaking procedures should not be read as merely establishing a “checklist” approach. Rather, each authorization of federal lawmaking imposes rules, including requirements of synchronicity. These rules, both express and implied, help reinforce the underlying values of the forms of lawmaking and thereby justify the exercise of governmental power.

What about the general plausibility of a requirement of synchronicity? Consider an uncomplicated form of lawmaking, one hardly analogous to any process found in the Constitution. Imagine a city charter that specifies that a city council composed of five individuals, each serving one-year terms and term limited, may pass city ordinances by ordinary majority votes. If the council votes in the space of seconds or minutes to enact an ordinance by a vote of three to two, we can say,

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<sup>174</sup> U.S. CONST. art. I, § 5, cls. 1, 3.

<sup>175</sup> While much of the work of Congress is done in committees and thus conducted by submajorities, these committees are never given authority to pass legislation for a chamber, override presidential vetoes, consent to treaties and nominees, or propose constitutional amendments.

<sup>176</sup> If Congress cannot authorize a subset of its legislators to legislate, *see* *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991) (“Congress may not delegate the power to legislate to its own agents or to its own Members.”), it seems to follow that neither chamber may authorize a subset to act for the entire chamber in the process of bicameralism and presentment.

<sup>177</sup> U.S. CONST. art I, § 5, cl. 2. Though the Constitution specifies that a two-thirds supermajority is necessary to expel a representative, it does not specify the threshold for other, lesser sanctions. *Id.*

<sup>178</sup> *Id.* cl. 1.

<sup>179</sup> These rules are not always followed. *See* Thomas Beck, Opinion, *Congress Ought to at Least Show Up to Vote*, WALL ST. J. (Apr. 23, 2013, 7:01 PM), <https://on.wsj.com/2PadZ9o> [<https://perma.cc/VB66-Q4XG>] (describing how chambers pass legislation without a quorum).

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with an extremely high degree of confidence, that a majority favors the ordinance. The council will have spoken.

But what if, instead, the council leaves voting open, not for minutes but for years. In the first year, one member votes “yes.” The other four abstain. In the second year, a new councilmember votes “yes.” Again, the others abstain. In the third year, a newly elected councilmember votes “yes,” and the others abstain. In year three, one could say, accurately, that three council members have voted “yes.” We could also declare that no one voted against the proposal. Finally one might further insist that, because three “yes” votes have been cast, a majority favors the bill and therefore it has passed.

This last assertion is surely misguided and misses the point of the exercise. In fact, out of fifteen members who have served on the council, only three have favored the bill over three years. Twelve have not. To say that there is a majority in this context is to wholly misunderstand what is transpiring and to misconstrue the reason for requiring a majority vote. In truth, there never has been a majority because in no single period, however loosely defined, do we observe a majority of the council favoring the proposal. Another way of putting the point is that, when the city charter specifies majority rule on the council, it envisages a majority situated in a particular period, acting synchronously. It presupposes a majority vote occurring in a relatively brief moment of time, not one that stretches out over years.

The same sort of argument applies for each species of federal law-making. The Presentment Clause does not establish a list of disjointed actions that may occur without regard to order or timing. Even though there is nothing in the Constitution that expressly bars pre-passage signing of a bill, the President cannot meaningfully sign a bill before the chambers pass it. If a President were to try to sign a bill not yet presented to him, that action would be null and void, meaning that after any eventual bicameral passage of that bill, it would be as if the President had not yet signed it. Likewise, the chambers cannot override a President’s objections to a bill before the President returns a bill with his objections, even though, again, nothing in the Presentment Clause expressly bars such pre-signing overrides by Congress.<sup>180</sup>

Similarly, the Presentment Clause assumes a measure of synchronicity. The clause supposes that a majority in each chamber ought to favor

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<sup>180</sup> Even when there is a two-thirds supermajority in both chambers, Congress must nonetheless present a bill to the President for his signature or veto. Congress simply cannot avoid presentment. U.S. CONST. art. I, § 7, cl. 2. Some presidential objections to a bill may resonate with legislators who previously voted for the bill. In such cases, even though a bill formerly enjoyed a two-thirds supermajority in both chambers, the President’s objections may cause some legislators to vote to sustain the presidential veto and perhaps cause the override attempt to fail. The overarching point is that the preferences of legislatures do not invariably remain static in the wake of the veto and that the sequence of the Constitution must be followed even if the final outcome seems obvious to all.

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a bill in reasonable proximity to each other. The House, representing the people of the United States, and the Senate, representing the states, may *jointly* act to make federal law. We are far less assured of such concurrence if representatives vote on a bill over the course of a decade and if the House decrees that while all “nays” can be switched to “ayes,” any “aye” remains forever an “aye.” Likewise, we are less assured of meaningful joint approval if the House acts in 2019 and the Senate acts a decade (or century) later. After all, in 2029 (or 2119) there may no longer be a House majority that favors the bill. Similarly, we are far less confident of joint approval if the House and Senate pass a bill in the same year but congressional leadership delays presentment to the President for five or ten years. Indeed, years after passage neither chamber may continue to have a majority that favors the bill. The basic point is that, as we stretch out the period of statute making, we make it far less likely that the three actors — the House, the Senate, and the President — (or in cases of override, the two chambers) favor the bill *at the same time*.

Parallel inferences and conclusions are appropriate for constitutional amendments. The practice of relatively synchronous proposal of amendments to the states reflects the sound intuition that Article V does not establish a set of disconnected criteria. Rather, we want both chambers to propose an amendment in relative proximity because that reflects the probability that both chambers simultaneously favor a proposed amendment. The other portion of practice — the exceptionally asynchronous ratification of proposed amendments — is at war with this notion that the amendment should be considered law because the relevant actors agreed to it. When we concatenate state ratifications from across centuries, it is less likely that a supermajority of states favor the constitutional amendment at any particular time. In fact, it may be that only one state — the last state to ratify — favors the amendment at the end of the process. Even so, current practice suggests that the amendment has been adopted once the thirty-eighth state has ratified, *even if every other state is now wholly opposed to the amendment*. This seems contrary to the implied features of Article V.

Finally, we also should regard the treaty-making process as containing a requirement of synchronicity. When the Senate consents to the making of a treaty, it does so in a particular domestic and international context. For instance, Senate consent to an alliance, granted in 1819, is an impermissible basis for the 2019 presidential ratification of the alliance. Likewise, a President cannot make a treaty with Russia based on a Senate consent resolution from over fifty years ago. In either case, the Senate’s consent has grown stale.

*A. Statutes*

Existing practice has much to commend it. The period of two years or so allows some flexibility in the manifestation of majorities across two chambers. At the same time, that practice does require something in the way of synchronicity. If the Senate acts to pass a bill within two years after House passage, during a period where the membership in both chambers is relatively stable, there is reason to suppose that when the Senate acts, a House majority continues to favor the bill.

And yet one might think that the Constitution's text does not require the conventional view. Nothing in the Presentment Clause specifies that both chambers must approve a bill in a single Congress. While the clause provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States,"<sup>181</sup> it never mentions a time constraint on bicameral passage. Those inclined to read the Constitution as ceding tremendous lawmaking discretion to Congress might even say that, because the Constitution says nothing about when a bill must pass, it implicitly grants Congress *carte blanche* authority to engage in asynchronous lawmaking.<sup>182</sup>

Similarly, that all bills must be presented to the President prior to becoming law says nothing about when the chambers must present. As its popular title suggests, the Presentment Clause is meant to ensure that bills are sent to the President prior to becoming law. Arguably, the clause does not address when the chambers must present a bill. Because without presentment there can be no federal statute, the Framers may have thought that their system fairly ensured presentment. Hence they may have supposed there was no need to regulate when presentment must occur.

Finally, there is nothing in the text that specifies when, after receipt of a veto, the chambers must override the President's objections. One might assume that the chambers will try to override soon after a veto's receipt, on the theory that legislative hostility to executive "interference" might be at its height in the wake of a veto and thereby maximize the number of legislators willing to override. Yet cooler heads might suggest that sometimes waiting for a more propitious moment might better secure the votes needed to override. Indeed, if one is certain that there are insufficient votes to override a veto, delaying an override vote actually increases the chances of overriding.

Despite the absence of any express rule about statutory synchronicity, I believe the Constitution imposes such a rule. As noted earlier, a number of implicit rules regulate or constrain the lawmaking processes:

<sup>181</sup> *Id.*; *see id.* cl. 3.

<sup>182</sup> *See* Tillman, *supra* note 42 (claiming that the Constitution permits asynchronous congressional lawmaking).

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one representative, one vote; members of one chamber cannot vote in the other; outsiders cannot vote in Congress; quorum-less chambers cannot pass legislation; a bare majority may pass legislation. These and other implied rules reign over federal lawmaking.

I think the Constitution likewise imposes an implicit perfection period for statutes. The Constitution contains an unspoken rule that all lawmaking steps necessary to make a statute — bicameral passage, presentment, and the final stage (presidential signature, the efflux of ten days, or veto and override) — must occur within a single congressional session. If a bill does not become law during a single session of Congress, whatever lawmaking steps that have occurred (for example, passage, presentment, and the like) are for naught, for the end of the session wipes the legislative slate clean. If Congress wishes to enact a bill that did not become law in a prior session because all the requisite steps were not completed within that session, the chambers must begin from square one in an ensuing session.

This “session rule” turns on the eighteenth-century conception of “session,” a term that the Constitution uses but does not define. The original Constitution signaled that Congress would meet in a “Session”<sup>183</sup> and required that there be at least one meeting of Congress every year.<sup>184</sup> The Twentieth Amendment requires that Congress meet on January 3 of every year unless Congress varies this rule by law.<sup>185</sup> Certain express rules are tied to sessions. During a session, members of Congress have certain legislative immunities.<sup>186</sup> Within a session, a chamber cannot adjourn for more than three days without the other chamber’s concurrence.<sup>187</sup> Without the Senate’s consent, the President may appoint individuals to vacant offices during recesses of Congress, and those appointments expire at the end of the Senate’s next session.<sup>188</sup> Beyond these rules, the Constitution does not attach any obvious consequences to sessions. Nonetheless, as argued below, there are implicit consequences of a session, ones known to the Founders.

I infer the session rule from the now wholly lost understanding of a legislative session *and* from early practice. For the first half-century under the Constitution, the political branches acted on the belief that bills that failed to become law by the end of a congressional session were defunct, meaning that the legislative process had to begin anew in a fresh session.

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<sup>183</sup> U.S. CONST. art. I, § 5, cl. 4.

<sup>184</sup> *Id.* § 4, cl. 2.

<sup>185</sup> *Id.* amend. XX, § 2.

<sup>186</sup> *Id.* art. I, § 6, cl. 1.

<sup>187</sup> *Id.* § 5, cl. 4.

<sup>188</sup> *Id.* art. II, § 2, cl. 3.

This deep-rooted and, to modern eyes, curious practice reflected the British rule relating to sessions. Under that system, bills that did not become law within a session of Parliament had to be repassed by both chambers and signed by the sovereign in a new session if they were to become law.<sup>189</sup> As William Blackstone put it, the “end to the session” signified that bills “not perfected [into law], must be resumed *de novo* (anew) (if at all) in a subsequent session.”<sup>190</sup> The Crown could exploit this rule by proroguing (terminating) a session, thereby forcing Parliament to start anew in the next session.<sup>191</sup> This meant that the Crown could not only veto bills but also effectively force Parliament to retrace legislative steps that had occurred in the previous session.

For our purposes, the key point is Blackstone’s discussion of the *consequence* of the end of a session. Prorogation was but one means of ending a session. Another means of ending a session was via dissolution of Parliament. Either way, any bill not perfected in the terminated session had to begin anew in the next session, and any completed lawmaking steps would have to be repeated.

One cannot identify with certainty the rationale undergirding this parliamentary practice. But perhaps the justification was that the chambers had to agree to a bill in proximity to each other if they were to present it to British monarchs. This idea dovetails with the intuition that majoritarian lawmaking processes require proof or display of a requisite majority, even when those processes occur across two legislative chambers. In the language of enactment clauses, the Lords and Commons have not collectively “advi[sed] and consent[ed]” to the monarch’s enactment of a bill if they have given their advice and consent in different periods.<sup>192</sup> Limiting lawmaking to a session helps ensure synchronous approval by the two chambers.

Because the Constitution speaks of “session,” it incorporates the prevailing conception of that word in much the way that its use of the word “pardon” incorporates the prevailing understanding of that word. Even though the Pardon Clause says nothing about making someone a “new man” and “innocent” in the eyes of the law, a “pardon” under the Federal Constitution has that effect because that was the prevailing sense of the word at the Founding.<sup>193</sup> Similarly, “session” came freighted with the

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<sup>189</sup> See 1 WILLIAM R. ANSON, *THE LAW AND CUSTOM OF THE CONSTITUTION* 71 (4th ed. 1909); EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS* 27 (London, M. Flesher 1644).

<sup>190</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*187.

<sup>191</sup> *Id.*

<sup>192</sup> 2 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 440 n.3 (3d ed. 1923) (noting that the Crown makes laws “by and with the advice and consent” of the two chambers of Parliament).

<sup>193</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380–81 (1866).

notion that the end of session terminated all pending (and therefore unperfected) bills. By explicitly introducing the concept of legislative sessions, the Constitution imposed a limited period for the perfection of bills and thereby provided that any bill not perfected in a session had to be taken up *de novo* in a succeeding session.

