FROM FOUNDING FATHERS TO FOUNDING MOTHERS: LESSONS FROM FAILED AMENDMENTS

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In September 1787, thirty-nine men became the "Founding Fathers" of the nation by signing the U.S. Constitution in Philadelphia, Pennsylvania, sending it on to ratifying conventions in the states. Constitution Day commemorates that moment every year.[1] Constitution Day need not be devoted to veneration of the Founding Fathers or the document that emerged from their compromises. It can be an opportunity for Americans to reflect on those eighteenth-century compromises, and to ask how well the Constitution is serving the democracy we aspire to be today.

The Founding Fathers of the U.S. Constitution were all white property-holding men, and for many of them, the property they owned included Black enslaved persons.[2] They did not regard women as worthy of the equal rights and privileges of citizenship.[3] But to their credit, the Founding Fathers recognized that neither they nor the constitution they adopted were perfect; that the process of making a "more perfect union" would have to continue. James Madison, for instance, wrote: "That useful alterations will be suggested by experience, could not but be foreseen."[4] That was why the Constitution included an amendment rule, set out at Article V. The goal of Article V was to make it possible, but not too easy and not too difficult to change the Constitution as the

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[1] 36 U.S.C. § 106.
[2] *See* JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION (2002).
[3] *See* ROSEMARIE ZAGARRI, REVOLUTIONARY BACKLASH: WOMEN AND POLITICS IN THE EARLY AMERICAN REPUBLIC 11 (2007).
[4] THE FEDERALIST NO. 43, at 296 (James Madison) (Jacob E.Cooke ed., 1961)

sentiments and needs of the people changed. Madison warned that an extremely difficult amendment process might perpetuate the "discovered faults" of the constitution.[5]

It is the possibility of amendment that led women to pursue constitutional changes that would improve their lives and include them as full members of our polity, even from their disfranchised positions. The women's temperance movement in the nineteenth century sought a Prohibition Amendment to weaken the effects of male drunkenness on their domestic lives,[6] and leaders moved the demand for women's suffrage into the mainstream.[7]

2023 marks a significant inflection point in the trajectory of this other set of constitutional framers—the "founding mothers" if you will. A century ago, in the summer of 1923, the National Woman's Party convened in Seneca Falls, New York led by suffragist Alice Paul.[8] They did not rest on their laurels following the 1920 passage of the Nineteenth Amendment's passage in 1920, but instead introduced the Equal Rights Amendment, formally proposed in Congress in December of 1923.[9] They saw the vote as only the beginning of a much broader constitutional transformation required to include women as full participants in our democracy and economy.[10] An Equal Rights Amendment ("ERA") would empower women to contribute equally to men as citizens in the legal, political, social, and economic life of our nation. That constitutional project has not succeeded to date, one hundred years after it was introduced, and counting. Why not? Answering that question

[5] *Id*.
[6] *See generally* JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT 123-151 (2023); BARBARA LESLIE EPSTEIN, THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA (1981); ELAINE FRANTZ PARSONS, MANHOOD LOST: FALLEN DRUNKARDS AND REDEEMING WOMEN IN THE NINETEENTH-CENTURY UNITED STATES (2003).
[7] *See* JANET ZOLLINGER GIELE, TWO PATHS TO WOMEN'S EQUALITY: TEMPERANCE, SUFFRAGE, AND THE ORIGINS OF MODERN FEMINISM (1995); RUTH BORDIN, FRANCES WILLARD A BIOGRAPHY (1986).
[8] *See* CHRISTINE A. LUNARDINI, FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN'S PARTY, 1910-1928, (1986); *Women Open Fight for Equal Rights*, N.Y. Times, July 21, 1923, at 8.
[9] H.J. Res. 75, 68th Cong. (1923).
[10] *See* Crystal Eastman, *Now We Can Begin*. THE LIBERATOR, Dec. 1, 1920.

requires a critical look at the constitutional design that emerged on the first Constitution Day in 1787.

The Founding Fathers made it possible to imagine constitutional change in creating an amendment rule at Article V of the Constitution, but the amendment rule they designed became impossible to use in the twenty-first century. Historian Jill Lepore suggests the ERA effort of the 1970s put the nail in the coffin of Article V.[11] Not only did the ERA die in the 1970s when it failed ratification; with it, the very possibility of amendment got buried.

