Can a Sunset Clause Derail an Amendment to the U.S. Constitution?

Former President Biden, a couple of days before the end of his term in office, issued a statement acknowledging the passage of the Equal Rights Amendment (ERA) as the 28th amendment. The ERA was a proposed amendment to the United States Constitution approved by both chambers of Congress with bipartisan support in 1972 explicitly prohibiting sex discrimination. The text of the amendment which has 3 sections stated that :
"1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article. 3. This amendment shall take effect two years after the date of ratification."

As stipulated by the amendment process outlined in the United States Constitution (Article V), for an amendment to be ratified, it must be approved by two-thirds of both houses of Congress. Then, it must be ratified by three-fourths of the state legislative bodies or three-fourths of state constituent conventions. In essence, 38 states are required to ratify the proposed amendment. In 2020, the Virginia state legislature ratified the ERA, becoming the 38th state to meet the formal requirement of the amendment process.

Despite the ratification from the State of Virginia, the status of the ERA as the 28th amendment to the US Constitution is disputed. The reason is a sunset clause in the preamble of the joint resolution by the Senate and House of Representatives which passed the ERA. In the preamble it was stated that 'the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress'.

By 1977, before the seven-year period expired, only 35 states had ratified the Equal Rights Amendment. To save the amendment, Congress passed a motion to extend the ratification deadline by three more years until 1982. However, not only did no new states ratify it, but remarkably, legislative bodies in states like Nebraska, Tennessee, Idaho, Kentucky, and South Dakota passed resolutions to rescind their earlier support. Despite the expiration of the sunset clause, and its 3-year extension, it seems that the election of Trump in 2016 revived the interest on the ratification of the ERA amendment. Momentum was rebuilt when in 2017 Nevada ratified the ERA, then in 2018 Illinois' ratification followed.

The crucial question is the following: which institution has the authority to determine whether the ERA has been properly ratified? And second did Congress have the authority to set a deadline for completing the ratification process? These questions are crucial, as the text of the US Constitution, and Article V is silent on both. Interestingly, two Supreme Court decisions offer guidance on these matters.

When the Eighteenth Amendment to the Constitution was ratified, a dispute emerged about its validity. This amednment prohibited the sale and importation of alcohol. The case began when Jacob Dillon was convicted of transporting liquor in violation of the National Prohibition Act (Volstead Act), which was enacted to enforce the Eighteenth Amendment. Dillon challenged his conviction, arguing that the Eighteenth Amendment was invalid.

Accordingly the legal dispute before the Supreme Court centered on whether the Eighteenth Amendment to the Constitution was invalid because Congress had set in section 3 of the joint resolution proposing the amendment a seven-year ratification deadline in its resolution proposing the amendment [1] The 18th amendment provided in secion 3 that "This article shall be inoperative unless it shall have been ratified as an amendment to the

[1] Dillon v. Gloss 256 U. S. 371 (1921).

Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

The Supreme Court ruled that Article V does not explicitly state that Congress can set a time limit for ratification, such a power is reasonably implied as part of Congress's broader authority in the amendment process.[2] It also hold that proposal and ratification must be treated as succeeding steps and therefore the ratification process should occur within a reasonable timeframe to ensure that the amendment reflects the current will of the people across the country.[3] At the same time the inclusion of a sunset clause is a good policy advancing legal certainty as such deadline for the ratification prevents uncertainty and speculation about what constitutes a reasonable ratification time. The Court also made an historical argument according to which all previous successful amendments had been ratified within a short timeframe, typically within four years, while the unsuccessful remained dormant for decades.

Fuertermore, another case, the Coleman v. Miller[4] appeared before the Supreme Court, this time for about the power of Congress to determine whether an amendment remains valid for ratification if no time limit is specified. In particular, in 1924, Congress proposed the Child Labor Amendment, which was sent to the states for ratification without any time limitation. Kansas legislature ratified it 13 years after it was proposed by Congress, Hence, one of the central legal issues before the court was whether the amendment was active for ratification. The Supreme Court ruled that Congress has plenary power to decide on this issue, and not the judiciary. In essence with its decision the Supreme Court removed judicial oversight in cases where Congress had not set a deadline.

These two decisions sparked a debate among academics around the roles of Congress and the judiciary in resolving disputes over amendments. Dellinger, in The Legitimacy of Constitutional Change: Rethinking the Amendment[5] Process, advocates for a more formal, rule-based approach to the amendment process, with courts playing a central role in resolving disputes. He critiques the Coleman v. Miller decision, which grants Congress final authority over amendment validity, arguing that this model lacks textual support and creates uncertainty. Dellinger specifically addresses time limits, referencing Dillon v. Gloss (1921), which upheld Congress's power to impose deadlines.