Indeed, many of the Constitution's early implementers concluded that it had incorporated the British sense of that word with its attendant consequences. Members of the House considered this very point in 1790.<sup>194</sup> Representatives were debating a seemingly esoteric point about the title of a journal entry and its use of "[s]econd [s]ession of the First Congress."<sup>195</sup> Some wanted this reference to a "session" deleted.<sup>196</sup> Others protested that the House was, in fact, in its "second session," and eliminating the reference would cause confusion.<sup>197</sup> In the course of this debate, members claimed that, with the end of the first session, all pending business had to begin *de novo* in the second.<sup>198</sup> As one member put it, "all the proceedings of the Legislature were to cease at [the session's] expiration, and to commence anew after the recess, whether the body consisted of the same members or otherwise."<sup>199</sup> Others disagreed, claiming that, based on some state practices, pending business lasted as long as the term of office for legislators, which was beyond any single session.<sup>200</sup>

After the House unilaterally (but implicitly) decided that it would proceed *de novo* in a new session, the Senate proposed a joint committee on the matter<sup>201</sup> presumably because, without a joint rule, the chambers might adopt different approaches, a variance that could prove troublesome. For instance, the House might pass a bill in the first session and the Senate in the second, with the Senate insisting the bill had properly passed both chambers and was ready for presentment and the House balking.<sup>202</sup> The joint committee on "unfinished business" concluded that both chambers had to begin *de novo* at the beginning of each session.<sup>203</sup> Each chamber adopted the recommendation.<sup>204</sup> Because both policy and constitutional reasons were advanced for the *de novo* rule, it

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<sup>194</sup> See 1 ANNALS OF CONG. 1041–42, 1047–51, 1056, 1074–77 (1790) (Joseph Gales ed., 1834).

<sup>195</sup> *Id.* at 1041.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 1041–42.

<sup>198</sup> *Id.* at 1041, 1048–49.

<sup>199</sup> *Id.* at 1051.

<sup>200</sup> *Id.* at 1048, 1056.

<sup>201</sup> *Id.* at 1073.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 1077.

<sup>204</sup> *Id.* at 1078, 1080.



is impossible to say with absolute certainty the basis of the judgment.<sup>205</sup> But the better view was that the session rule was constitutionally obligatory. Again, by adopting the word “session,” the Constitution had implicitly provided that all laws not perfected by the end of session had to start anew in a succeeding session.

President Washington certainly believed this, as did his successors. At the end of every congressional session, Presidents would journey to Congress.<sup>206</sup> The end of the session was often frenzied as pending bills were rushed through both chambers. A dozen might be passed on the last one or two days.<sup>207</sup> Occupying a special presidential office near the chambers of Congress, Presidents would pore over these bills, with their trusted advisors beside them.<sup>208</sup> Chief Executives made this trek at the end of every session because they thought that they would not be able to conduct an unhurried or leisurely consideration of the bills passed at the close of the session. They went to Congress to shorten the delivery period and thereby increase the time for perusal and deliberation.

But even ensconcing themselves within Congress was insufficient for ideal consideration. Presidents faced tremendous time pressure, particularly with bills presented to them on the last day of a session, of which there were typically many. For instance, in the third session of the First Congress, President Washington signed fourteen bills on the last day of the session,<sup>209</sup> thirteen of which Congress presented on that last day.<sup>210</sup> He shouldered this workload over one day because he had to act on the bills while Congress was still in session.

As a result, Chief Executives complained of the rush of business and the dearth of time. The first President lamented that notwithstanding the Constitution, he often did not have ten days to consider bills.<sup>211</sup> On the last day of his second term, before he left the public stage for what seemed the final time, President Washington wrote to a friend that “all the Acts of the Session[,] except two or three very unimportant Bills, have been presented to me within the last four days.”<sup>212</sup> He reflected that this fact “must astonish *others* who know that the Constitution allows the President ten days to deliberate on *each Bill*.”<sup>213</sup> In fact, he

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<sup>205</sup> For instance, some say that judgment was made for political reasons. See CHARLENE BANGS BICKFORD & KENNETH R. BOWLING, *BIRTH OF THE NATION: THE FIRST FEDERAL CONGRESS, 1789-1791*, at 57-58 (1989).

<sup>206</sup> PRAKASH, *supra* note 9, at 248-49.

<sup>207</sup> *Id.* at 249.

<sup>208</sup> *Id.* at 248-49.

<sup>209</sup> See 1 Stat. xxi (1791) (listing fourteen statutes signed on March 3, 1791).

<sup>210</sup> See H.R. JOURNAL, 1st Cong., 3d Sess. 407-08 (1791) (listing thirteen statutes presented on March 3, 1791).

<sup>211</sup> PRAKASH, *supra* note 9, at 248.

<sup>212</sup> Letter from George Washington to Jonathan Trumbull (Mar. 3, 1797), in 35 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 156, at 411, 411.

<sup>213</sup> *Id.* at 411-12.

was “allowed by the Legislature less than half that time to consider *all* the business of the Session; and in some instances, scarcely an hour to revolve the most important.”<sup>214</sup> Writing in his *Commentaries on American Law*, Chancellor James Kent made the exact same point about the President’s predicament at the end of a session.<sup>215</sup>

Because a session’s end terminated *all unperfected laws*, there was no ten-day consideration period for bills presented to the President in the waning days of a session. He had only whatever time remained in the session. If a bill was given to the President within minutes of the end of a session, he only had minutes to consider and sign it. If he did nothing — if he inadvertently or purposely failed to sign the bill within the session — that bill could not become law, by his signature or otherwise. Or, rather, it could become law only if the lawmaking process began anew in a subsequent session. President Washington’s practice and his complaint perfectly reflected the prevailing rule that termination of the session meant termination of all pending bills. Like Congress, President Washington understood the consequences of an end of the session: every bill that did not become law by its end could no longer be made law.

The political branches were not alone in subscribing to this prevailing conception of a session. The Massachusetts Supreme Judicial Court found a similar implied constraint in the Massachusetts Constitution. In a 1791 advisory opinion delivered to the Massachusetts Senate, the court declared that bills that did not become law by the end of a session could not become law. As the court put it, “a bill or resolve, after the session is ended, cannot acquire the force of law.”<sup>216</sup> First, this meant that the governor could not sign bills into law after a session ended. Second, it meant that the efflux of time was irrelevant. Under the Massachusetts Constitution, if the governor did not return a bill with objections within five days, it automatically became law.<sup>217</sup> Yet whether or not the governor returned a bill with his objections within five days did not matter once the legislature’s session ended. In sum, a bill could not become law after the termination of the session, whether by signature, veto and override, or the passage of time.

Features of early practice that constrained federal statute making are worth mentioning. The chambers of Congress typically would have one

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<sup>214</sup> *Id.* at 412.

<sup>215</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 225 (New York, O. Halsted 1826) (noting that the President had fewer than ten days at the end of a session to consider bills).

<sup>216</sup> Opinion of the Justices of the Supreme Judicial Court on Certain Questions Referred to Them by the Senate of Massachusetts, in the Year 1791 (May 9, 1791), reprinted in 3 DUDLEY ATKINS TYNG, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 567, 568 (Boston, Little, Brown & Co. 1865) (emphasis omitted).

<sup>217</sup> MASS. CONST. of 1780, pt. 2, ch. 1, § 1, art. II.

or two sessions a year, with the Senate sometimes holding an extra “special session” to consider nominees to office.<sup>218</sup> Ordinary sessions might last for a little more than a month or as long as five months.<sup>219</sup> Long sessions conducted to the passage of more laws. Short sessions made it more difficult to complete all the requisite lawmaking steps.

With the passage of time came the erosion of this historical understanding regarding the consequence of the end of a session. Gradually, dissenters surfaced, likely because they did not grasp that individual sessions were meaningful. During the Administration of President Monroe, some members of the cabinet urged the President to sign a bill into law *after* a congressional session had expired.<sup>220</sup> President Monroe refused, consistent with the traditional understanding of “session.”<sup>221</sup> He seemed to believe that the bill could no longer become law absent renewed bicameral passage in a new session.<sup>222</sup>

Eventually the dissenters prevailed, leading to reform. In 1848, the chambers adopted a joint rule that, within a single Congress, bills could be taken up as they were left off in a previous session.<sup>223</sup> Essentially this was a decision to move from the session rule to a Congress rule, meaning that one chamber could act upon bills passed in the other chamber without regard to sessions so long as all action occurred in one Congress.

But there remained other questions that Congress’s rule did not address. First, could the President sign a bill after a Congress had adjourned *sine die*? President Lincoln, a constitutional innovator in so many ways, was the first to sign a bill into law after an adjournment *sine die*.<sup>224</sup> He signed a bill passed in the waning days of the Thirty-Seventh Congress in the early days of the Thirty-Eighth Congress.<sup>225</sup> But his move drew a severe protest from legislators who denied that the bill was law.<sup>226</sup> His successor, President Andrew Johnson, adopted a narrow approach, denying that he could sign a bill into law while

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<sup>218</sup> See generally *Dates of Sessions of the Congress*, *supra* note 35 (listing session dates for all Congresses).

<sup>219</sup> *Id.*

<sup>220</sup> See 6 MEMOIRS OF JOHN QUINCY ADAMS 379 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

<sup>221</sup> *Id.* at 380.

<sup>222</sup> *Id.* at 381.

<sup>223</sup> See CONG. GLOBE, 30th Cong., 1st Sess. 994 (1848) (“After six days from the commencement of a second or subsequent session of a Congress, all bills, resolutions, or reports which originate in either House, and at the close of the next preceding session remained undetermined in either House, shall be resumed and acted on in the same manner as if an adjournment had not taken place.”).

<sup>224</sup> See Lindsay Rogers, *The Power of the President to Sign Bills After Congress Has Adjourned*, 30 YALE L.J. 1, 8 (1920).

<sup>225</sup> See *id.* n.18.

<sup>226</sup> *Id.* at 8.

Congress was in recess.<sup>227</sup> This claim, prompted by an inadvertent delay that led to presentment during a recess, was controversial. The Speaker of the House took the position that, had Congress actually adjourned *sine die*, of course the President could not sign the bill into law.<sup>228</sup> But since Congress had only recessed, the President could have signed the bill had he wished to do so because Congress was still in session.<sup>229</sup> The House, at the Speaker's suggestion, voted to reenroll the bill and send it back to the President. But the Senate did not go along and the bill was not redelivered to the President.<sup>230</sup>

To mitigate the problem of too little time for presidential consideration of bills at the end of a Congress, President Grant actually proposed a constitutional amendment barring Congress from presenting bills on the last day of "its sitting," as a means of giving the President a full twenty-four hours to consider bills enacted the day before.<sup>231</sup> Why President Grant sought to restrain *Congress* is something of a mystery. After all, if a constitutional amendment was on the table, Grant could have proposed one that expressly allowed the President to sign a bill into law *after Congress's session had expired*.

Eventually, it became common for Presidents to sign bills while Congress was not in session, a reform the Supreme Court noted and endorsed in *La Abra Silver Mining Co. v. United States*.<sup>232</sup> The Court held that the President could sign bills into law even when the chambers were not sitting.<sup>233</sup> However, *La Abra* left open the question of whether a bill could be signed after a final adjournment of a Congress.<sup>234</sup> As noted earlier, the Supreme Court endorsed the latter reform in *Edwards v. United States*.<sup>235</sup> The endorsement was incomplete, however, because the Court reserved the question of whether a statute passed in the waning days of one Congress, while President A was in office, could be signed by President B in a subsequent Congress.<sup>236</sup> Despite this possible limitation, the larger tableau was one of reform, with the political branches leading the way and the Supreme Court belatedly endorsing

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<sup>227</sup> *Id.* at 12. But President Johnson did not speak to whether the chambers could pass statutes across sessions but within a Congress and then present them to the President while Congress was in session. Hence, it is possible that President Johnson supposed that the chambers could act across sessions, but that a bill could not become law during any sort of recess of Congress.

<sup>228</sup> *Id.* at 13.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* n.34.

<sup>231</sup> Ulysses S. Grant, Fifth Annual Message (Dec. 1, 1873), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 235, 242 (James D. Richardson ed., Washington, Gov't Printing Office 1898).

<sup>232</sup> 175 U.S. 423 (1899).

<sup>233</sup> *Id.* at 452-55. Justice Harlan gave a long list of examples of statutes signed into law during congressional "recesses." *Id.* at 452 n.1.

<sup>234</sup> *Id.* at 455.

<sup>235</sup> 286 U.S. 482, 491-92 (1932).

<sup>236</sup> *Id.* at 493.

these moves. Over decades, Congress and the President had transitioned from a session rule to something like a two-years-plus-two-weeks rule.

As a matter of policy, these reforms were salutary. The second — relating to signing bills during recesses — sensibly gave Presidents more time to consider statutes. Deciding whether to sign bills within the last hours, or even minutes, of a session was far from ideal. The first shift was more debatable. Perhaps reformers thought they were merely side-stepping the unnecessary annoyance of having to repass legislation passed in a previous session of the same Congress. If the House had passed the bill in the first session and the Senate in the second, repassage in the House in the second session might seem a redundant formality.

Yet whatever the merits of these reforms, they were contrary to the Constitution. The Constitution, by incorporating the concept of “session,” provided that bills must be perfected into law in a single session. In my view, Congress lacked the power to alter that implicit feature of statute making. It had no more power to alter the session rule than it had authority to alter bicameralism and presentment. Neither the power to make internal rules, nor the Necessary and Proper Clause, nor any of the other legislative powers under Article I, section 8 authorized Congress to abandon the constitutionally required session rule and adopt a Congress-plus-two-weeks rule.

Having said all this, the session rule need not be that constraining. Although some congressional sessions have been but days or weeks, nothing requires that sessions be short. The length of a session is generally left to Congress’s discretion. While the Constitution provides that Congress shall assemble at least once a year, it does not specify when a session must end or a new one begin. In my view, there are no rules about the length of intrasession recesses, other than that both chambers must agree to recess for longer than three days. Nor is there a requirement that there be a new session every year (though that has been the practice).<sup>237</sup> Accordingly, I believe that Congress may hold sessions that last more than a year. Indeed, there were English sessions that lasted more than a year.<sup>238</sup> If it is possible to hold but one session over a two-year period, Congress could elongate the period for perfecting bills to two years.

A few additional words on the Congress-plus-two-weeks practice are in order. Although there seems to be an underlying logic to what we might call the “Congress rule” — that bicameralism, at least, must occur during a single “Congress” — there is no *constitutional* basis for that

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<sup>237</sup> See *Dates of Sessions of the Congress*, *supra* note 35.