But efforts to revive the Equal Rights Amendment made headlines in 2023.[12] Although the ERA was presumed dead for nearly forty years, the Senate held a hearing on it in 2023 in reaction to *Dobbs v. Jackson Women's Health*.[13] And, a majority of the Senate voted in favor of legislating the steps necessary to legitimize the ERA. But that majority fell short of the supermajority now required in the Senate to defeat the filibuster and advance a measure to an actual vote.[14] The ERA's situation is unprecedented in our constitutional history: while it was adopted by two-thirds of both Houses of Congress in 1972,[15] fifty years after it was first introduced, and then ratified by thirty-five states by 1978,[16] the final three ratifications necessary were achieved between 2017 and 2020, nearly forty years after Congress's time limit,[17] and after five states took action to rescind

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[11] Jill Lepore, *The United States' Unamendable Constitution*, THE NEW YORKER, Oct. 26, 2022.
[12] *See, e.g.* Annie Karni, *Democrats Try a Novel Tactic to Revive the Equal Rights Amendment*, N.Y. TIMES, July 13, 2023, https://www.nytimes.com/2023/07/13/us/politics/democrats-equal-rights-amendment.html.
[13] *The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution: Hearing Before Senate Comm. on the Judiciary*, 118th Cong. (2023); Dobbs v. Jackson Women's Health Organization, 597 U.S. __ (2022).
[14] 169 CONG. REC. S1406 (daily ed. Apr. 27, 2023) (Roll call Vote No. 99 Leg. regarding a joint resolution removing the deadline for the ratification of the Equal Rights Amendment, available at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1181/vote_118_1_00099.htm).

[15] H.J. Res. 208, 92d Cong. (1972).
[16] *See* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 70 (1986).
[17] *See generally* JULIE C. SUK, WE THE WOMEN: THE UNSTOPPABLE MOTHERS OF THE EQUAL RIGHTS AMENDMENT, 129-71 (2020);S.J. Res 2, Amend. No. 50, 79th Sess. (Nev. 2017); H.B. 0008, 98th Gen. Assembly (Ill. 2018); H.R.J Res. 1, 2020 Sess. (Va. 2020).

their ratifications.[18] Proposed resolutions in Congress attempt to forgive the three states' extreme lateness of ratification and recognize the ERA as a valid part of the Constitution;[19] recent years have seen hearings in both chambers of Congress as well as floor votes indicating majority support for the proposals.[20] But the House votes in 2020 and 2021 were not followed by Senate votes in the same legislative session, and the Senate vote indicating majority support for advancing the ERA in 2023 was immaterial because it did not attain the sixty-vote supermajority to defeat the filibuster.

ERA proponents argue that the future of women's rights hangs on this amendment.[21] Given the current Supreme Court majority's originalist approach to the rights of women in the *Dobbs* case, it is unclear whether and how the ERA will change the law of sex equality in the interpretive hands of this Court.[22] But what is more profoundly at stake in the legal and political controversy over the ERA is the future of constitutional amendment itself. The ERA's continued failure suggests that we the people have lost our ability to change a constitution that only the Supreme Court can change through interpretation in the course of judicial review. This is a grim fate for any people who want to live in a modern democracy.

Article V provides as follows:

> 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

[18] *See* JANE MANSBRIDGE, WHY WE LOST THE ERA (1986).
[19] *See* S.J. Res. 4, 118th Cong. (2023); H.J. Res. 25, 118th Cong. (2023); S.J. Res. 39, 118th Cong. (2023); H.J. Res. 82, 118th Cong. (2023).
[20] *See Equal Rights Amendment: Hearing Before H. Judiciary Comm*., 116th Cong.(2019); *The Equal Rights Amendment: Achieving Constitutional Equality for All*: *Hearing Before H. Oversight Comm.,* 117th Cong. (2021); *The Equal Rights Amendment: How Congress Can Recognize Ratification and Enshrine Equality in Our Constitution: Hearing Before Senate Comm. on the Judiciary*, 118th Cong. (2023)..
[21] *See, e.g.*, JESSICA NEUWIRTH, EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW (2015).
[22] Given the Supreme Court majority's originalist approach, its interpretation of the Equal Rights Amendment would perhaps focus on its meaning at the time of Congress's adoption all the way through to its final ratification in 2020, which may lead the Court to construe the ERA as having the same meanings as those emanating from the Court's sex equality jurisprudence construing the Equal Protection Clause.

> Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article, and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[23]

Regardless of Founding Fathers' intentions and regardless of how amendments worked in the eighteenth century with far fewer states, and far fewer people, on far smaller land, Article V makes it extremely difficult, and even when successful, extremely slow, to change the Constitution.

This has been especially true when the fault being corrected by amendment is the exclusion of some people deemed inferior and unworthy of full citizenship and decision-making power within our polity. Even though the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments eventually succeeded, the legal enslavement of Black people and exclusion of women from the vote were perpetuated long before the Article V process delivered a step towards inclusion. There were abolitionists like Benjamin Franklin who wanted slavery outlawed even at the Founding,[24] but our Constitution did not outlaw slavery until eight decades later. And, even though the 1848 Women's Rights Convention at Seneca Falls demanded women's suffrage, our Constitution did not outlaw the denial of the vote on account of sex until 1920, again, about eight decades after that.[25]

Women's navigation of the Article V process for a century brought the Equal Rights Amendment close, but there remain many contested questions about the validity of its ratification that stop it from being recognized as legitimate, due to rescissions and post-deadline ratifications.

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[23] U.S. CONST. art V.
[24] *See* SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING 67 (2018).
[25] *See* ELEANOR FLEXNER: CENTURY OF STRUGGLE: THE WOMAN'S RIGHT'S MOVEMENT IN THE UNITED STATES (1959).

The text of the amendment is so simple that it appears beyond reproach, but every capacious word is capable of holding a controversial meaning. It reads:

> Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3: This amendment shall take effect two years after the date of ratification.[26]

Our collective narrative of the ERA's failure focuses on why it failed – pointing to culture wars about the role of women in society and the relentless charisma of ERA opponent Phyllis Schlafly (her dynamism worthy of a television-drama portrayal by Cate Blanchett).[27] But this story of conservative women's victory over feminism eclipses the more troubling history of *how* the ERA failed. Institutional processes in Congress and state legislatures structured the battle for the ERA under Article V.[28] We must examine those institutional processes and ask whether they can be described as fair or democratic, even if legal.

In 1972, the ERA was adopted by over ninety percent of the vote in both houses of Congress. By 1972, the ERA's adoption was overdue: it had passed the House by ninety percent of the vote, with no ratification deadline, in 1970.[29] Despite overwhelming support for the ERA in the House, the ordinary legislative process kept the ERA's popularity hidden from public view. Because the Chairman of the House Judiciary Committee opposed the ERA, he was able to prevent it from getting a committee hearing or a debate on the floor by the whole body for many years.[30]

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[26] S.J. Res. 208, 92d Cong. (1972).
[27] *See Mrs. America* (Hulu 2020); MARJORIE SPRUILL, DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS (2018).
[28] For a detailed historical account of how procedural rules were deployed to delay the adoption of the ERA in Congress, *see* Suk, *supra* note 17, at 63-76. For an account of how state parliamentary rules thwarted ERA ratification in some states, *see id*. at 136-38, 146-50, 164-68.
[29] 116 CONG. REC. 28037-38 (1970).
[30] *See Martha Griffiths and the Equal Rights Amendment*, NATIONAL ARCHIVES, https://www.archives.gov/legislative/features/griffiths#:~:text=She%20was%20the%20first%20woman,Equal%20Ri

It was only when Congresswoman Martha Griffiths, one of ten women in the House, pursued a discharge motion, not routinely used, to wrest the ERA out of the Judiciary Committee's control to get a floor debate and vote on the ERA.[31] A discharge motion with the signatures of fifty-one percent of the House can make this happen.[32]

