

# NECROMANCING THE EQUAL RIGHTS AMENDMENT

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## I

In 1972, fifty years after an earlier version was first introduced, both houses of Congress approved the Equal Rights Amendment (ERA) by the necessary two-thirds vote, and, in accordance with the Constitution's amendment procedure, sent it to state legislatures, where three-fourths of them would have to ratify it before it could become the law of the land.<sup>1</sup> As had been the contemporary practice, Congress prescribed a seven-year deadline for ratification. The initial prognosis for the ERA was good: of the thirty-two state legislatures that were in session in 1972, over twenty ratified the amendment.<sup>2</sup> But ratifications soon slowed to a trickle, due in part to social conservatives' deft exploitation of public fears about changes that would be wrought by an ERA in the hands of an activist judiciary.<sup>3</sup> By 1979, the

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1. See generally *Equal Rights Amendment*, in John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-1995* at 119-21 (ABC-Clio, 1996); see also David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution 1776-1995* at 394-419 (U. Press of Kansas, 1996).

2. See *Equal Rights Amendment*, in Vile, *Encyclopedia of Constitutional Amendments* at 120 (cited in note 1); see also Kyvig, *Amending the U.S. Constitution* at 408 (cited in note 1).

3. For a description of the campaign mounted against the ERA by conservative activist Phyllis Schlafly, and aided by Senator Sam Ervin, see Kyvig, *Amending the U.S. Constitution* at 409-11 (cited in note 1).

original deadline, only thirty-five of the requisite thirty-eight states had ratified.

Three states shy of ratification, ERA proponents persuaded Congress to extend the deadline for ratification until 1982.<sup>4</sup> By then, however, even ardent supporters were exhausted, while ERA opponents were just warming to the fight. To make matters worse for supporters, five states rescinded their earlier ratifications<sup>5</sup> (though Kentucky's acting governor purported to veto its legislature's vote to rescind). Before the validity of those rescissions could be hashed out in the courts, however, the new deadline passed and ERA's opponents declared victory. Its proponents, meanwhile, were left to advance women's rights using the Equal Protection Clause and the Civil Rights Act's prohibition of sex discrimination.

Now, however, because of an extraordinary series of events that resulted in the irregular ratification of the Twenty-Seventh Amendment<sup>6</sup> (also known as the "Madison Amendment") 200 years after it was first proposed, ERA proponents are hoping to reanimate the ERA for the proverbial charmed third time.<sup>7</sup> We argue here that the Madison Amendment's precedential value for the ERA is slight at best, and that, in any event, given the

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4. On the congressional decision to extend the time limit by a simple majority vote, see Kyvig, *Amending the U.S. Constitution* at 415 (cited in note 1).

5. *Id.* at 414. For contemporaneous comment on the propriety of the extension, see Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919 (1979); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875 (1980). Before the expiration of the extension, one district court held that the extension was void. See *Idaho v. Freeman*, 529 F. Supp. 1107 (D. Idaho 1981). Once the extension had passed without the ERA obtaining the requisite number of states for ratification, however, the U.S. Supreme Court pronounced the case moot and ordered the district court to dismiss it. See *National Org. Women v. Idaho*, 459 U.S. 809 (1982). For a succinct analysis of the various legal issues surrounding the ERA the first time around, see Laurence H. Tribe, 1 *American Constitutional Law* § 1-19 at 102-03 n.48 (Foundation Press, 3d ed. 2000).

6. U.S. Const., Amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.").

7. See, e.g., Allison L. Held, Sheryl L. Herndon and Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & L. 113 (1997); Debra Baker, *The Fight Ain't Over*, 85 A.B.A. J. 52 (1999); Editorial, *An Old Idea is New Again*, St. Louis Post-Dispatch B6 (March 8, 2000); Ellen Goodman, *Equal Rights Amendment is Not Dead Yet*, New Orleans Times-Picayune B5 (Feb. 21, 2000); Laura Scott, *Another Go-Round for ERA*, K.C. Star B7 (Feb. 17, 2000); Dru Sefton, *Supporters Work to Revive ERA*, USA Today 3A (Oct. 22, 1999); Stephanie Simon, *Activists Seek to Bring ERA Back to Life*, L.A. Times A5 (Mar. 9, 2000).

subsequent history of the Twenty-Seventh Amendment, supporters of the ERA will not want to follow that precedent.