<sup>238</sup> See SIMONDS D’EWES, *THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELIZABETH* (post–preface page but before page 1) (London, Paul Bowes 1682) (noting a session that lasted three years, from 1580 to 1583).

longstanding practice. The principal difficulty is that it rests on an entirely manufactured concept, one so universally adopted that it will be difficult for some to see its artificiality. Despite the unquestioned view that a “Congress” lasts two years, the Constitution’s text never recognizes, much less declares, that “Congress” changes every two years. While we know that sessions certainly can end — recall that recess appointments end at the next session of the Senate — there is no rule that dictates that “Congress” necessarily expires. Nor does any text specify that, when terminated, an old Congress immediately segues into a new Congress.

The Constitution does enact a default rule about when Congress must meet. As amended, the Constitution requires Congress to meet on January 3, unless Congress creates a different rule.<sup>239</sup> Prior to the amendment, Congress had to meet every year on the first Monday of December, unless Congress otherwise provided.<sup>240</sup> But while these rules dictated when Congress must meet, neither declared when a “Congress” begins or ends. The Twentieth Amendment, in particular, never dictates that a “Congress” commences on January 3 of an odd year at noon and terminates on the same day and time two years later.

The first Congress apparently decided that the beginning and end of a Congress would coincide with March 4, likely because this was when the first meeting of Congress was supposed to be held in 1789.<sup>241</sup> While an expiring Congress would often sit up to March 4 of an odd year, the “new” Congress might not actually meet until months later, say the fall of that odd year. For instance, the Second Congress did not meet until October of 1791.<sup>242</sup>

This choice of a two-year increment likely was grounded on a desire to classify (and therefore differentiate) Congresses across time. One supposes that because House elections had to be held every two years, the first Congress decided to distinguish a two-year period and thereby differentiate March 4, 1789, to March 4, 1791, from March 4, 1791, to March 4, 1793. The first mention of a “First Congress” was apparently in 1790, when the House expressly adopted this phrase with respect to its Journal.<sup>243</sup> The first mention of a “Second Congress” might come from a newspaper account in late 1790, speaking of members being

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<sup>239</sup> U.S. CONST. amend. XX, § 2.

<sup>240</sup> *See id.* art. I, § 4, cl. 2 (amended 1933).

<sup>241</sup> 1 ANNALS OF CONG. 15, 95 (1789) (Joseph Gales ed., 1834) (Senate and House noting that they were to meet on March 4, 1789). That date, in turn, was set by the Continental Congress. *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 523 (Roscoe R. Hill ed., 1937) (resolving that the new government would commence on the first Wednesday of March 1789). There would not be a quorum for either chamber until April of that year.

<sup>242</sup> 3 ANNALS OF CONG. 142 (1791).

<sup>243</sup> 1 *id.* at 1041 (1790) (Joseph Gales ed., 1834).

electd to that Congress.<sup>244</sup> In 1792, Congress passed a statute referring to a law passed in the “[F]irst Congress.”<sup>245</sup> So, by 1792, Congress as a whole had begun the practice of using a two-year period for distinguishing Congresses.

Whatever the precise origins of this convention, nothing of constitutional significance turns on that old and arbitrary classification. Congress might have adopted any one of a number of approaches. For instance, when the idea that a “Congress” should last two years was first envisaged, senators might have insisted that their six-year terms ought to have been the benchmark, in which case, rather than discussing how we have had one hundred and sixteen Congresses, we would be speaking of thirty-nine Congresses. For his part, the first President might have suggested that Congress should be tied to changes in the presidency, in which case this would be the Forty-Fifth Congress.<sup>246</sup> Or one might suppose that, whenever the membership of either chamber changes, even in some minor way, there is a new Congress, in much the same way that Justice Byron White once asserted that “every time a new [J]justice comes to the Supreme Court, it’s a different court.”<sup>247</sup> Finally, one might conclude that while members come and go due to deaths, resignations, and expulsions, Congress itself never changes. This way of thinking would suggest that there is (and always has been) but one, uninterrupted Congress, albeit composed of different members across time. Curiously, the Senate has this view of itself. While the Senate follows the convention that there have been one hundred and sixteen Congresses, with the 116th just beginning, the Senate also claims that it “is a continuing body” and hence does not understand itself as having different iterations.<sup>248</sup> In other words, while there have been many Congresses, the Senate believes that there has been but one Senate since 1789, albeit with a changing cohort of senators.<sup>249</sup> The same could be said of the Supreme Court.

<sup>244</sup> See *Second Congress*, CUMBERLAND GAZETTE (Portland, Me.), Dec. 13, 1790, at 1; see also *Article of Wednesday, Feb. 23, 14* COLUMBIAN CENTINEL (Boston) 187 (1791) (noting that “the first session of the second Congress” would not sit until November of 1791).

<sup>245</sup> Act of Jan. 23, 1792, ch. V, § 1, 1 Stat. 229 (referencing an act passed in “the second session of the first Congress”).

<sup>246</sup> The United Kingdom has something of this convention, at least in the manner in which it classifies old laws. Statutes passed before 1963 mention the regnal year of a sovereign; for example, 5 Eliz. 2 c. 2. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 475 tbl.T.2.42 (Columbia Law Review Ass’n et al. eds., 2015).

<sup>247</sup> DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 467 (1998).

<sup>248</sup> The earliest version of this claim that I have found comes from 1867. See JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW 138 (Albany, Weed Parsons & Co. 1867) (referring to the Senate as a “continuing or perpetual body” because senators are chosen in a staggered manner and claiming that the House ends every two years).

<sup>249</sup> For a critique of this claim and its supposed consequences for the filibuster rule, see Aaron-Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401 (2010).

Though it has “terms” and though it first met in 1790, no one speaks of the 228th Supreme Court as having commenced arguments in the fall of 2018.

Of course, how we choose to divide up Congress across time matters for our inquiry only if we suppose that a bill must be perfected within a Congress. But, as noted earlier, there is no reason for so concluding. The Constitution’s text no more endorses the two-year perfection period than it does a six-year period or a four-year time frame. While I believe that the word “session” imported a rule regarding the termination of pending bills at the end of a session, there is nothing about the word “Congress” that imports the view that Congresses end after two years, much less that legislation not perfected must begin anew in the next two-year Congress. A “Congress” is but a “meeting,” often of ambassadors.<sup>250</sup> The Framers of the Constitution borrowed “Congress” from the Continental Congress, an assembly of state representatives that first met in 1774.<sup>251</sup>

Lastly, a few words about presentment and override are required. Though nothing in the Presentment Clause expressly requires that override occur soon after a veto, the clause does say that after receiving the vetoed bill the originating chamber shall “proceed to reconsider it.”<sup>252</sup> This command in the clause strongly intimates that overrides should occur shortly after vetoes.<sup>253</sup> There is no similar textual hook suggesting that passage and presentment must be tightly tethered. Yet the overarching requirement that legislation be passed within a session and the desire to make return possible (by ensuring that presentment occurs well before the end of a session) do much to ensure that presentment will closely follow passage.<sup>254</sup>

In sum, though the Constitution never expressly announced a perfection period for statutes, it nonetheless implicitly imposed a session rule. By utilizing “session,” a term laden with meaning from parliamentary practice, the Constitution dictated that bills not made law in a single session had to begin anew in the next session. All the steps necessary

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<sup>250</sup> 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, 6th ed. 1755) (defining “Congress” as “[a]n appointed meeting for settlement of affairs between different nations”). Prior to the Continental Congress, the most famous Congresses were European diplomatic parleys, like the Congress of Aix-la-Chapelle and the Congress of Utrecht. But America had her Stamp Act Congress as well. See Prakash, *supra* note 169, at 803. None of those meetings was associated with a two-year time frame.

<sup>251</sup> For a discussion of the Continental Congress, including its beginnings, see generally JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979).

<sup>252</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>253</sup> That is why the Supreme Court, in the *Pocket Veto Case*, discussed speedy legislative reconsideration after a veto. See 279 U.S. 655, 684–85 (1929). The Court spoke of Congress “proceed[ing] immediately with its reconsideration” after receipt of presidential objections. *Id.* at 685.

<sup>254</sup> See CONG. RESEARCH SERV., *supra* note 59, at 2.



to make law — bicameralism, presentment, presidential acquiescence (signature or the passage of ten days) or override — had to occur in the same session. In contrast, the “Congress rule” for bicameralism and presentment cannot plausibly be derived from constitutional text, structure, or early history because the idea of a two-year Congress has no grounding in the Constitution. The division of Congress across time into two-year segments is but an administrative convenience with no constitutional implications and none that attach to the perfection of statutes.

From a policy perspective, the notion that unperfected bills should become stale at some point has much to commend it. The idea that a habeas suspension passed by the Senate during the Administration of President Jefferson<sup>255</sup> might be passed by the House in 2019 and presented to President Trump without a new Senate vote appears ludicrous, even if, in both periods, there is an “[i]nvasion” or “[r]ebellion” and the bill adverts to a congressional judgment about the “public [s]afety.”<sup>256</sup> Similarly, the notion that the House might authorize the President to conduct air strikes against Kosovo in 2019 by belatedly agreeing to a Senate Resolution passed in 1999 seems bizarre.<sup>257</sup> It would be equally strange to allow Congress to delay presentment of a bill for scores of years or to override a veto decades after a President issued it. The legislative actions of the chambers and of the President should not remain in suspended animation forever, ready to be revived and acted upon at any time. At some point, unperfected bills must begin the legislative odyssey anew.

### *B. Constitutional Amendments*

As noted, Article V contains no explicit perfection or proximity rules. From this we might infer that, contrary to what existing practice might suggest, there are no constitutional limits regarding the time frame — one session, one decade, or one century — over which the chambers of Congress may propose amendments to be sent to the states. We might further suppose that a single constitutional convention authorized to generate amendments might never end and instead might periodically propose amendments, perhaps every decade or so. Finally, we might conclude that the states may, at their leisure, collectively ratify proposed amendments over the course of centuries, as was apparently done in the case of the Twenty-Seventh Amendment.

These readings are too wooden. Implicit in Article V is the concept of synchronicity, the notion that the relevant decisionmakers must make

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<sup>255</sup> See ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 21 (2001).

<sup>256</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>257</sup> S. Con. Res. 21, 106th Cong. (1999).

their assessments in relative proximity, taking into account the difficulties of registering collective sentiment across dozens of legislatures and almost twice as many chambers. While “reasonable” is an admittedly elusive concept, I believe that, in order for an amendment to satisfy Article V, the amendment’s proposal and ratification must both occur within a reasonable time.

Take the matter of proposals. The text declares “whenever two thirds of both Houses shall deem it necessary,” Congress “shall propose Amendments to this Constitution.”<sup>258</sup> The phrase “whenever two thirds of both . . . shall deem it necessary” is hardly crystal clear. Yet it does seem to require an agreement of sorts. Not a contract, mind you. But a shared understanding that “both . . . deem [an amendment] necessary.” The phrase is not best read to cover a situation where the Senate passes an amendment in 2003 and the House acts in 2019. In 2019, absent a renewed Senate vote, we have rather little reason for concluding that two-thirds of the Senate favors the amendment, and hence we cannot say that two-thirds of *both* chambers deem it necessary. While the condition “whenever . . . both Houses shall deem it necessary” certainly does not require simultaneity — the chambers need not vote on an amendment at precisely the same moment — it does fairly imply that the votes within the chambers have to be relatively synchronous in order to ensure that *both* chambers do, indeed, deem an amendment necessary.

Admittedly, the Framers could have created a rule rather than a standard. They could have specified that “whenever, within a six-month period, two-thirds of both Houses shall deem it necessary, Congress shall propose Amendments to this Constitution.” But the absence of a bright-line rule does not detract from the best reading of the text, namely that the phrase “whenever . . . both Houses shall deem it necessary” establishes a standard requiring something in the way of synchronicity.

As noted earlier, most amendments that have been sent to the states have emerged from a bicameral process completed in one (relatively short) session. The chambers adopted the first ten amendments on the same day: September 26, 1789.<sup>259</sup> The same is true for the Eleventh, Twenty-Fourth, and Twenty-Seventh Amendments — the chambers adopted each over the course of a single day.<sup>260</sup> The Twelfth, Fourteenth, Fifteenth, Sixteenth, Eighteenth, and Twenty-First Amendments were adopted by both chambers over the span of a week.<sup>261</sup> The chambers took from two weeks to five months to adopt

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<sup>258</sup> U.S. CONST. art. V.

<sup>259</sup> See 2 VILE, *supra* note 103, at 564.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

the Nineteenth, Twentieth, Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments.<sup>262</sup>

Two amendments are outliers, because Congress took almost a year to adopt them. As to those two — the Thirteenth and Seventeenth Amendments — the proposals emerged in the space of one Congress but across sessions.<sup>263</sup> In both cases, the Senate passed the proposal in the first session, with the House taking up the amendment in the second session. Given that Congress had adopted a joint rule in 1848 decreeing that either chamber could act upon items passed in a previous session in the other chamber,<sup>264</sup> Congress sent the amendments to the states after House passage in the second session, without renewed Senate action.<sup>265</sup>

As a matter of constitutional structure, I believe that whatever the rule for the bicameral passage of statutes, the same period ought to apply to bicameral proposal of an amendment. In both situations, we can conceive of Congress as proposing something: in the case of statutes, to the President, and in the case of amendments, to the states. Because the situations are somewhat analogous,<sup>266</sup> it makes sense to suppose that the same time constraints ought to apply to both sets of proposals.

Hence, if the Constitution implicitly requires Congress to complete the lawmaking steps for a statute within a session (or begin from square one in a subsequent session), it might likewise oblige both chambers of Congress to adopt a proposed amendment in but one session. This reading of the Constitution 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>267</sup>

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.* (providing dates for the Thirteenth Amendment); THOMAS H. NEALE, CONG. RESEARCH SERV., R40421, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 7–8 (2013) (noting that the Senate voted on the Seventeenth Amendment in 1911 and the House adopted the Senate proposal in 1912). After the House adopted the Senate version, the Senate did not revote in 1912. *See id.* at 8 (noting that after “the House receded from its version and accepted the amendment as passed by the Senate . . . [t]he ‘clean’ amendment was sent to the states”).

<sup>264</sup> *See supra* text accompanying note 223.

<sup>265</sup> *See* 2 VILE, *supra* note 103, at 564.