Despite a majority far greater than two-thirds of the House voting for the ERA in 1970 with no ratification deadline, the ERA did not even get a vote in the Senate in that legislative session because a handful of opponents, empowered by Senate procedural rules, prevented a vote. Senator Sam Ervin, a powerful segregationist who opposed the ERA, and was known for filibustering civil rights laws, had prolonged debate on the ERA until time ran out in that legislative session. This tactic, allowed by the longstanding Senate practice of not limiting debate on any measure, had the intention and effect of killing the ERA. A handful of vocal Senators continued to raise possible amendments to the proposal, including the seven-year ratification deadline, appearing to shape an ERA they would support, when ultimately they voted against it even with the deadline. Senator Ervin's substantive objection to the ERA was its potential to erode women's traditional roles within the family, but he also pointed to the ERA's lack of a ratification deadline as a reason to keep debating about it.[33] He held the Senate floor with the appearance of raising a neutral procedural concern, and this tactic prevented a vote that likely would have led to the ERA's adoption without a ratification deadline. It was this experience of the senior Senator's manipulation of minority-empowering parliamentary tools that led Congresswoman Martha Griffiths to include

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ghts%20Amendment%20(ERA); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-2015, at 400, 404 (2016).

[31] *See id*.

[32] *See Guide to the Rules, Precedents, and Procedures of the House*, U.S. GOV'T PUBL'G OFF. 451, https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-108/html/GPO-HPRACTICE-108-20.htm#:~:text=The%20Discharge%20Rule%3B%20Motions%20to%20Discharge%20Generally%20Under%20rule%20XV,committee%2030%20days%20prior%20thereto.

[33] *See* Suk, *supra* note 17, at 63-64 (citing the debate at 116 CONG. REC., 35959).

a seven-year ratification deadline when she reintroduced the ERA in the next legislative session, in the hopes that the small but powerful minority in the Senate would not use the absence of a time limit to hold up the ERA again.[34] The paragraph containing the time limit reads:

> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), 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.*[35]

In retrospect, this concession was probably unnecessary; it did not stop Senator Ervin from holding the floor with substantive attacks on the ERA before it finally came to a vote in 1972.[36] After hours of prolonged debate and efforts to change its text which failed, eighty-four senators—well over the two-thirds of the Senate required—voted in favor of the ERA in the same form adopted by the House.[37] No Senator who voted for the ERA suggested that he would have voted against it without the deadline.

Thirty-five states ratified the ERA in the first five years, three states short of the thirty-eight necessary to get to three-fourths of the 50 states. Ratification stalled; Phyllis Schlafly's STOP-ERA campaign was effective in battleground states, like Illinois, where a state rule requires a three-fifths supermajority of the legislature to ratify a federal constitutional amendment.[38] It was often idiosyncratic and anti-democratic procedures in state legislatures, rather than lack of popular support, that derailed ERA ratification.[39] Congress voted to extend the time frame by another three

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[34] *Equal Rights for Men and Women 1971, Hearings on H.J. Res. 35, 208 and Related Bills Before Subcomm.t No. 4 of the House Committee on the Judiciary*, 92d Cong. 41 (Statement of Martha Griffiths).
[35] H.R.J. Res. 208, 92nd Cong. (1972) (emphasis added).
[36] *See* 118 CONG. REC. 9084-9597 (1972). *See generally* Suk, *supra* note 17, at 86-88.
[37] 118 CONG. REC. 9597.
[38] *See* Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975).
[39] For instance, in the Virginia House of Delegates, the Privileges and Elections Committee controls whether any measure, including federal constitutional amendments, will be reported out for a vote by the entire body. On several occasions, that committee declined to advance the ERA for a debate and vote by the larger body in the 1970s. *See generally* Suk,, *supra* note 17, 165-66.

years in 1978, but no additional states ratified the ERA until 2017, when Nevada did.[40] Then, Illinois ratified in 2018[41] and Virginia in 2020.[42] At the same time, five state legislatures took action in the 1970s to try to reverse their ratifications.[43]

Does this mean the ERA is part of the Constitution? Although neither side has acknowledged it in congressional debates, there are reasonable arguments on both sides: the ERA has technically met the requirements of Article V; adoption by two-thirds of both houses of Congress (in 1972) and ratification by three-fourths of the states. Article V says nothing about deadlines. On the other side, skeptics say that the three ratifications that came nearly forty years after the ratification deadline—after five states rescinded their ratifications in the 1970s – cannot bring the ratification count up to the requisite number of thirty-eight.[44] Much turns on Article V's silence regarding time. Does it imply that proposal and ratification must be contemporaneous to be fair and accurate? If not, is it up to Congress or the states to decide when a ratification must occur in order to be valid?