## II

Originally proposed as one of James Madison's original twelve amendments,<sup>8</sup> ten of which became our Bill of Rights, the Madison Amendment provided that changes in congressional pay would not take effect until an election had occurred. When proposed in 1791, this amendment initially gained the assent of only six states; four short of the number needed to ratify (a number that increased as other states joined the Union).<sup>9</sup> In the 1870s, when Congress retroactively increased members' salaries to \$2,500 a year, Ohio ratified the amendment in protest. In 1978, after decades of rising congressional salaries, Wyoming added its ratification, bringing the number to eight.<sup>10</sup>

In 1982, Gregory Watson, a student at the University of Texas at Austin, wrote a term paper in which he argued that the amendment could still be ratified. Although he received only a C for his efforts,<sup>11</sup> he launched a low-key crusade that mustered thirty-two additional state ratifications.<sup>12</sup> In 1992, the national archivist in charge of keeping a tally certified that the amendment had been ratified; and in an election year marked by unprecedented public hostility towards Congress, both houses ratified the certification by lopsided votes—99 to 0 in the Senate, and 414 to 3 in the House.<sup>13</sup>

## III

The ratification of the Twenty-Seventh Amendment has, not surprisingly, given ERA supporters renewed hope. And why not? Proponents can hardly be faulted for asking why the passage of twenty-eight years should pose a barrier to ratification of

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8. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 8-19 (Yale U. Press, 1998) (discussing Madison's amendments not originally adopted as part of the Bill of Rights).

9. See *Twenty-Seventh Amendment*, in Vile, *Encyclopedia of Constitutional Amendments* at 323 (cited in note 1); see also Kyvig, *Amending the U.S. Constitution* at 461-70 (cited in note 1).

10. Vile, *Encyclopedia of Constitutional Amendments* at 324 (cited in note 1).

11. Watson's "C" and his subsequent success led one judge to quip, "One wonders what a student of Watson's professor would need to do to get an 'A'." *Shaffer v. Clinton*, 54 F. Supp. 2d 1014, 1016 n.1 (D. Colo. 1999).

12. Vile, *Encyclopedia of Constitutional Amendments* at 324 (cited in note 1).

13. *Id.*

the ERA when it took 203 years to ratify the Twenty-Seventh Amendment.<sup>14</sup> But the advocates of this belated ratification overlook at least three important distinctions between the ERA and the Twenty-Seventh Amendment.

First, no time limit accompanied the Twenty-Seventh Amendment; the Equal Rights Amendment, by contrast, has exhausted not one, but two such limits. Many in 1979 questioned the propriety of extending the first deadline at all, much less by majority vote instead of the two-thirds congressional superma-

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14. Professor Tribe wrote that the ratification of the Twenty-Seventh Amendment "refocused scholarly attention on whether there exist any constitutional limits on the amount of time that may pass between proposal and ratification of an amendment"—drolly adding that "[i]f there are to be any such limits, it would seem that the more than two-century span represented by the Twenty-seventh Amendment would implicate them." Tribe, 1 *American Constitutional Law* at 102 (cited in note 5) (footnote omitted). Professor Tribe's concern is not an academic one. If, in fact, the ratification of the Twenty-Seventh Amendment means that *no* limits exist, then there are sleeper amendments that could become part of the Constitution. See *infra* notes 19-20 and accompanying text. Though a careful analysis of the various schools of thought is beyond the scope of this essay, there are two main approaches to the issue—the "formalist" model and the "contemporaneous consensus" model.

Walter Dellinger has argued that the legitimacy of constitutional amendments should be ensured by a formalistic application of rules by the judiciary. See Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 432 (1983) ("article V should be viewed as a set of formal rules rather than as the embodiment of vague policy objectives"). The "contemporaneous consensus" model, endorsed by a plurality of the Court in *Dillon v. Gloss*, in contrast, argues that to be truly effective, ratification "must be sufficiently contemporaneous in [the three-fourths majority required by Article V] to reflect the will of the people in all sections at relatively the same period, which . . . ratification scattered through a long series of years would not do." *Dillon v. Gloss*, 256 U.S. 368, 375 (1921).