<sup>266</sup> They are, of course, not completely analogous. Under Article I, section 7, Congress can pass legislation over the President’s objections if there is a two-thirds majority in both chambers. *See* U.S. CONST. art. I, § 7, cl. 2. In contrast, Congress cannot formally amend the Constitution without the involvement of the states. *See id.* art. V.

<sup>267</sup> Two points are worth noting. First, some scholars have cited difficulties arising out of the ratification of a handful of constitutional amendments. The most serious and well-known shortcomings in process have to do with the Reconstruction Amendments and the pressure exerted on southern states to ratify. *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 379–80, 418–19 (2001) (noting claims of coercion but defending the lawfulness of the Reconstruction Amendments). Second, and relatedly, some may well conclude that all

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If, however, current practice with respect to federal bills better reflects Article I, section 7 — meaning that bills may be perfected over a two-year Congress — then all of the Constitution’s amendments were proposed in a constitutionally proper manner because the chambers proposed each one in the space of a single Congress.

There is a third possibility: nothing constrains the chambers from proposing amendments across years or decades. But if that is so, then the Senate in 2019 may act upon amendments sent by the House in 1789. Upon passage in the Senate and without holding a fresh vote in the House, congressional leadership may forward the amendments to the states. Likewise, the House today might adopt a proposal to require House elections by district, a proposal passed by the Senate in 1819, 1820, and 1822.<sup>268</sup> I do not believe that Article V intimates that, as a constitutional matter, one chamber’s passage of a proposed amendment constitutes an offer of indefinite duration to the other chamber — an unheard of super-“firm” offer, to use the language of the Uniform Commercial Code<sup>269</sup> — that can be accepted by the other chamber decades or centuries later.

For similar reasons, I regard the practice of ratifying amendments across generations and over centuries as resting on a misreading of Article V and its latent features. Three-fourths of the states have *not* ratified an amendment if three-eighths of the states (nineteen) ratify an amendment in 1999 and three-eighths more try to ratify in 2099. Indeed, the 1999 proposal is stale even if all fifty states attempt to ratify it in 2099. Congress needs to restart the process if the proposal is to be an actual amendment.

Consider a prosaic example far removed from Article V. Suppose a family has a rule that the children cannot borrow one of the family cars for long trips without securing the “approval of both parents.” Suppose the daughter, Gayathri, approaches parent A on January 1 and secures approval for a long trip to Disneyland. And suppose that parent B demurs or sidesteps when asked during the first week of January. Then suppose that Gayathri reapproaches parent B in August and belatedly secures approval for a road trip to Disneyland. In her thrilled state, Gayathri does not return to parent A. In this scenario, has the two-parent rule been satisfied? I think not. I think it is more appropriate to say that in neither January nor August have both parents approved the request.

Take a closer scenario. Suppose the House of Representatives holds a vote on January 1 on a controversial bill. The bill falls short on that day by ten votes, in part because some members who might have voted

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twenty-seven amendments are actually part of the Constitution, whether or not they were adopted in a manner consonant with Article V. *See supra* p. 1228.

<sup>268</sup> 1 VILE, *supra* note 103, at 90.

<sup>269</sup> U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM’N 2017).

yes are not in the chamber on January 1. Suppose further that the vote is held open for weeks and, by February 1, ten of those not around for the first vote approve. Nothing in the Constitution expressly bars a chamber from concluding that a measure has passed under such circumstances. Nonetheless, I would say that there has been no requisite majority because the voting is so asynchronous. The House has not “passed” the bill within the meaning of Article I, section 7.

Similarly, I believe that Article V implicitly imposes a requirement of synchronicity as a means of ensuring the proper sort of supermajority, one that exists at a particular period of time. In contrast, if an amendment may be ratified over centuries, it may well be that there never is a supermajority of the states that favor it at any particular time. Indeed, by the end of the process, it is possible that *only one state favors the amendment*, namely the thirty-eighth state to ratify. Even more odd, it may well be that, at each and every moment in time during this drawn-out process, *no more than one state backs the proposed amendment*.

A host of difficulties plague the idea of ratification over decades or centuries. To begin with, is the denominator for purposes of the two-thirds majority requirement the number of states that existed when the proposal was first sent to the states, or is it the number of states that exist now? As the period of ratification stretches out for decades or centuries, the question becomes especially pertinent, for the number of states is more likely to vary. In the case of the Twenty-Seventh Amendment, we seem to have settled upon the sense that the two-thirds figure should be assessed according to the number of states that exist now. But that is hardly obvious. Perhaps that amendment was ratified as soon as two-thirds of the original number of states ratified it, even though new states joined the Union. Because the amendment was proposed when the Union consisted of only eleven states, maybe the amendment was ratified after just eight states had approved it.<sup>270</sup>

Moreover, what are we to do if states ever decide to merge? Nothing in the Constitution prevents two states from merging,<sup>271</sup> something that might be useful if the fixed costs of government are high relative to the tax base and if both are sparsely populated. Are we to ignore the ratification of one or both of these states, given prior to unification, because there is a new state, one formed from the union of two? Or do those previous ratifications still count?

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<sup>270</sup> North Carolina and Rhode Island joined the new government after the other eleven original states had already joined under the Constitution and after Congress sent the Bill of Rights to the states. See 2 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING* 657–58 (2005).

<sup>271</sup> The Constitution protects states from being denied their equal suffrage in the Senate without their “consent.” U.S. CONST. art. V. That language suggests that two states can be denied their equal suffrage if they voluntarily merge with each other.

Another problem rests on the meaning to be attributed to an amendment ratified over centuries. Under either a public meaning or an original intent approach,<sup>272</sup> there are serious complications that arise when we try to make sense of the possibility that there may be different public meanings or diverse ratification intents for an amendment ratified across centuries.<sup>273</sup> For instance, the public meaning of a proposed amendment in the eighteenth century may be quite different than the public meaning of the same text in the twentieth century. Likewise, nineteenth-century state ratifiers may have had intentions that diverge from those in the twenty-first century. Indeed, some have argued that the public meaning of “due process” in the mid-nineteenth century had a substantive component that the phrase lacked in the late eighteenth century.<sup>274</sup> Others have claimed that the meaning of the Bill of Rights changed from 1791 to 1868, when the Fourteenth Amendment incorporated it against the states.<sup>275</sup> Obviously, such possibilities proliferate when ratification stretches across epochs. What is the public meaning of the Twenty-Seventh Amendment, given that there may have been different public meanings of the text in the eighteenth, nineteenth, and twentieth centuries? What is the original intent of the Twenty-Seventh Amendment, given that various state legislatures ratified it over the course of three centuries? Perhaps the gist of “compensation,” “services,” or “shall take effect” has varied across time, making it impossible to discern an original meaning or an original intent.

Furthermore, when there is no terminal point for ratification, we must keep a wary eye on all amendments that Congress has sent to the states. To be sure, some amendments might be welcome, like the proposed amendment barring citizens from accepting foreign titles.<sup>276</sup> But others might provoke anxiety. Consider the Corwin Amendment: “No amendment shall ever be made to the Constitution which will authorize or give to Congress 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 the said State.”<sup>277</sup> Congress sent this amendment to the states in 1861 as a sop to the South.<sup>278</sup> While the passage

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<sup>272</sup> For a discussion of the differences, see ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); and Jamal Greene, *Interpretation*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 887 (Mark Tushnet et al. eds., 2015).

<sup>273</sup> To be sure, these difficulties may surface whatever the period for ratification. But the possibility that they will arise greatly increases as the time for ratification expands to infinity.

<sup>274</sup> See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415–16 (2010).

<sup>275</sup> See AKHL REED AMAR, THE BILL OF RIGHTS 215–30 (1998) (arguing that the changed conception of rights and the text of the Fourteenth Amendment led to the refined incorporation of the Bill of Rights against the states).

<sup>276</sup> See 1 VILE, *supra* note 103, at 74.

<sup>277</sup> *Id.* at 118 (internal quotation marks omitted).

<sup>278</sup> *Id.*

of the Thirteenth Amendment moots this proposed amendment's application to slavery, the Corwin Amendment might protect other "domestic institutions," such as marriage, family, and so forth, from the reach of future constitutional amendments.

Finally, as a matter of structure, it is bizarre to suppose that while the Framers of the Constitution required synchronicity for the proposal of amendments (over one session or, at most, two years), they threw the door wide open for ratification of them. This is akin to a clotheshorse choosing to pair a fitted tuxedo jacket with baggy, flowing board shorts: an odd combination of tight and formal constrictions coupled with unbounded laxity.

Historical practice, I believe, also supports the idea that the amendment process must occur over a reasonable, and therefore limited, period. At the outset, it seems that in the nineteenth century many thought that unsuccessful proposals had expired. Take the case of the "failed amendments." At the close of the eighteenth century, the first two of the twelve amendments sent by Congress to the states in 1791 had not received the requisite ratifications.<sup>279</sup> One had to do with apportionment of the House and the other had to do with compensation, what we now call the Twenty-Seventh Amendment. The failure to secure timely ratifications caused many to regard these two proposals as stale.

We can see this in the reaction to a series of congressional pay scandals. In 1816, Congress went from a per diem to a salary,<sup>280</sup> a move that supposedly doubled the effective compensation of members. The "popular indignation" was "remarkable,"<sup>281</sup> leading a Virginian senator to propose the very same pay amendment that Congress had sent to the states in 1789.<sup>282</sup> Tennessee, Georgia, and other states made similar proposals, recommending that their legislators propose pay amendments in Congress.<sup>283</sup> Other states, including New Hampshire and Vermont, opposed the proposal to amend the Constitution.<sup>284</sup>

No one asserted that these recommendations and proposals were superfluous because the 1789 proposal was still pending. If the 1789 pay amendment was still viable, those favoring limits on congressional pay

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<sup>279</sup> 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 3, 34 (Washington, Gov't Printing Office 1897).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> 30 ANNALS OF CONG. 30 (1816); Ames, *supra* note 279, at 34.

<sup>283</sup> 31 ANNALS OF CONG. 169–70 (1818); Message of Delaware Governor to the Legislature of Delaware (Jan. 7, 1819), in 15 NILES' WEEKLY REGISTER 74, 75 (Baltimore, W. Niles Supp. 1819) [hereinafter Message of Delaware Governor] (mentioning proposals by Tennessee, Georgia, and Kentucky and opposition from Ohio, Vermont, and New Hampshire). Some of these proposals contained minor differences in wording. Compare Resolution of Sept. 23, 1789, Ch. 3, 1 Stat. 97, with 1817 Ky. Acts 279.

<sup>284</sup> See Message of Delaware Governor, *supra* note 283, at 75.

surely would have pointed out that the states could ratify the 1789 proposal without any need for Congress to repropose and resend a pay amendment to the states. At that point in time, Tennessee and Georgia had not ratified the 1789 amendment. Yet these two states were asking Congress to resend a similar proposal to the states even though they had done nothing with the prior proposal. The opponents also did not say that calls for a new proposal were pointless because the states could ratify the 1789 proposal. Clearly politicians thought that they could not act upon the musty proposal. Only that view explains the clamor for a new pay proposal and the adverse reaction to such demands.

The idea that the 1789 proposal was a legal nullity was sometimes clearly expressed. Discussing the proposed Fourteenth Amendment in 1866, Senator James Doolittle of Wisconsin noted that two of the twelve “articles” that Congress proposed in 1789 were “rejected by the States.”<sup>285</sup> He did not advert to any particular votes by those states that had not passed it. Rather, their failure to ratify it, coupled with the passage of time, meant that those amendments were rejected, at least in the sense that they could no longer be ratified. In 1874, Representative James A. Garfield, future President, likewise asserted that the states had rejected the pay amendment.<sup>286</sup> Some commentators outside Congress made the same point,<sup>287</sup> with one saying that a proposed amendment was “legally dead” if it had been “before the people long enough for a verdict to be passed upon it.”<sup>288</sup>

Even if this might have been the dominant view, it was not the only perspective. In 1873, Congress gave itself a retroactive fifty percent pay increase for the prior two years. Unsurprisingly, many were outraged at the “salary grab”<sup>289</sup> or, as some called it, the “back-pay swindle.”<sup>290</sup> Apparently hoping to catalyze the indignation into action, a correspondent wrote to *The Nation* suggesting that something could be done to mitigate such self-dealing.<sup>291</sup> The correspondent mentioned the amendment and Madison’s explanation of the need for it, and noted that a

<sup>285</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3040 (1866). Senator Doolittle used the words “articles” and “amendments” interchangeably in this context.

<sup>286</sup> B.A. HINSDALE, *THE REPUBLICAN TEXT-BOOK FOR THE CAMPAIGN OF 1880*, at 187 (New York, D. Appleton & Co. 1880).

<sup>287</sup> See 1 JAMES SCHOULER, *HISTORY OF THE UNITED STATES OF AMERICA UNDER THE CONSTITUTION* 115 (New York, Dodd, Mead & Co. 1880) (noting that two proposed amendments had “fail[ed]”); *THE BLUE BOOK OF THE STATE OF WISCONSIN* 17 (Wisconsin, J.E. Heg. 1881) (noting two articles were “rejected”).

<sup>288</sup> *General Topics*, 3 *FINANCIER: SATURDAY REV. MONETARY INTS. & POL. ECON.* 344 (1873).

<sup>289</sup> *Butler and the Republican Party*, 16 *NATION: WKLY. J. DEVOTED TO POL. LITERATURE SCI. & ART* 428 (1873) (internal quotation marks omitted).

<sup>290</sup> *Notes*, 16 *NATION: WKLY. J. DEVOTED TO POL. LITERATURE SCI. & ART* 269 (1973) (quoting correspondent).