After a hearing in the Senate Judiciary Committee, a majority of Senators registered their support in a cloture vote, fifty-one to forty-seven, for a resolution that would recognize the ERA as ratified and part of the Constitution, essentially removing the deadline, excusing some states for ratifying very late, and rejecting the efforts by other states to rescind their ratifications.[45] In the last two sessions of Congress, the House voted to remove the deadline on ERA ratification.[46] The

[40]S.J. Res. 79th Sess., Amend. No. 50, (Nev. 2017).
[41] SJRCA0004, 110th Gen. Assembly (Ill. 2018).
[42] H.J. Res. 1, S.J. 1, 2020 Sess. (Va. 2020) (ratifies and affirms Equal Rights Amendment).
[43] *See* Memorandum for the Gen. Couns. Nat'l Archives and Recs. Admin., Ratification of the Equal Rights Amendment, at 6-7 (Jan. 6, 2020).
[44] *See, e.g., id.* at 37.
[45] 169 CONG. REC. S1406 (daily ed. Apr. 27, 2023) (Roll call Vote No. 99 Leg. regarding a joint resolution removing the deadline for the ratification of the Equal Rights Amendment, available at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1181/vote_118_1_00099.htm).
[46] H.R.J. Res. 79, 116th Cong. (2019); 166 Cong. Rec. H1140 (daily ed. Feb. 13, 2020); H.R.J. Res. 17, 117th Cong. (2021); 167 Cong. Rec. H1419 (daily ed. Mar. 17, 2021).

text of Article V does not require both houses of Congress to take action on an amendment in the same legislative session in order to be effective, but such a requirement has long been assumed. If both houses take action to remove the deadline in the future, would that make the ERA part of the Constitution?

It depends on what kind of deadline it was. Was it an expiration date for the proposed amendment, or a target date that could be changed if circumstances warrant? The ordinary deadlines that govern people's lives—for work projects, student papers, return of library books—are due dates. If the task is completed after the due date, it may or may not be accepted late. It depends. Often, being late on a deadline is excused at the discretion of the party who issued it. But sometimes, the deadline is clearly an expiration date, after which late work cannot be accepted. The Constitution's provisions on amendment say nothing about ratification deadlines. So what does that mean for the deadlines Congress imposed on almost every amendment since the Prohibition Amendment?[47]

Article V of the Constitution gives Congress the power to propose amendments and to choose the "mode of ratification," whether by state legislatures or ratifying conventions.[48] The Supreme Court has held that this power encompasses the power to put deadlines on state legislatures or conventions for their ratification of any amendment Congress proposes.[49] Because

[47] After the Eighteenth Amendment (Prohibition), the only amendment Congress adopted with no ratification time limit was the Nineteenth Amendment, after consideration of the pros and cons of time limits in hearings and floor debates. *See* Suk, *supra* note 17, at 19-20; *Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the House Committee on Woman Suffrage*, 65th Cong. 252 (1918) (Statement of Carrie Chapman Catt); 56 CONG. REC. 807-09.

[48] U.S. CONST. art. V.

[49] In Dillon v. Gloss, the Supreme Court recognized that "An examination of article 5 discloses that it is intended to invest Congress with a wide range of power in proposing amendments," including the power to set reasonable time frames on ratification. 254 U.S. 363, 374 (1921). This understanding was affirmed in Coleman v. Miller, 307 U.S. 433, 452 (1939).

the deadline power belongs to Congress, it is logical to conclude that Congress also has the power to change, extend, or lift any deadlines it imposes.[50]

How the ERA deadline gets resolved has immense implications for the role of Congress and the people in amending the Constitution. After all, as James Madison noted, "useful alterations" of the Constitution become necessary to mend its "discovered faults."[51] Those faults are discovered by experience – and in the world we now inhabit, that experience is largely one of judicial control over Constitutional meaning through litigation and interpretation.[52] The amendment process is the most significant check on judicial supremacy that our constitution provides.[53] It is designed to give the people's representatives in Congress the lead role in shaping constitutional meaning, especially at moments when the Supreme Court's interpretations of the Constitution neglect the modern needs and sentiments of the American people.