Then the question arises, "Who decides?" Professor Dellinger urged, *contra Dillon*, that the Supreme Court should exercise jurisdiction over such questions. See Dellinger, *supra*. Laurence Tribe, in response, weighed in on the side of judicial abstention, and argued that Congress should have pride of place in amendment controversies since "[t]he resort to amendment—to constitutional *politics* as opposed to constitutional *law*—should be taken as a sign that the legal system has come to a point of discontinuity, a point at which something less radical than revolution but distinctly more radical than ordinary legal evolution is called for." Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 436 (1983) (footnote omitted).

The case of the Twenty-Seventh Amendment seems to demonstrate the weaknesses of both approaches. Under the "rules" of Article V, Congress did the correct thing by certifying the amendment, since it contained no time limit on its ratification and the requisite number of states ratified it. But the fact that such an approach carries with it the possibility, which bore fruit in the case of the Madison Amendment, that amendments never die, would suggest that formalism can be pernicious—despite the fact that Professor Dellinger himself thought that the doctrine of desuetude prevented the Amendment from being revived. On the other hand, the haste with which Congress certified the Twenty-Seventh Amendment, suggests that it might not entirely take seriously its responsibility as referee in those controversies. See also John R. Vile, *Judicial Review of the Amending Process: The Dellinger-Tribe Debate*, 3 J.L. & Pol. 21 (1986).

majority required to propose amendments. (Proponents defended the decision to extend the deadline on the ground that the original time limit was placed in the amendment's authorizing resolution; not in the text of the amendment itself, where it would be self-enforcing.) If the first extension was like adding an extra quarter to benefit the losing team in a football game, allowing ratification efforts to resume twenty years after ERA's apparent defeat is like authorizing the losing team to continue a game after the winning team has left the stadium.

Second, unlike the Twenty-Seventh Amendment, which unquestionably got *more* popular with age,<sup>15</sup> at least five states attempted to rescind their initial ratification of the ERA, some in response to the extension of the initial time limit.<sup>16</sup> Were additional states to ratify an allegedly revived ERA, a question would immediately arise whether those rescissions were valid. While pundits debated whether three or eight additional states were needed to ratify, *more* states would likely attempt to rescind (though in a post-*Ally McBeal* world it is difficult to imagine that the prospect of unisex bathrooms—a favorite bugaboo of ERA's opponents—would be as effective as a scare tactic this time around).<sup>17</sup> State second-guessing of the ERA belies any notion that public opinion has been ineluctably moving in favor of ratification.

The third point is related to the first two. The ERA was proposed with great fanfare and was vigorously debated by both sides. Proponents had two shots to make their case. For a vari-

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15. See Kyvig, *Amending the U.S. Constitution* at 466 (cited in note 1) ("Resentment of federal government spending and the allure of a simple means of chastising the people immediately responsible fueled growing interest in Madison's long-dormant proposal. As support in Congress for the balanced budget amendment began to wane, state legislative enthusiasm for the congressional pay raise amendment accelerated.")

16. Simon, L.A. Times at A5 (cited in note 7) ("Five states that ratified the ERA in the '70s later passed resolutions taking it back.")

17. Though Held, Herndon, and Stager argue that rescissions are not valid, they do not really explore the arguments for and against, but rather note that it is the subject of debate among scholars. See Held, Herndon and Stager, 3 Wm. & Mary J. Women & L. at 131-34 (cited in note 7). Professor Tribe, who served as counsel for the National Organization of Women in their appeal from the decision of an Idaho district court upholding the validity of its rescission, argues that "the better view . . . is that the weight to be given to a state's purported rescission of a prior ratification is a political question inseparable from other nonjusticiable aspects of Congress' supervision of the ratification process." Tribe, 1 *American Constitutional Law* at 103 n.48 (cited in note 5). For further discussion of this issue, see Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 725-26 (1993) (arguing that rescissions are permitted until "the magic number of state ratifications occurs"). See generally John R. Vile, *Permitting States to Rescind Ratifications of Pending Amendments to the U.S. Constitution*, 20 Publius: J. Federalism 109 (1990).