<sup>291</sup> *Id.*



handful of states had ratified it.<sup>292</sup> *The Nation* itself “add[ed] that there is nothing in the Constitution to prevent these ratifications from being carried forward as still valid, and counted in favor of Madison’s amendment, should any other States now feel like reviving it.”<sup>293</sup> To this suggestion, Ohio responded. In a resolution, the Ohio legislature claimed that the compensation amendment was still “pending” and purported to “ratify” it, almost ninety years after it was first proposed.<sup>294</sup>

Despite the widespread outrage over the retroactive pay raise, not one state followed Ohio’s example. This was likely because many saw *The Nation*’s claim as a “startling suggestion.”<sup>295</sup> One commentator said that Ohio’s action “resulted only in talk, and . . . is not likely to lead to anything more substantial in the future.”<sup>296</sup> Others seemed to agree, for five compensation amendments surfaced in the House in 1873.<sup>297</sup> Such proposals would have been largely superfluous had ratification of the 1789 proposal been a valid option. These new proposals went nowhere, likely because Congress repealed the “obnoxious [pay raise] law.”<sup>298</sup> In any event, Ohio’s attempt to ratify the compensation amendment, and the claim that the proposal was still pending, seemed to not resonate despite the evident interest in constraining legislators’ proclivity to increase their own compensation retroactively. Indeed, comments indicating the “rejection” of the compensation amendment were made *after* Ohio’s supposed ratification, suggesting that the Buckeye State’s reading of Article V was rather unpersuasive.<sup>299</sup>

In 1921, the question of synchronicity came before the Supreme Court in *Dillon v. Gloss*.<sup>300</sup> In concluding that Congress could impose a seven-year limit on the Eighteenth Amendment’s ratification, the Court opined on whether the Constitution itself required some measure of synchronicity. Although the Constitution “says nothing about the time” for ratification,<sup>301</sup> “the fair inference or implication from Article V is that the ratification [of an amendment] must be within some reasonable time after the proposal.”<sup>302</sup> The undivided Court gave three reasons:

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<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> 1873 Ohio Laws 409.

<sup>295</sup> B.A. Hinsdale, *Legislation on the Compensation of Members of Congress*, 5 MAG. W. HIST. 583, 589 (1887).

<sup>296</sup> *Id.*

<sup>297</sup> Ames, *supra* note 279, at 35.

<sup>298</sup> *Id.*

<sup>299</sup> See 22 CONG. REC. 522 (1890) (claiming that the 1789 compensation proposal was “rejected”); 41 CONG. REC. 283 (1906) (noting that the proposal was “defeated”).

<sup>300</sup> 256 U.S. 368 (1921).

<sup>301</sup> *Id.* at 371.

<sup>302</sup> *Id.* at 375.

First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do.<sup>303</sup>

The Court went on to note that several amendments had been sent by Congress but never ratified, mentioning two from 1789, one from 1810, and one from 1861.<sup>304</sup> To the view that these proposals might yet be enacted into law by the states, the Court insisted that “few would be able to subscribe, and in our opinion it is quite untenable.”<sup>305</sup> The Court further concluded that Congress’s seven-year limit was reasonable.<sup>306</sup>

More than a decade and a half later, in *Coleman v. Miller*,<sup>307</sup> the Court considered whether a proposed amendment could no longer be ratified because it had been pending before the states for thirteen years.<sup>308</sup> In the case of the proposed Child Labor Amendment, Congress itself had imposed no ratification period.<sup>309</sup> The plaintiffs claimed that, with the passage of thirteen years, the proposal had lapsed and hence was incapable of being incorporated into the Constitution.<sup>310</sup> In keeping with *Dillon*, the Court’s opinion endorsed the idea that Article V requires states to adopt an amendment within a reasonable period.<sup>311</sup> Yet the Court denied that the judiciary could enforce the requirement, saying that the matter was left to Congress.<sup>312</sup>

Confusingly, four members of the seven-person majority wrote separately, arguing that the Court should have said nothing about whether Article V imposed a reasonable time constraint.<sup>313</sup> Thus, a majority of Justices in the winning coalition rejected the majority opinion’s endorsement of *Dillon*’s holding that the Constitution itself imposes a time limit

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<sup>303</sup> *Id.* at 374–75.

<sup>304</sup> *Id.* at 375.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 376.

<sup>307</sup> 307 U.S. 433 (1939).

<sup>308</sup> *Id.* at 451.

<sup>309</sup> *Id.* at 452.

<sup>310</sup> *Id.* at 451.

<sup>311</sup> *Id.* at 452.

<sup>312</sup> *Id.* at 452–54.

<sup>313</sup> *Id.* at 457–60 (Black, J., concurring).

on state ratification. In the view of these four Justices, this was a political question on which the Court should have remained silent.<sup>314</sup> Nonetheless, a majority of the Justices, consisting of three in the majority and two in the dissent, endorsed the notion of a time limit on ratification. In fact, the two dissenters used such a reasonable-period framework to conclude that the proposed Child Labor Amendment had failed due to the passage of time.<sup>315</sup> Thus, in *Coleman*, five Justices agreed that the Constitution itself imposed a time limit on ratification. Moreover, both *Dillon* and *Coleman* signaled that there were implicit limits on the longevity of proposals sent to the states.

In the wake of these two cases, Congress continued to impose time limits, thereby reducing an indeterminate constitutional principle (a “reasonable” time for ratification after proposal) to a concrete constraint. After *Dillon*, almost every amendment sent by Congress to the states contained a ratification period, either in the amendment itself or in the resolution accompanying the proposed amendment.<sup>316</sup> The period was invariably seven years.<sup>317</sup> In the case of the ERA, Congress voted to extend the initial seven-year period.<sup>318</sup> But the attempted extension was in vain, for the extra time was insufficient to secure any additional state ratification.<sup>319</sup>

So, by the 1970s, there seemed to be a consensus that if sufficient states did not ratify a proposed amendment within a reasonable period after submission to them, the proposal was stale and a legal nullity. This consensus was voiced in books<sup>320</sup> and reflected in Congress. Debate focused on whether Congress could extend the period of ratification for the ERA at all, whether this could be done by majority vote in both chambers, and whether a period of a little longer than ten years for ratification was permissible. Then-Professor Ruth Bader Ginsburg, in testimony before Congress, spoke for many when she said that “[i]mplicit

<sup>314</sup> *Id.* at 459.

<sup>315</sup> *Id.* at 472–73 (Butler, J., dissenting).

<sup>316</sup> See, e.g., Ruth Bader Ginsburg, Observation, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919, 921 (1979) (noting that the Twentieth through the Twenty-Sixth Amendments all contained a seven-year ratification period). But see Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437, 441 (1999) (noting that the proposed Child Labor Amendment lacked a ratification period).

<sup>317</sup> See Ginsburg, *supra* note 316, at 921.

<sup>318</sup> H.R.J. Res. 638, 95th Cong. (1978).

<sup>319</sup> See generally MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN’S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 70–85 (1986).

<sup>320</sup> See J.W. PELTASON, CORWIN & PELTASON’S UNDERSTANDING THE CONSTITUTION 111 (9th ed. 1982); ALLEN SCHICK & ADRIENNE PFISTER, AMERICAN GOVERNMENT: CONTINUITY AND CHANGE 40 (1975).

in Article V is the requirement that ratification of a proposed constitutional amendment occur within some reasonable time.”<sup>321</sup> The Office of Legal Counsel (OLC) emphatically opined that *Dillon* and *Coleman* had established a proposition “no longer open to question,”<sup>322</sup> namely that “implied within Article V is the condition that a constitutional amendment may only become law if it has been ratified ‘within some reasonable time after the proposal.’”<sup>323</sup> The OLC’s assertion seemed spot-on about the state of the arguments, for during the debate on whether to extend the ratification period for the ERA for an extra three years, no one in Congress claimed federal legislators might extend the period indefinitely. That argument surely would have been made had it been available because an indefinite period would have increased the chances of ratification.

Another signal about the status of hoary proposals comes from the repeated modern attempts to amend the Constitution to regulate congressional compensation. Members of Congress proposed more than a dozen pay amendments after 1975, the last of which was proposed in 1989.<sup>324</sup>

The year 1987 marked a transition, however, as some members became aware of the “pending” compensation amendment from 1789 and urged states to adopt it.<sup>325</sup> As soon as thirty-eight states purported to ratify it, federal legislators proposed an avalanche of resolutions affirming adoption of the amendment.<sup>326</sup> It seemed that every member of Congress wanted to join the bandwagon. The actual resolution affirming Congress’s sense that the states had ratified the compensation amendment was passed by lopsided margins<sup>327</sup> normally reserved for more innocuous fare, such as National Apple Pie Day. Gone was any sense that Article V imposed a time limit on ratification and that, if there were to be a compensation amendment, Congress had to repropose it.

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<sup>321</sup> *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearing on H.J. Res. 638 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 122 (1978) [hereinafter *ERA Hearings*] (statement of Prof. Ruth Bader Ginsburg, Columbia Law School); see also *id.* at 68 (statement of Prof. Charles L. Black, Jr., Yale Law School) (stating that there is a reasonable time limit).

<sup>322</sup> *Id.* at 7, 14 (statement of John M. Harmon, Assistant Att’y Gen.) (attaching Memorandum from John M. Harmon, Assistant Att’y Gen., Office of Legal Counsel, Dep’t of Justice, to Robert J. Lipshutz, Counsel to the President (Oct. 31, 1977)).

<sup>323</sup> *Id.* at 14 (quoting *Dillon v. Gloss*, 256 U.S. 368, 375 (1921)).

<sup>324</sup> See H.R.J. Res. 193, 101st Cong. (1989); H.R.J. Res. 20, 101st Cong. (1989); H.R.J. Res. 62, 100th Cong. (1987); H.R.J. Res. 498, 99th Cong. (1986); H.R.J. Res. 127, 98th Cong. (1983); S.J. Res. 50, 96th Cong. (1979); H.R.J. Res. 304, 95th Cong. (1977); S.J. Res. 5, 95th Cong. (1977); H.R.J. Res. 75, 95th Cong. (1977); H.R.J. Res. 1044, 94th Cong. (1976); H.R.J. Res. 1002, 94th Cong. (1976); H.R.J. Res. 987, 94th Cong. (1976); S.J. Res. 149, 94th Cong. (1975).

<sup>325</sup> See, e.g., H.R. Con. Res. 60, 101st Cong. (1989); H.R. Con. Res. 45, 100th Cong. (1987).

<sup>326</sup> See, e.g., S. Con. Res. 118, 102d Cong. (1992); H.R. Con. Res. 317, 102d Cong. (1992).

<sup>327</sup> See Berke, *supra* note 37 (noting that the Senate vote was 99 to 0 and the House vote was 414 to 3).

Fully present was the sense that the American people had spoken loud and clear, albeit a bit belatedly.

As noted earlier, in 1992, the OLC concluded that the Constitution did not impose a requirement of timely ratification. The OLC said that *Dillon's* reasonable period language was dictum and that the majority in *Coleman* did not believe that the Court should endorse anything like a reasonable period limitation.<sup>328</sup> Because there supposedly was no definitive judicial pronouncement on whether the states had to ratify proposals in close proximity to submission, the OLC felt at liberty to follow its own reasoned judgment and conclude that the proposed amendment remained viable forever and should be declared valid whenever the requisite number of states ratified it.<sup>329</sup> The OLC noted that despite the presence of time limits elsewhere in the Constitution, none was to be found in Article V.<sup>330</sup> To the OLC, this suggested that none was intended or imposed. Moreover, the OLC asserted that for Article V to “function effectively,” it “must provide a clear rule that is capable of mechanical application.”<sup>331</sup> But Article V could not provide such certainty if the time frame for ratifying amendments rested upon an “open-ended” principle of reasonableness.<sup>332</sup> In contrast, reading Article V as imposing no time limits provided that needed certainty.<sup>333</sup> The constitutional “rule” about ratification periods was that there was no rule.

The OLC's extraordinary volte-face from its 1977 opinion leaves much to be desired. The 1992 opinion does not explain why what the OLC in 1977 described as “no longer open to question” could now not only be questioned but utterly denied. In fact, while the 1992 opinion cites the 1977 opinion in a footnote,<sup>334</sup> the 1992 opinion never even mentions that the earlier opinion came to the exact opposite conclusion, something of an embarrassment.

In any event, the 1992 opinion rests on an implausibly narrow reading of Article V. It also relies upon an inexorable logic that, if applied elsewhere, would lead to astonishing results. The OLC's rigorous deployment of the *expressio unius* canon places far too much weight on a rule of construction that should form only part of the analysis. For instance, there is no explicit time frame in which the two chambers of Congress must enact proposals for amendment. Given the opinion's logic, it follows that the chambers may propose amendments over centuries, with one chamber acting in the late eighteenth century and the other in the late twenty-first century. Likewise, the opinion's reasoning signals that Congress can make laws intergenerationally, with the House

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<sup>328</sup> Congressional Pay Amendment, 16 Op. O.L.C. 85, 90, 92, 97 (1992).

<sup>329</sup> *Id.* at 93, 97.

<sup>330</sup> *Id.* at 88–89.

<sup>331</sup> *Id.* at 95.

<sup>332</sup> *Id.* (internal quotation marks omitted).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 102 n.24.

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passing legislation in the eighteenth century and the Senate in the nineteenth, presentment to the President in the twentieth, and override in the twenty-first. After all, the Presentment Clause does not contain time limits, other than the rule that the President must return his objections within ten days.

The OLC's dismissive treatment of *Dillon* is likewise dubious. That unanimous Court's discussion of a limited ratification period was not dictum. The Court believed that, in order to gauge whether the seven-year period imposed by Congress was appropriate, it first had to judge whether there were any constitutionally imposed time limits on ratification.<sup>335</sup> Hence, *Dillon*'s discussion of "contemporaneous" ratification was not a gratuitous pronouncement, but rather a necessary building block for its ultimate conclusion that Congress could impose a seven-year period.<sup>336</sup> After all, it might be easier to conclude that Congress could impose a particular ratification period if one already had concluded that the Constitution itself established a ratification period. Only this reading of *Dillon* explains why the Court spent pages on the question of whether the Constitution itself contained ratification limits. The fact that someone else might have come to the conclusion that Congress could impose a time limit on ratification without regard to whether Article V itself imposed such a constraint does nothing to detract from the *Dillon* Court's evident belief that the latter reading was a necessary bedrock of the former. The OLC (and the *Coleman* concurrence) fallaciously treated the foundation of *Dillon* as if it were an utter superfluity, albeit one that inexplicably took up the vast majority of the *Dillon* opinion.