Some of our most important constitutional amendment efforts—some that succeeded in changing the words of the Constitution—came in direct response to decisions of the Supreme Court. The Supreme Court's decision in *Dred Scott*, ruling that Black people could never be US citizens[54] made it necessary for Congress to propose the Thirteenth and Fourteenth Amendments, which were drafted by abolitionists, including women in the abolitionist movement.[55] Two states

[50] Then-law-professor Ruth Bader Ginsburg made this argument during hearings on Congress's extension of the ERA ratification deadline. *Equal Rights Amendment Extension: Hearings on S.J.Res. 134 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 95th Cong. 262 (Statement of Ruth Bader Ginsburg).
[51] THE FEDERALIST NO. 43, *supra* note 4.
[52] *See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the de facto ERA - 2005-06 Brennan Center Symposium Lecture*, 94 CAL. L. REV. 1323 (2006) (explaining that the Constitution changed with regard to sex equality through Article III rather than Article V).
[53] *See generally* Laurence H. Tribe, *A Constitution We are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).
[54] Scott v. Sandford, 60 U.S. 393 (1857).
[55] *See* Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); Brandon Hasbrouck, *The Antiracist Constitution*, 132 BOSTON UNIV. L. REV. 87 (2022).

rescinded their ratifications of the Fourteenth Amendment, which Congress ignored when it recognized the Fourteenth Amendment as part of the Constitution.[56]

After the Supreme Court struck down federal laws that restricted child labor,[57] Congress proposed the Child Labor Amendment in 1924 to authorize federal legislation regulating child labor.[58] Women social reformers who advocated for better working conditions for women and children, including Florence Kelley, were thought leaders with regard to the introduction of the Child Labor Amendment in Congress.[59] After twenty-eight states ratified it, the Supreme Court dramatically changed course. Not only did the Court begin upholding federal child labor laws;[60] it also conceded that the question of a constitutional amendment's timeliness was a political question that the Constitution left to Congress rather than the courts. In *Coleman v. Miller*, the Supreme Court held that Congress, being closest to the sentiments of the people, should assess the social, economic, and political conditions after the Child Labor Amendment has been ratified to determine whether it is still necessary.[61] That is exactly what the Senate resolution to remove the ERA deadline attempts to do.

The Child Labor Amendment had no deadline, whereas the ERA does. But, if such fine formal differences matter, the difference in language and form between the ERA's deadline and the expiration dates that Congress put on other amendment proposals of the twentieth century should matter, too. The Prohibition Amendment, for instance, included a section that said in no uncertain terms, "This article shall be inoperative unless it shall have been ratified as an

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[56] BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 112 (1998).
[57] Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture, 259 U.S. 20 (1922).
[58] H.J. Res. 184, 68th Cong. (1924).
[59] Florence Kelley and other women from reform groups testified at Congressional hearings on the amendment. *See* Child-Labor Amendment to the Constitution: *Hearings Before a Subcommittee of the Senate Committee on the Judiciary* (1923) (Statement of Florence Kelley).
[60] United States v. Darby, 312 U.S. 100 (1940).
[61] Miller, 307 U.S. at 454-55.

amendment to the 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."[62] The "inoperative unless" language was repeated with the twentieth, twenty-first, and twenty-second amendments.[63] It stands in stark contrast to the ERA deadline's flexible language, which was placed in the resolution proposing the amendment rather than the text of the amendment itself, stipulating that the ERA would be "valid . . . when ratified . . . within seven years."[64] Whereas the deadlines that said "inoperative unless ratified" imposed *expiration dates*, the ERA deadline, like the deadlines for the twenty-fifth and twenty-sixth amendments, was worded as a *target date* that Congress could adjust if needed. Whether to accept the ratifications that occurred long past the target date, or to allow some states to take back their ratifications, is a political question that only Congress is authorized by the Constitution to answer.[65]

How should Congress answer this important political question? It must look to the legislative debates in the states that recently ratified the amendment, and make sense of contemporary popular sentiment to determine whether the amendment is still necessary. Skeptics say that the ERA is no longer necessary because the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to include sex equality.[66] However, in Nevada, Illinois, and Virginia, the legislatures ratified the ERA in the twenty-first century, with proponents pointing to the ongoing need for law and public policy to address remaining manifestations of