In response, Laurence Tribe, in A Constitution We Are Amending: In Defense of a Restrained Judicial Role,[6] defends a more restrained judicial role. While acknowledging flaws in Coleman v. Miller, Tribe argues that excessive judicial involvement would undermine the flexibility that is necessary in the amendment process. Accordingly, he supports congressional discretion in resolving disputes, including time limits, rescissions, and deadline extensions. Tribe illustrates his concerns about the judiciary's role by highlighting the risk of judicial bias, particularly in cases where constitutional amendments are intended to overturn Supreme Court decisions.

In Constitutional Politics: A Rejoinder,[7] Dellinger responds to Laurence Tribe's critique of his earlier article. He argues that while courts should not judge the wisdom or merits of proposed amendments (a political question), they are well-suited to resolve procedural disputes, such as whether an amendment was ratified in accordance with Article V. In addition

[2] Dillon v. Gloss 256 U. S. 371 (1921).
[3] Dillon v. Gloss 256 U. S. 371 (1921).
[4] Coleman v. Miller, 307 U.S. 433 (1939).
[5] Walter Dellinger, 'The Legitimacy of Constitutional Change: Rethinking the Amendment Process' (1983) 97 Harv L Rev 386
[6] Laurence H Tribe, 'A Constitution We Are Amending: In Defense of a Restrained Judicial Role' (1983) 97 Harv L Rev 433
[7] Walter Dellinger, 'Constitutional Politics: A Rejoinder' (1983) 97 Harv L Rev 446

Dellinger argues that Tribe's approach, which leaves these issues to Congress on an ad hoc basis, creates uncertainty and politicizes the amendment process.

Vile inspired by the Dellinger-Tribe exchange of ideas in his article Judicial Review of the Amending Process: The Dellinger-Tribe Debate[8] emphasizes the practical implications this debate in relation to contemporary issues like the Equal Rights Amendment (ERA) and the potential for a constitutional convention.

Vile suggests that neither Dellinger's call for strict judicial review nor Tribe's defense of congressional discretion is entirely satisfactory. Instead, he recognizes that the question of oversight in the amendment process is not a binary choice between judicial review and congressional authority. Instead, he argues for limited judicial review in extreme cases while advocating for deference to congressional judgment in most situations. This middle-ground approach aims to balance the need for certainty and stability with the flexibility required to address unique circumstances.

Within Vile's framework, the ratification of ERA is an extreme case which should deserve a ruling from the judiciary for the following reasons. First, the argument put forward by the Court in Dillon v. Gloss (1921) that proposal and ratification are successive steps that must occur within a reasonable timeframe has been undermined by the ratification of the 27th Amendment. The 27th Amendment, ratified over 200 years after its proposal, demonstrates the flexibility of the constitutional amendment process. Since Article V does not impose an explicit time limit on ratification, this case highlights the possibility that amendments may still be valid even if ratified long after their initial proposal.

Second, in Barnhart v. Peabody Coal Co. (2003),[9] the U.S. Supreme Court addressed a sunset clause issue related to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). The Court ruled that the statutory deadline imposed by the sunset clause was directory rather than mandatory, meaning that missing the deadline did not terminate the agency's authority to act. The case specifically concerned whether the Commissioner of Social Security could assign beneficiary obligations to coal companies after the statutory deadline had passed. The Court held that the agency retained its authority to act beyond the deadline, emphasizing that agencies are often granted discretion in meeting deadlines—especially when the statute does not explicitly state that failure to meet the deadline voids the agency's action. By analogy, this reasoning could be applied to the Equal Rights Amendment (ERA). It may be argued that the seven-year ratification deadline in the ERA's preamble was directory rather than mandatory. Accordingly, mutatis mutandis, ratifications by state legislatures after the deadline could still be considered valid.

The question of whether the Equal Rights Amendment (ERA) has been successfully ratified remains unresolved and continues to be a subject of legal and political debate. Based on the precedents set by the Supreme Court in Dillon v. Gloss (1921) and Coleman v. Miller (1939), it appears that Congress holds the ultimate authority in determining the validity of an amendment's ratification.

These rulings suggest that neither the judiciary nor the executive branch—including the Supreme Court or the President—has the power to finalize or "seal" the ratification of a constitutional amendment. Instead, Congress has plenary power to decide whether an amendment that has been ratified by the required number of states should be officially recognized as part of the Constitution or rejected due to procedural concerns, such as expired deadlines or state rescissions.

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[8] John R Vile, 'Judicial Review of the Amending Process: The Dellinger-Tribe Debate' (1986) 3 JL & Pol 21

[9] Barnhart v. Peabody Coal Co., 537 U.S. 149 (2003).