Finally, the OLC's uncompromising insistence on a "clear rule that is capable of mechanical application"<sup>337</sup> is fantastical. The Constitution is replete with provisions *incapable* of mechanical application. To this day, we puzzle over "equal protection of the laws,"<sup>338</sup> the import of the Necessary and Proper Clause,<sup>339</sup> and the application of "unreasonable searches and seizures."<sup>340</sup> At most, the OLC's preference might be some sort of small factor in assessing *whether* a clear rule exists as opposed to a standard. But in the case of Article V, that thumb on the scale in favor of a rule cannot tip the balance away from the sound notion that the article imposes a standard, namely a reasonable time constraint connecting proposal of an amendment to ultimate ratification.

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<sup>335</sup> *Dillon v. Gloss*, 256 U.S. 368, 371–75 (1921).

<sup>336</sup> *Id.* at 375.

<sup>337</sup> Congressional Pay Amendment, 16 Op. O.L.C. at 95.

<sup>338</sup> U.S. CONST. amend. XIV, § 1.

<sup>339</sup> *Id.* art. I, § 8, cl. 18.

<sup>340</sup> *Id.* amend. IV.

In sum, *Dillon* had it right when it declared that proposal and ratification should not be “treated as unrelated acts[,] but as succeeding steps in a single endeavor” and hence cannot be “widely separated in time.”<sup>341</sup> Moreover, amendments are meant to deal with issues that arise in a specific context and should be “disposed of [by the states] presently,”<sup>342</sup> or the proposed amendment should be understood as having failed or expired. Finally, the idea of adoption of amendments presupposes a consent that is “sufficiently contemporaneous” such that the ratifications occur in the “same period.”<sup>343</sup> These principles combine to ensure that an amendment proposed by Congress in 1789 cannot be ratified in 2089, even if all the ratifications occur on the exact same day in 2089. Congress must send the proposal to the states again before the latter can meaningfully act upon it in 2089.

Though I have asserted that ratification must occur within some reasonable period, I have said little elucidating what constitutes such a period. At a minimum, it would seem that this period encompasses two years. After all, each of the ten amendments in the Bill of Rights was approved by states in a little over a two-year period.<sup>344</sup> Although Professor Maeva Marcus has suggested that ratification of the Bill of Rights proceeded slowly (she suggests that there was a “lack of interest”<sup>345</sup>), apparently no one thought that any of those ten proposed amendments had gone stale. In other words, no one seems to have argued that two years and a handful of months was too protracted a period for ratification.

Moreover, the seven-year period for ratification after a congressional proposal that was something of a default rule in the wake of *Dillon* seems about right. Beyond seven years, one has to wonder whether the ratifications have occurred in the “same period” and whether they satisfy the implicit (but important) rule that ratifications be synchronous with proposal.

There is the hint in *Coleman* that different ratification periods might be appropriate for different proposals. “[T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic . . . .”<sup>346</sup> I am rather inclined to think that the Constitution does not make the question of reasonable time turn on the subject matter of the amendment. I fail to see why separation of powers amendments should receive more (or less) time for ratification than social policy amendments. Likewise, I see little reason to treat “reasonable time” as

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<sup>341</sup> *Dillon*, 256 U.S. at 374–75.

<sup>342</sup> *Id.* at 375.

<sup>343</sup> *Id.*

<sup>344</sup> Maeva Marcus, *Speech*, The Adoption of the Bill of Rights, 1 WM. & MARY BILL RTS. J. 115, 118 (1992).

<sup>345</sup> *Id.*

<sup>346</sup> *Coleman v. Miller*, 307 U.S. 433, 453 (1939).

having different implications for balanced budget amendments as opposed to regulations of campaign finance. And yet I think it plausible that the concept of “reasonable time” takes into account the ratification context. If an invasion diverts attention from the proposed amendment or makes it impossible for the states to deliberate or vote, it may make sense to allow more time for ratification. In other words, when there are external shocks to the constitutional system, it may be wise and appropriate to suspend the “countdown” to the expiration of the proposal.

My arguments about synchronicity suggest that the Twenty-Seventh Amendment is no amendment at all. If I am right, it would not be the first time an unratified proposal found its way into copies of the Constitution. The Titles of Nobility Amendment emerged from Congress in 1810.<sup>347</sup> The amendment was never ratified.<sup>348</sup> Yet it found its way into some printed Constitutions because some erroneously supposed that it had been.<sup>349</sup> Today, it is nowhere to be found in modern editions of the Constitution. In that case, a mistaken impression was corrected, suggesting that other sorts of mistakes can be fixed as well.

As for a federal convention to propose amendments, something not seen in over two centuries (but which we may yet witness), I think the examples of the Philadelphia Convention and state conventions supply the benchmarks. These conventions tended to last for several months and then, their work complete, disbanded. Though some conventions have sought to perpetuate themselves, sometimes to implement any amendments approved by the people and other times to respond to the possible rejection of their handiwork, these situations typically involved revolutionary conventions.<sup>350</sup> The constitutional convention contemplated in Article V, while extraordinary in a sense, is meant to act within the system. It is a legal entity and not, in any sense, extraconstitutional or revolutionary. The period of several months or a year is ample time to propose, debate, and adopt constitutional amendments. After forwarding proposals to Congress, a constitutional convention no longer has warrant for continuing. It may not set itself up as a perpetual constitutional convention, free to reconvene as its members see fit.

The antecedent matter — whether states have called for a convention — is similarly subject to a requirement of synchronicity. On application of two-thirds of the states, Congress “shall call a Convention for proposing Amendments.”<sup>351</sup> The issue is whether the two-thirds supermajority can be manifested over the course of fifty years or a century.

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<sup>347</sup> Jol A. Silversmith, *The “Missing Thirteenth Amendment”: Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577, 579 (1999).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 586–89.

<sup>350</sup> See JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 473–78 (Lawbook Exch. 2013) (1887).

<sup>351</sup> U.S. CONST. art. V.



Again, I believe Article V should be read to establish a single enterprise — calling a constitutional convention — composed of the acts of multiple states, in much the same way that a vote of a chamber consists of the votes of multiple legislators. Just as voting on a measure in a chamber cannot be considered a single enterprise if the voting period stretches out over decades, so too the calls for a convention cannot be part of a single enterprise if we string together disparate calls from the nineteenth, twentieth, and twenty-first centuries.

### C. *Treaties*

Much of what was said in the previous sections applies to treaties, albeit with less persuasive force. Someone unfamiliar with treaty making might suppose that securing the Senate's consent to a treaty is sufficient to make that treaty. Yet no one familiar with the actual process imagines that the Treaty Clause lists all the requirements. From the Constitution's inception, Senate consent has been absolutely necessary but never sufficient.

Given that the Treaty Clause does not specify all the conditions of making a treaty, the question is what others, besides presidential ratification and the exchange (or deposit) of instruments of ratification, are implicit. In my opinion, one of those implied conditions is that there be some level of synchronicity. The process is not a series of "unrelated acts." Rather, making a treaty should be seen as a "single endeavor"<sup>352</sup> with multiple participants.

To take an extreme case, if the Senate consents to the ratification of a treaty but the treaty is not actually made within twenty years, the President should no longer be able to make the treaty because too much time has elapsed between consent and ratification. More precisely, because the Constitution implicitly constrains the "shelf life" of Senate consent, the President would have to secure the Senate's renewed consent if he wished to make the treaty belatedly. The Senate's previous consent, given two decades earlier, should elapse as a matter of constitutional law.

The contours of the treaty perfection period are uncertain. Nonetheless, we find some guidance from the Constitution's ratification. It was ratified by the requisite states in the period of a year,<sup>353</sup> suggesting that a treaty may also be made within a year of the Senate's consent. Although few today conceive of the Constitution as a treaty, it used the

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<sup>352</sup> *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

<sup>353</sup> For a discussion of the Constitution's ratification, see PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2010). The Philadelphia Convention sent the proposed Constitution to the Continental Congress in September of 1787, and the Constitution was ratified by the states in June of 1788, when the ninth state, New Hampshire, ratified. *See id.* at 63, 313.

language of treaties when it provided that the Constitution would be established by its “Ratification” by state conventions.<sup>354</sup>

A more helpful clue comes from the Articles of Confederation. Unlike the Constitution, the Articles of Confederation were often conceived of as a treaty amongst the sovereign states.<sup>355</sup> Congress declared that the Articles, sent to the states in 1777, would go into force only when every state ratified them.<sup>356</sup> In effect, the Articles were a multilateral treaty. By 1781, every state had ratified, and the Articles took formal effect.<sup>357</sup> This series of events may well have been on the minds of the Framers as they thought about the treaty process.

As with ratification of constitutional amendments, I would say that, as a constitutional matter, treaties generally may be made within the scope of seven years from Senate consent. Periods appreciably longer would vitiate the sense that the Senate consented to the treaty in the context in which the treaty ultimately purported to become a valid international contract and supreme federal law. Senate consent granted in 1992 to a treaty of commerce with China would have been given in a totally different context than when the nations belatedly exchanged ratifications in 2019. The point is that the Constitution limits the continuing effectiveness of senatorial consent because it recognizes, as an abstract matter, that such consent necessarily arises out of a time and place and should not be understood to be valid decades, much less centuries, later.

Return for a moment to the Russian Bilateral Investment Treaty mentioned in Part I. Recall that the Senate consented in 1992.<sup>358</sup> Although Russia never ratified, the treaty supposedly remains ready to be made without renewed Senate action. The better approach would be to have the Senate renew its consent in close proximity to any Russian ratification. Absent such renewal, there has been no Senate consent within the meaning of the Treaty Clause. The President cannot make the treaty without renewed Senate action because he no longer meaningfully has the Senate’s consent. The President has lost that consent in much the same way a teen cannot attend a sleepover at a friend’s house by citing a parent’s permission given years earlier. In both cases, the consent is stale.

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<sup>354</sup> U.S. CONST. art. VII.

<sup>355</sup> See THE FEDERALIST NO. 43, at 276 (James Madison) (Clinton Rossiter ed., 1961) (noting that the Articles were a “compact” or “treaty” among independent sovereigns).

<sup>356</sup> 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 925 (Worthington Chauncey Ford ed., 1907).

<sup>357</sup> Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 412 (2017).

<sup>358</sup> 138 CONG. REC. 22,861 (1992).

Finally, even when the other nation (or nations) quickly ratifies a treaty and the Senate swiftly consents to the treaty, considerable time may elapse before the United States also ratifies. As noted earlier, one cause of such delay may be the need to pass implementing legislation.<sup>359</sup> If the Senate's ratification resolution declares that the United States may ratify only if Congress passes implementation legislation but it takes decades for Congress to pass such legislation (because the House is not keen on the treaty), then the passage of decades makes the Senate's prior conditional consent rather stale. Hence, even when Congress is the cause for the delay in making the treaty, the context may have changed so drastically that prior Senate consent should be understood as having expired.

In sum, the Treaty Clause is best read as imposing a requirement of synchronicity. The treaty process, only a small portion of which the Constitution discusses, is not a series of disjointed steps but is instead a single enterprise to be completed in a timely manner. Just as the treaty-making steps that must be taken post-Senate consent are unspoken but nonetheless required (presidential ratification and exchange or deposit of instruments of ratification), so too the requirement of synchronicity is implicit.

### III. FINE-TUNING SYNCHRONICITY

Thus far, I have argued that the Constitution itself imposes time constraints on the perfection of statutes, treaties, and constitutional amendments. In the case of federal statutes, my reading of the Constitution and the word "session" may have struck some as too confining. With respect to constitutional amendments and treaties, those who favor rules may be unnerved by the claim that the Constitution imposes something of an inexact synchronicity standard.

This Part addresses the ability of participants in the lawmaking process to impose express limits on the shelf life of proposals. It then turns to the possibility that some proposals contain implied perfection periods. Finally, it considers the next chapter in the saga of the ERA. The proposal seemed fated to expire in 1979 before Congress gave it a three-year extension, putting it on life support until 1982. After that deadline came and went, people declared it dead. Now there is a revitalized political movement to transform a supposedly moribund proposal into the Twenty-Eighth Amendment.

#### A. *Express Synchronicity*

Even as the Constitution itself imposes perfection periods for all three forms of federal lawmaking, it also grants each lawmaking participant some measure of authority. In particular, each actor has some

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<sup>359</sup> See *supra* pp. 1248–49.

latitude to specify the period in which its actions continue to have force or effect.

With amendments, such possibilities should be familiar. For the past century, when Congress proposed an amendment, it usually has adopted text indicating the period over which the states may ratify the amendment. Such text reduced an indeterminate standard — reasonable time — to a precise rule: a term of years.

Some suggest that legitimate apprehensions about Ohio's 1873 "ratification" of the 1789 compensation amendment triggered the inclusion of such limits.<sup>360</sup> Others are more cynical, arguing that the limitation was included in the Prohibition proposal (what was to become the Eighteenth Amendment) to doom its prospects.<sup>361</sup> Senator Warren G. Harding, who was "dry" or "wet" depending upon the audience, proposed five years.<sup>362</sup> According to Professor David Kyvig, Senator Harding supposed that this would take the issue out of Congress for a period and ultimately doom the proposal.<sup>363</sup> At the insistence of die-hard dries, however, the limit was raised to six and then seven years.<sup>364</sup> It turned out that Senator Harding had utterly misread the politics. The proposal became an amendment in a little over a year.<sup>365</sup>

Often, Congress embedded the limitation in the body of the amendment itself. That trend began with the Eighteenth Amendment, which expressly provided that it would "be inoperative unless it shall have been ratified . . . within seven years from the date of the submission" to the states.<sup>366</sup> While the Nineteenth Amendment (and its accompanying resolution) omitted any reference to a time limit, the Twentieth, Twenty-First, and Twenty-Second Amendments all included an express time frame embedded in their texts.<sup>367</sup>

For other proposals, Congress included the limitation in the resolution accompanying the amendment and not in the amendment itself. This trend began with the Twenty-Third Amendment. In the congressional resolution that encompassed the amendment, a resolution sent to the states, Congress declared that the amendment would be "valid" only if the necessary ratifications occurred within seven years of submission.<sup>368</sup> The placement of the limit in the resolution seemed a matter of aesthetics — rather than saddling an amendment's text with procedural

<sup>360</sup> See *Dillon v. Gloss*, 256 U.S. 368, 372–73 (1921).

