

THURSDAY, JANUARY 16, 2020

PERSPECTIVE

## Equal Rights Amendment is still in play, if Congress wants it to be

By David A. Carrillo, Stephen M. Duvernay and Brandon V. Stracener

The Equal Rights Amendment, long thought dead, may be resurrecting itself. Only one more state needed to ratify it to meet the Article V condition that amendments “shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states.” And Virginia just did so. The question is whether the ERA retains vitality today. It does, because the amendment’s viability is a political question, and because Congress has the power to resurrect even a dormant amendment.

The ERA was thought dead because the ratification deadline Congress set lapsed years ago without enough state ratifications. (Congress sent the ERA to the states in 1972 with a seven-year ratification deadline, then extended it another three years to 1982.) After a 40-year gap, Nevada became the 36th state to ratify the ERA in 2017, followed by Illinois in 2018. On Wednesday, Virginia’s legislature ratified it, marking the 38th state and meeting the constitutional requirement that amendments be ratified by three-quarters of the states. The federal Office of Legal Counsel issued an opinion on this issue, concluding that Congress has constitutional authority to impose a deadline for ratifying a proposed constitutional amendment. It also opined that because the necessary 75% of states did not ratify before the deadline, the ERA is no longer pending, and Congress cannot revive a proposed amendment after a deadline for its ratification has expired.

Congress does have constitutional authority to impose a deadline for ratifying a proposed constitutional amendment. But OLC’s crabbed view of congressional power on the second point is at odds with U.S. Supreme Court precedent, elemental principles governing legislatures, and past experience. Congress can revive a proposed amendment after a deadline for its ratification has expired because it can always revoke or modify its own past acts, and because the core issue here is a political question.

Congressional ratification deadlines are political questions for the political branches to resolve. Considering the 18th Amendment, the Supreme Court read Article V as “intended to invest Congress with a wide range of power in proposing amendments,” with two restrictions for expired provisions: “that the proposal shall have the approval of two-thirds of both houses,”



New York Times News Service

The Virginia House of Delegates cheers for Delegate Jennifer D. Carroll Foy, center, sponsor of a resolution to ratify the Equal Rights Amendment, in Richmond, Va. on Wednesday, Jan. 15, 2020.

and “excluding any amendment which will deprive any state, without its consent, of its equal suffrage in the Senate.” *Dillon v. Gloss* (1921) 256 U.S. 358, 373–74. Neither restriction applies here.

Although in *Dillon* the court concluded that “the fair inference or implication from article 5 is that the ratification must be within some reasonable time after the proposal,” *id.* at 375, it has held elsewhere that Congress has authority to settle ratification debates because they are political questions. As Chief Justice Charles Hughes noted in his controlling opinion in *Coleman v. Miller* (1939) 307 U.S. 433, historical precedent supported accepting the political call by Congress to certify the 14th Amendment’s adoption and to ignore conflicting rejections and withdrawals by some states. *Id.* at 449. Accordingly, he concluded that “the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.” *Id.* at 450.

*Coleman* is clear that ratification dead-

lines are a political question for Congress: “we think that it should also be regarded as an open one for the consideration of the Congress when, in the presence of certified ratifications by three-fourths of the States, the time arrives for the promulgation of the adoption of the amendment. The decision by the Congress, in its control of the action of the Secretary of State, of the question whether the amendment had been adopted within a reasonable time would not be subject to review by the courts.” *Id.* at 454. If Congress has power to resolve political questions over ratification deadlines and to judge what constitutes a reasonable limit of time for ratification, it should be irrelevant whether a limit was fixed in advance. Modifying, ignoring, or revoking deadlines should also be political questions within Congress’s Article V power.

Ratification deadlines are flexible because a legislature may not bind its future self. *Manigault v. Springs* (1905) 199 U.S. 473, 487. It is well-established that Congress can always repeal or modify its past acts. *Reichelderfer v. Quinn* (1932) 287 U.S. 315, 318. Chief Justice John Marshall first stated this principle “that one legislature is competent to repeal any act which a former legislature was competent to pass;

and that one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck* (1810) 6 Cranch 87, 135. Today’s Congress is fully vested with power to revoke or modify the ratification deadline. And while *Dillon* and *Coleman* state that Congress may prescribe a “reasonable time” to ratify an amendment, this is not a fixed standard. The 27th Amendment, submitted to the states by the first Congress in 1789, was finally ratified nearly 203 years later, in 1992. If Congress can set a definite period, it can modify it later.

What if (after Virginia ratifies the ERA) Congress unanimously passes a resolution, which a President signs, adopting the ERA and extending the deadline retroactively? That would be a conclusive policy decision to accept ratification. It need not even expressly revoke the past deadline. If (now that Virginia ratified the ERA) Congress by resolution gives notice to the National Archives that the ERA has been adopted, that’s the end of it.

Amending the nation’s charter is an ultimate political act, a political question assigned to the states and to Congress within Article V’s procedures. If the states and Congress want the ERA to be adopted, let it be so. ■

David A. Carrillo is executive director of and Stephen M. Duvernay and Brandon V. Stracener are senior research fellows at the California Constitution Center.