[62] U.S. CONST. amend. XVIII § 3.
[63] U.S. CONST. amend. XXI, §3, U.S. CONST. amend. XXII, § 2.
[64] H.J. Res. 208, 92d Cong. (1972).
[65] In Coleman v. Miller, the Supreme Court noted, citing the historical precedent of Congress's approach to the Fourteenth Amendment's rescission by two states, that "the question of 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." 307 U.S. at 450.
[66] *See* H. R. REP. NO. 116-378, Removing the Deadline for the Ratification of the Equal Rights Amendment, Dissenting Views, at 20-21 (2020).

gender inequality, including disadvantages women face due to pregnancy, motherhood and caregiving obligations, and the persistence of sexual assault and harassment.[67]

These problems—disadvantages associated with childbearing and childrearing, as well as sexual violence—took on a new sense of urgency for many American women after the Supreme Court stopped protecting the constitutional right to terminate a pregnancy in *Dobbs v. Jackson Women's Health*.[68] That decision has effectively exposed millions of American women to laws that degraded their access to reproductive healthcare beyond abortion[69] and forced them to bear children, even those conceived through sexual assault,[70] in states that do nothing to alleviate the burdens, disadvantages, and risks of mortality stemming from maternity.[71] The *Dobbs* decision demonstrates the Supreme Court's pinched view of the Fourteenth Amendment's commitments as limited to those widely accepted at the moment of ratification in 1868, before women could vote and before women were otherwise regarded by the legal order as equal citizens.[72]

The constitutional amendment process exists for moments like this. Representative bodies like Congress must respond to a Supreme Court that is stuck in the past, on behalf of the people of the here and now. If Congress had not deployed its Article V power in 1868 to declare the Fourteenth Amendment ratified despite state rescissions, that foundation of inclusive democracy would not have become part of the Constitution. Through the resolution recognizing the continued

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[67] *See* Suk, *supra* note 17, at 134 (pay inequity in Nevada floor debates), 144-45 (sexual violence and harassment in Illinois legislature), 160-61 (motherhood and pregnancy in Virginia ratification).
[68] *See* Dobbs, 597 U.S. __.
[69] *See* S. Marie Harvey, et. Al., *The Dobbs Decision—Exacerbating U.S. Health Inequity*, N. ENGL. J. MED. 1444 (2023).
[70] *See* Dana Goldstein & Ava Sasani, *What New Abortion Bans Mean for the Youngest Patients*, N.Y. TIMES (July 16, 2022), https://www.nytimes.com/2022/07/16/us/abortion-bans-children.html.
[71] *See* Oriana Gonzalez, *Report: Mothers in states with abortion bans nearly 3 times more likely to die*, AXIOS, (Jan. 19, 2023), https://www.axios.com/2023/01/19/mothers-anti-abortion-bans-states-die.
[72] *See* Reva B. Siegel, *Memory Games: Dobbs' Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (2023); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality: Dobbs on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901 (2023).

vitality of the ERA and the validity of its ratification now, Congress could express a commitment to modern ideas of gender equality where the Supreme Court has refused to do so.

The history and present predicament of the ERA highlight the tragic reality that took hold because the ERA failed half a century ago: Americans have lost our ability to amend the Constitution. The U.S. Constitution has not been amended since 1992. The amendment that was added to the Constitution most recently, over three decades ago, limited congressional pay raises, requiring an intervening election before any legislation raising congressional salaries could go into effect.[73] James Madison himself wrote the amendment that became the Twenty-Seventh Amendment, which Congress adopted in 1789, but took over two centuries to ratify.[74] Before that, the last amendment that was ratified by a healthy supermajority of the states was the ERA.

Saving the ERA and adding it to the Constitution would show, to the contrary, that our Constitution is still amendable. Nonetheless, an amendment rule that requires two-thirds of a Congress that operates under antiquated minority-empowering procedures,[75] and three-fourths of state legislatures that are increasingly criticized for being gerrymandered and antidemocratic,[76] may be impossible to use successfully in the future. Our annual Constitution Day reflections should lead us to confront the troubling question of whether an unamendable constitution—no matter how brilliant its eighteenth-century framers were—can retain its legitimacy for our twenty-first century democracy.

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[73] U.S. CONST. amend. XXVII,

[74] *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L. J. 677, 679 (1993).

[75] STEVEN LEVITSKY & DANIEL ZIBLATT, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT 160-63(2023).

[76] *See* Miriam Seifter & Jessica Bulman-Pozen, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WISC. L. REV. 1337 (2022); David Pepper, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES (2021); JACOB GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2021).