<sup>361</sup> See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–2015*, at 223 (1996).

<sup>362</sup> DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 93 (2010).

<sup>363</sup> See KYVIG, *supra* note 361, at 223.

<sup>364</sup> See *id.*; see also OKRENT, *supra* note 362, at 93–94.

<sup>365</sup> See KYVIG, *supra* note 361, at 223–24.

<sup>366</sup> U.S. CONST. amend. XVIII, § 3 (repealed 1933).

<sup>367</sup> See *id.* amend. XIX; *id.* amend. XX, § 6; *id.* amend. XXI, § 3; *id.* amend. XXII, § 2.

<sup>368</sup> S.J. Res. 39, 86th Cong. (1960).

matters, Congress placed the constraint in the accompanying resolution.<sup>369</sup> Treading the same path, the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments also used the resolutions accompanying the proposals to impose seven-year ratification periods.<sup>370</sup>

The ERA, proposed by Congress in 1972, likewise took the resolution route.<sup>371</sup> The resolution framing the proposal provided that the amendment would be valid if ratified within seven years of submission.<sup>372</sup> While the proposal initially racked up a number of ratifications, it eventually encountered fierce headwinds.<sup>373</sup> Some states tried to rescind their ratifications.<sup>374</sup> Others refused to act upon it or rejected it outright.<sup>375</sup> Before the expiration of the seven-year deadline, Congress passed a resolution extending it by a little more than three years.<sup>376</sup>

The extension was controversial. Some claimed that the extension had to be passed by a two-thirds majority in both chambers just as the original limit had been.<sup>377</sup> Its passage by less than that supermajority made it a nullity and therefore inoperative, or so critics argued. Others asserted that state ratifications given under the original resolution could not be counted as ratifications beyond the original seven-year period because states had ratified with the understanding that their ratifications would expire in seven years.<sup>378</sup> The amendment's apparent failure — it did not secure sufficient additional votes within the extra three years<sup>379</sup> — seemed to moot these disputes.

In the aftermath of the ERA, the desire to avoid the possibility of a legislative extension led to a reversion to the previous system of including the ratification period in the amendment's text. When, in 1978, Congress approved an amendment granting the District of Columbia actual representation in Congress (legislators with full privileges in the House and Senate), the amendment itself contained a seven-year period for ratification.<sup>380</sup> Any tardy "ratification" by some states, even if somehow deemed valid, would merely sanction an amendment that, by its

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<sup>369</sup> *Id.*

<sup>370</sup> S.J. Res. 7, 92d Cong. (1971) (Twenty-Sixth Amendment); S.J. Res. 1, 89th Cong. (1965) (Twenty-Fifth Amendment); S.J. Res. 29, 87th Cong. (1962) (Twenty-Fourth Amendment).

<sup>371</sup> THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 7–8 (2014).

<sup>372</sup> *Id.* at 8.

<sup>373</sup> *Id.* at 9 (noting that twenty-two states ratified the amendment by the end of 1972).

<sup>374</sup> *Id.*

<sup>375</sup> KYVIG, *supra* note 361, at 408.

<sup>376</sup> NEALE, *supra* note 371, at 10.

<sup>377</sup> *Id.*

<sup>378</sup> BERRY, *supra* note 319, at 70–71.

<sup>379</sup> NEALE, *supra* note 371, at 11.

<sup>380</sup> H.R.J. Res. 554, 95th Cong. § 4 (1978).

own terms, was “inoperative” due to the failure to ratify within the period specified. The proposal failed because it did not obtain the necessary ratifications within seven years.<sup>381</sup>

In any event, with respect to proposed amendments sent to the states, we seem quite comfortable with Congress imposing a time constraint on state ratification.<sup>382</sup> What is true for amendment ratification is true more generally. I believe that each of the actors in the various federal lawmaking processes might adopt similar measures.

Take amendment proposals. In my view, either chamber may impose a more stringent constraint than the Constitution demands. If the House wishes to impose a stricter time frame on congressional passage than the Constitution itself imposes, it might provide, in the body of its proposed amendment, that the Senate must approve an amendment within one month of House passage. The House would do this by specifying, in the text of the amendment, that the amendment “shall be inoperative” unless passed by the Senate within a month of the House’s passage.

The states also enjoy similar authority with respect to amendments. For instance, Maryland can provide that its ratification of a proposal is valid only for a particular period. Specifically, Maryland can declare that its ratification lapses after five years from its date of ratification. Nothing in Article V or elsewhere expressly bars such conditional ratification.

To be sure, even though the Constitution did not expressly bar conditional consent by the original thirteen states, some Federalists insisted that the states lacked authority to consent conditionally to the Constitution.<sup>383</sup> Similarly, some modern commentators might suppose that the states cannot conditionally consent to amendments, perhaps because they believe that the Constitution implicitly forbids such qualified consent. But even if the Constitution forbids the states from granting conditional consent to amendments, states nonetheless can ensure that any ratification meant to be conditional is not an unconditional ratification. For instance, in its resolution conditionally approving a constitutional amendment, the Maryland legislature can provide that if the Federal Constitution somehow forbids conditional ratification, its resolution apparently ratifying an amendment is null and void. Maryland would be approving the amendment if, and only if, it may specify the expiration date of its ratification. Maryland could do this because even if the Constitution forbids conditional ratification, it cannot possibly be read to require that all attempts to conditionally ratify must be deemed

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<sup>381</sup> KYVIG, *supra* note 361, at 423.

<sup>382</sup> There are some who deny that Congress can impose such a limitation. See, e.g., Kalfus, *supra* note 316. This denial may be understood as a claim that the Constitution grants the states an unlimited period. For the reasons discussed in Part II, *supra* pp. 1251–86, I believe such a claim is unfounded.

<sup>383</sup> See MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 498 (2016).

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*unconditional ratifications.* The Constitution does not contain a rule that both bars conditional ratifications *and* perversely mischaracterizes all such attempts as unconditional ratifications.

The same possibilities arise with treaties. As discussed earlier, the Senate sometimes consents to the ratification of a treaty at variance with the one the President submitted for its consideration. This practice dates back to the Washington Administration and continues to this day. These conditions generally have to do with the substance of the treaty. Yet nothing prevents the Senate from introducing process conditions. Indeed, the Senate has imposed the requirement that legislation be passed before presidential ratification, meaning that Congress must act before the President makes the treaty.<sup>384</sup> With respect to synchronicity, the Senate might indicate in its resolution that it consents to a treaty only if the treaty goes into force within a specified period; for example, “this treaty shall be inoperative if it does not go into force within two years of the Senate’s consent resolution.” Such language would prevent delay on the part of the President or the other nation or nations. For a multilateral treaty, the Senate’s consent might turn on whether certain nations enter into the treaty. For instance, the Senate might provide that the President may ratify a greenhouse gas treaty if, and only if, China and India have ratified within five years after the Senate resolution. The Senate might impose the latter constraint because it believes that the treaty is undesirable absent the participation of those two nations.

Finally, take statutory bicameralism. If the House wished to adopt a tighter time constraint than either the Congress rule used today or the session rule used in the past, it could do that as well. At the beginning of a Congress, the House might adopt a bill that expressly provides that “this law will be inoperative unless the Senate adopts it within one month of House passage.” A chamber might wish to compress the time frame for lawmaking because it believes that while current circumstances justify the bill, later contexts might not. The originating chamber would have to revisit the matter if bicameral passage proves impossible within the bill’s stated limit.

Moreover, the chambers might craft rules that are tied to turnover in Congress. The House might indicate that the Senate may act upon a bill even after the seating of new legislators, if the change in the composition of the chambers does not rise above a certain threshold. For instance, the House might declare that a bill “shall be inoperative if, after House passage, turnover in either chamber is above five percent at the time of the Senate’s passage.” If either chamber experiences significant turnover (above five percent), the Senate knows that the House bill is a nullity and that both chambers must begin from square one. Indeed, many might suppose that constraints tied to changes in membership are

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<sup>384</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 408–09 (2000).

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ideal because, if there is drastic turnover within a two-year Congress (say because of a plague or warfare), one might assume that a majority no longer exists for a certain bill.

Thus far, I have described the power of the relevant lawmaking institutions to impose constraints *more stringent* than the Constitution itself imposes. If readers reject my conclusion that the Constitution itself imposes time constraints on the making of supreme law, they might nonetheless conclude that lawmaking institutions can create rules that depart from current practices in ways that *increase* the chances of a fruitful process.

For instance, in the text of a bill to amend the Internal Revenue Code, the House might provide that its passage is valid for one year, without regard to whether a particular Congress completes its term. After all, in a world without constitutional rules about synchronicity, the House might suppose that a finite period tethered to the House's passage is superior to the current practice of deeming bills dead that are not passed by both chambers *in one Congress*. In such a scenario, a bill passed by the House late in a Congress would not constitute a wasted effort merely because the Senate could not conduct a vote in the waning days of that same Congress. Instead, the Senate could act within the bill's stated time frame, albeit in the next Congress.

As a policy matter, some might object that unperfected bills ought never to last past an election. But current practice already permits this. First, the President may sign bills into law after Congress welcomes newly elected members, even though changes in membership may mean that there is no longer majority support in either chamber for that legislation. Indeed, the President may sign a bill passed by a *previous* Congress. Second, after elections take place, a chamber of Congress, full of lame ducks, may enact legislation previously passed by the other chamber and then send that bill to the President. Repassage in the first chamber is entirely unnecessary.

A chamber might deploy a similar strategy to make clear that its consent to a proposed constitutional amendment lasts longer than a single Congress. For instance, the Senate might declare that its approval of an amendment endures five years from its passage, without regard to the termination of a particular Congress. This would free the Senate of the burden of having to repass the proposal every two years, as current practice dictates.

Summing up, each of the participants in the three federal lawmaking processes may impose express conditions on its participation that could be used to limit (or in some cases expand) the duration of its consent, ratification, etc. This possibility may be particularly attractive to those who found the claims in Part II unpersuasive. If the Constitution itself imposes no limits, surely the relevant institutions can take steps to protect themselves from the possibility that ancient approvals will have eternal validity. Likewise, if the Constitution imposes no constraints,



the players can signal that their actions have continuing validity beyond what current customs suggest.

### *B. Implied Synchronicity*

Sometimes proposed statutes, amendments, and treaties are best read to contain implicit time constraints. In other words, even if one concluded the Constitution does not impose a perfection period on the relevant form of lawmaking, and even if the participants did not impose an express time limit on their approval, the relevant proposal may itself contain an implicit perfection period.

The easiest case is with respect to statutes. Even if the Constitution imposes no synchronicity requirement on congressional passage of a bill, the requirement that both chambers act within a single Congress surely is an implied feature of all modern bills. This is true due to practice and the standing rules about carrying business over across sessions. Hence, if the House passed a bill in the 116th Congress and the Senate passed it in the next Congress, the House could surely insist upon the need for new House action in the 117th Congress before presentment to the President. Put another way, all bills passed by both chambers during a Congress contain an implicit limitation: this bill cannot become law unless both chambers act within this Congress.

That is an easy case, given the strength of the prevailing practice and the congressional rules. But we can also conceive of other timing rules that are perhaps hard to discern yet still there. Imagine that in the wake of an invasion, the House passes a resolution that “suspends the privilege of the writ of habeas corpus.”<sup>385</sup> The resolution does not mention the invasion, but everyone knows that the suspension relates to it. Before the Senate considers the House bill, the military thwarts the invasion. But suppose an unrelated rebellion materializes within months of the unsuccessful invasion, causing the Senate to pass the House bill suspending the privilege of the writ. The best view is that — though the chambers passed identical text in one Congress (perhaps even in the same session), and though the Suspension Clause’s requirements were satisfied at the time of both votes — the House must repass the bill in the wake of the rebellion if the House and Senate are to present the suspension of the privilege to the President. The House’s bill suspending the privilege should be understood as no longer having continuing vitality given that the particular crisis that triggered its passage has evaporated. The House sought to suspend habeas corpus to deal with an invasion. The Senate sought to suspend habeas for an entirely different reason — a rebellion.<sup>386</sup>

<sup>385</sup> See U.S. CONST. art. I, § 9, cl. 2.

<sup>386</sup> For an argument that only Congress can suspend the privilege, see Saikrishna Bangalore Prakash, *The Great Suspender’s Unconstitutional Suspension of the Great Writ*, 3 ALB. GOV’T L. REV. 575 (2010).

Or consider a more mundane example. The House wishes to grant a subsidy of \$5000 to every veteran and passes a bill to that effect. The Senate desires \$15,000, but in a spirit of compromise adopts a bill appropriating \$10,000 per veteran. The House agrees to the compromise and passes the Senate bill. The President signs that bill into law even though he favors \$15,000 as well. I would argue that the Senate cannot thereafter take up the original House bill, pass it, and present it to the President without renewed House action on the \$5000 subsidy bill.<sup>387</sup> That is so because the original House bill should be understood to be a proposal to provide \$5000 for each veteran *so long as no other monetary subsidies are also granted to veterans*. Alternatively, the \$10,000 subsidy can be understood as implicitly vitiating the initial House bill. Either way, there are embedded terms that prevent the Senate from “agreeing” to the now-defunct House bill.

The same arguments about implicit limits may apply to proposed amendments and treaties. Proposals for these forms of law may contain implicit constraints, limits that have to be teased out. For instance, a proposed amendment designed to grant the President extraordinary powers for the duration of an extant crisis ought to be understood as inert or stale as soon as the crisis subsides, *even if only a few weeks have passed since the proposal first went to the states*. One might say that the predicate for the measure no longer exists, and therefore the measure cannot be acted upon by the states.

Similarly, a treaty might implicitly contain terms that render delayed action problematic. If the Senate consents to a treaty of alliance and the hoped-for ally attacks the United States before the treaty goes into force, the alliance can no longer be made unless the Senate renews its consent. If, after the war, there is to be an alliance with the former enemy, the treaty process must undergo a fresh start. The completed steps in the earlier process should be understood as immaterial, for they no longer have any continuing validity. More broadly, the conditions under which the Senate consented to ratification — the nation’s place in the international system, the nation’s defense posture, the relative strength of treaty partners — may no longer obtain, meaning that the Senate might not grant its consent in the new environment. In other words, because the Senate consents in a given context and not once and for all, its consent may be vitiated by outside events.

Again, the larger point is that independent of any limits arising from the Constitution itself and independent of any express limits contained in other proposals, consents, or ratifications, a particular proposal might itself contain an implicit perfection period or perfection constraint. This

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<sup>387</sup> A statute requires the signature of the Speaker of the House before presentment. *See* 1 U.S.C. § 106 (2012). For this hypothetical to make sense, we must assume that the Speaker favors the extra \$5,000 and would be willing to enroll the bill and sign it without renewed House passage.

especially might be true when we have reason to suppose that the proposal's genesis crucially rested upon a particular state of affairs that no longer exists.

*C. The Twenty-Eighth Amendment?*

As this Article goes to press, the media is rife with reports that thirty-seven states have ratified the ERA.<sup>388</sup> Many are excited about the prospect of passage.<sup>389</sup> What Professor Mary Frances Berry called a “failure” in 1986<sup>390</sup> now seems more like an “incomplete” that may yet become a “pass.” By 1982, thirty-five states had assented, three short of the number necessary for ratification.<sup>391</sup> In 2017, Nevada purported to ratify,<sup>392</sup> with Illinois doing the same in 2018.<sup>393</sup> Some ERA proponents claim that the proposal remains viable either because Congress cannot impose any time limits on ratification or because Congress never did impose a binding restriction on ratification.<sup>394</sup> The first argument seems to be drawing a lesson from the ratification of the Twenty-Seventh Amendment.<sup>395</sup> The second argument emphasizes that the restriction on ratification was not part of the amendment itself, but was instead part of a resolution that does not have legal force.<sup>396</sup>

I favor the ERA. I favor it because I endorse the idea that the Constitution ought to be changed over time to reflect contemporary values and because I endorse the ERA's particular value. Equality of rights under the law should not be denied on the basis of sex. I take this seemingly absolute statement to reflect (and incorporate) the extant test applicable to sex-based classifications — intermediate scrutiny — one that does actually allow for some sex-based classifications. Nonetheless, a bit of apprehension is in order because the courts may cite the ERA as a basis for applying an even higher standard, one even less permissive of sex-based classifications. These fears do not dissuade me, in part because judges may choose to impose a higher standard for sex-based

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<sup>388</sup> See, e.g., Matthew Haag, *The Equal Rights Amendment Was Just Ratified by Illinois. What Does that Mean?*, N.Y. TIMES (May 31, 2018), <https://nyti.ms/2J3m2wZ> [<https://perma.cc/3Y6F-6KRM>].

<sup>389</sup> See Editorial, *Pumping Life into the Equal Rights Amendment*, N.Y. TIMES (Mar. 25, 2017), <https://nyti.ms/2mCm484> [<https://perma.cc/KZ9U-ZTY5>].

<sup>390</sup> BERRY, *supra* note 319, at 1; see also JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986).

<sup>391</sup> See David Montero, *Thirty-Five Years Past a Deadline Set by Congress, Nevada Ratifies the Equal Rights Amendment*, L.A. TIMES (Mar. 20, 2017, 6:55 PM), <http://www.latimes.com/nation/la-na-nevada-era-2017-story.html> [<https://perma.cc/KXC3-3UCL>].

<sup>392</sup> See *id.*

<sup>393</sup> See Haag, *supra* note 388.

<sup>394</sup> See Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 122–23, 135–36 (1997).

<sup>395</sup> See *id.* at 122–23.

<sup>396</sup> See *id.* at 135.

classifications without regard to whether there is an equal rights amendment. Again and again, judges have proven that they do not need an intervening constitutional amendment to alter judicial doctrine. From my perspective, it is far better to alter constitutional text to reflect modern mores than to have courts change the Constitution via doctrine. We the People, not the courts, should change the Constitution.

Having said this, in my view the 1972 ERA is no longer viable. As noted earlier, the Constitution is best read as imposing a reasonable time constraint between congressional proposal and ratification. It has been over forty-five years since the amendment was proposed and over thirty-five years since it failed. I agree with then-Professor Ginsburg's point that "[i]mplicit in Article V is the requirement that ratification of a proposed constitutional amendment occur within some reasonable time."<sup>397</sup> She indicated that "even 20 years would constitute a rational, constitutional time period,"<sup>398</sup> but also signaled her approval for the proposition that Congress should not deem an amendment ratified when it was sent to the states decades ago.<sup>399</sup> That latter point precisely describes the ERA, for Congress sent it to the states decades ago. I also agree with the OLC's 1977 opinion that "implied within Article V is the condition that a constitutional amendment may only become law if it has been ratified 'within some reasonable time after the proposal.'"<sup>400</sup> The conclusion, made by the Executive and Congress in 1992, that the Twenty-Seventh Amendment was properly ratified was a mistake. We should not repeat it.

But even if I am in error about the Constitution's limits on the amendment process, there are additional wrinkles here, ones not present in the Twenty-Seventh Amendment. To begin with, Congress imposed a restriction of seven years on the ERA's ratification and then supplied an extra three years. Even if the Constitution imposes no timeliness condition, there is rather little warrant for supposing that Congress cannot impose such a constraint. The text of the Constitution leaves open this possibility because it never forbids such a synchronicity restriction. Moreover, the almost universal practice of the last century has been to include such limits. In *Dillon*, the Supreme Court endorsed the idea that Congress may set an outer limit for ratification, "entertain[ing] no doubt" on the question.<sup>401</sup> "[T]he Constitution speaks in general terms,

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<sup>397</sup> *ERA Hearings*, *supra* note 321, at 122 (statement of Prof. Ruth Bader Ginsburg, Columbia Law School).

<sup>398</sup> *Id.* at 121.

<sup>399</sup> *Id.* at 121 n.3.

<sup>400</sup> *Id.* at 14 (quoting *Dillon v. Gloss*, 256 U.S. 368, 375 (1921)) (statement of John M. Harmon, Assistant Att'y Gen.) (attaching Memorandum from John M. Harmon, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Robert J. Lipshutz, Counsel to the President (Oct. 31, 1977)).

<sup>401</sup> 256 U.S. at 376.

leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and Article V is no exception to the rule.<sup>402</sup> Neither the experience with the ERA extension nor the putative Twenty-Seventh Amendment casts doubt on Congress's power to impose a limit on ratification.

Congress imposed a period and, before its expiry, extended it. That overall time frame, ten years, has more than come and gone. After it expired, the ERA was deemed to have failed and for good reason. Everyone at the time understood that there had to be a limit, and the only question was how long could that limit be. Supporters wanted seven more years (for fourteen years total). They compromised and got three. No one at the time of the extension thought that it was impermissible for Congress to impose a restriction.

Some may respond that Congress did not actually impose a restriction because the restriction is not in the body of the amendment. If it were, then the issue of constraints would be fully presented because the amendment would then self-destruct when the internal constraint was violated. But the movement from the body to the accompanying resolution was done for aesthetic reasons and not substance. I do not believe the choice about where to place the restriction — in the amendment's body or in the framing resolution — should be legally dispositive. If we are asking what Congress sought to do, no one could have thought that the restriction was meaningless. It was included in the first resolution and the whole point of the second resolution was to extend the period. The second resolution would have been wholly unnecessary if the placement of the restriction in the initial resolution made it a legal nullity. Congress would have debated for months for no purpose.

In fact, we have long treated some legislative resolutions as quite consequential. For centuries, advice and consent resolutions have contained restrictions that are legally operative in the sense that if the President does not comply with them, he cannot make the relevant treaty. If the Senate imposes a restriction via its resolution of advice and consent, it thereby constrains how and when the President may ratify. Presidents cannot ignore the restraints found in treaty advice and consent resolutions, at least if they wish to ratify the treaty.

Moreover, resolutions in the amendment context have long been given legal force. All constitutional amendments have been adopted by Congress via what we now call "Concurrent Resolutions." These resolutions have specified, among other things, who would ratify (legislatures or conventions) and the time frame. Surely the decision to send a proposed amendment to state legislatures was not merely a suggestion but a binding constraint on how the states could ratify. When told by Congress that ratification is to be by the legislatures, no state could have ratified by means of a popular convention. If that is true for the fora of

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<sup>402</sup> *Id.*

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ratification, it is hard to see why the resolution cannot impose a legally binding constraint on the period for state ratification.

Finally, there are lurking questions of severability. If the time limits contained in the ERA resolution and its extension are meaningless because they are unconstitutional or are nullities, then one must rather doubt whether two-thirds of Congress actually passed the ERA sent to the states in 1972 and whether thirty-five states actually ratified the ERA. The ERA was embedded in a congressional resolution that contained the ratification period. Would two-thirds of each chamber have voted for the ERA in 1972 had federal legislators known that the ratification period was unlimited because the attempt to impose a time limit was a nullity? Remember the cameral supermajorities did not simply endorse the amendment's text, but the time-constraining resolution as well. Would thirty-five states have ratified it? They too endorsed the amendment's text in a context in which Congress stipulated that the ratification period was limited. The states received Congress's resolution of proposal, which contained the amendment *and* the time restriction.

Likewise, there is reason to doubt that the ERA extension would have passed both chambers had the period of extension lasted longer than three years. Recall that the most ardent supporters of the ERA wanted fourteen years total but settled for about ten, presumably because they wanted the votes to pass the extension in a context where many argued that the extension itself was unconstitutional. Given this history, the ERA extension may not have passed had the legislators known that there would be an unlimited time for ratification. More importantly, the protracted debate on the ERA's ratification extension was an utter waste of time if the extension and the original seven-year period were both nullities.

In short, if congressionally imposed time limits are unconstitutional or if such constraints are ineffective when placed in resolutions, then we are faced with serious and thorny questions. We simply cannot say that either two-thirds of both chambers of Congress or thirty-five states actually endorsed the ERA, in particular the ERA that is liberated from Congress's constraints. If one pulls the string on Congress's attempts to impose limits on state ratification, the ERA unravels.

Will the fate of the potential Twenty-Eighth Amendment be decided by such fine legal questions? Only on the margins, I imagine. If proponents do not wish to begin from square one or are concerned that they may not be able to get enough state ratifications if they go back to the beginning, they will joyfully declare the amendment ratified once the thirty-eighth state ratifies. If the Twenty-Seventh Amendment ran roughshod over all that preceded it because politicians wanted to rush to embrace it, the same could certainly happen to the Twenty-Eighth Amendment.

ERA opponents, what few remain, may pull out all the stops to declare the amendment dead, including by noting that several states “rescinded” their ratifications and by filing suits. There can be no guarantee that the courts will stay out of the fray. While the *Coleman* Court said that the question of a reasonable time was a political question, it never repudiated *Dillon*, and it never signaled a refusal to consider enforcing time constraints that Congress imposed. The Court has never said that it would recognize an amendment that was ratified contrary to the instructions drafted by Congress.<sup>403</sup> Rather, *Coleman* stood for the proposition that where Congress imposed no time constraints, the question of whether an amendment was properly ratified is for Congress alone. That rule cannot properly be applied to the case of the Twenty-Eighth Amendment.<sup>404</sup>

### CONCLUSION

The Constitution is best read as implicitly constraining the time in which statutes, constitutional amendments, and treaties must be perfected. The underlying theory of the Constitution (that majorities or supermajorities may rule by altering the law) implicitly requires the synchronous registration of the majority’s or supermajority’s preferences across all three forms of federal lawmaking. Put another way, each of the lawmaking processes turns on the manifestation of collective sentiment, albeit aggregated in different ways. Moreover, none of these lawmaking processes merely establishes checklists that can be satisfied in any order and without regard to time. Rather, each set of steps is part of a “single endeavor,” to be regarded not as a series of disjointed measures, but as a series of relatively tightly knit ones.

Some resist this conclusion, noting that when the Constitution means to impose time constraints, it does so expressly. But the presence of clear time limits does not prove their absence elsewhere. Does anyone think that if only eight states had ratified the Constitution in 1788 and no other state had ratified in two hundred years, that those original eight states would be bound by the Constitution when a ninth state belatedly ratified it in 2008? There is no express time limit on the making of the Constitution, found in Article VII or otherwise. Nonetheless, there was an implicit requirement of synchronicity. As *Dillon* stated: “That the Constitution contains no express provision on [a] subject is not in itself controlling; for with the Constitution, as with a statute or other written

<sup>403</sup> Cf. *Idaho v. Freeman*, 529 F. Supp. 1107, 1152–54 (D. Idaho 1981).

<sup>404</sup> If the Court believes the ERA merely incorporates its existing doctrinal framework, it could duck the question of whether the ERA could be ratified some forty-five years after it was first proposed. It could say that whether or not the ERA was properly ratified, sex-based classifications are subject to intermediate scrutiny and avoid weighing in on the debate.

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instrument, what is reasonably implied is as much a part of it as what is expressed.<sup>405</sup>

More generally, our Constitution is awash with implicit procedural rules about the manifestation of preferences. As noted, each member of the House gets one vote and Congress cannot change that by statute and the chambers cannot change it by rule. Similarly, each Justice on the Supreme Court gets one and only one vote in each case. Congress could not provide by statute that Chief Justice Roberts gets nine votes and that each associate Justice gets one. Nor could the Supreme Court itself. Finally, federal criminal trials require jury unanimity if the accused is to be found guilty, a constraint not written into the Constitution's text but there nonetheless.

This Article has offered theories about synchronicity across the three spheres of federal lawmaking. Perhaps others will focus their energies on a single form of lawmaking or contest the more global claims made herein. Either response would be preferable to the status quo, one in which we pay little attention to synchronicity. We the People surely can afford a bit of time thinking about how majorities and supermajorities prove themselves and how our federal and state institutions make supreme law.

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<sup>405</sup> 256 U.S. at 373.