ety of reasons, including judicial victories that seemed to render the ERA superfluous,<sup>18</sup> they fell short. To allow a third bite at the apple for the ERA would suggest that no amendment to the U.S. Constitution ever proposed—including the amendment that some right-wingers think strips lawyers of their citizenship and whose ratification in the early nineteenth century was, they argue, illegally nullified<sup>19</sup>—could ever be regarded as rejected. While the amendment process set forth in Article V of the Constitution was intended to be arduous, it was not intended to be eternal.<sup>20</sup>

#### IV

Even if the Twenty-Seventh Amendment did set a precedent, those hoping that Fortune will likewise smile on the ERA's third bid for ratification should stop to consider what sort of precedent was set. Let's assume that the requisite number of states could be persuaded to ratify. Let's further assume that in an election year, members of Congress could be bullied into approving certification of the ERA, lest they be tagged as "not getting it." The question remains, "Then what?" If the ERA's model for extraordinary ratification is the Twenty-Seventh Amendment, the answer is "Nothing." No doubt in part because of the Amendment's suspect pedigree, the courts and most members of Congress have tended to treat the Twenty-Seventh as a "demi-amendment," lacking the full authority of the twenty-six that preceded it.<sup>21</sup>

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18. See, for example, *United States v. Virginia*, 518 U.S. 515, 524 (1996) (requiring an "exceedingly persuasive justification" for gender-based governmental action); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sustaining an equal protection challenge to federal law allowing male members "automatic dependency allowance" for wives, but requiring wives to prove dependency of husbands); Baker, 85 A.B.A. J. at 54-55 (cited in note 7) (describing the gains made by women in the judiciary).

19. The argument is made in David M. Dodge, *The Missing Thirteenth Amendment*, available at <<http://www.nidlink.com/~bobhard/orig13th.html>> (last visited on Oct. 16, 2000). For an analysis of this case of the "missing amendment," see generally, Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. Cal. Interdisc. L.J. 577 (1999). For a rebuttal (of sorts), see generally, Richard C. Green, *The Demon of Discord: Ratification and Suppression of the Original Thirteenth Article of Amendment to the Constitution of the United States*, available at <<http://www.nidlink.com/~bobhard/orig13threality.html>> (last visited on Oct. 16, 2000). For other amendments that could be revived, see Paulsen, 103 Yale L.J. at 701-04 (cited in note 17).

20. Quite the contrary. James Madison cautioned his fellow citizens not to resort too frequently to the amending process. See Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 Tenn. L. Rev. 155, 169-72 (1997).

21. There are three reported cases that discuss the Twenty-Seventh Amendment.

The only Court of Appeals decision interpreting the Twenty-Seventh Amendment turned back a congressman's<sup>22</sup> challenge to annual cost-of-living increases (COLAs) automatically given to members of Congress as part of the 1989 Ethics Reform Act.<sup>23</sup> According to the court's reasoning, the automatic increases are not "law[s] varying the compensation" of members of Congress.<sup>24</sup> Instead, the original act that provided for the annual adjustments was the law; and—assuming as the court did that the Twenty-Seventh Amendment applies to laws passed before its ratification—"the COLA provision of the Ethics Reform Act of 1989 is constitutional because it did not cause any adjustment to congressional compensation until after the election of 1990 and the seating of the new Congress."<sup>25</sup> While this may be a plausible textual argument, the construction given by the Court certainly blinks at the apparent purpose of the Amendment.<sup>26</sup> A jury-rigged ratification of the ERA might result in its similar evisceration by the judiciary that will be called upon to interpret it.<sup>27</sup>

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See generally *Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994); *Shaffer v. Clinton*, 54 F. Supp. 2d 1014 (D. Colo. 1999); *Boehner v. Anderson*, 809 F. Supp. 138 (D.D.C. 1992).

22. Because federal courts will not hear "generalized grievances," or suits in which a plaintiff's harm (here, congressional violation of the Twenty-Seventh Amendment), is shared by millions of citizens, members of Congress appear to be the only ones possessed of the requisite "standing" to challenge the cost-of-living increases for itself in court. See, for example, *Shaffer*, 54 F. Supp. 2d at 1016-24 (denying standing to taxpayers and to state legislator who voted to ratify Twenty-Seventh Amendment; invoking a variety of other procedural doctrines including venue and ripeness to avoid decision on the merits of claim challenging constitutionality of COLAs). On standing generally, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 55-92 (Aspen, 1997).

23. *Boehner*, 30 F.3d at 161.

24. *Id.* at 161-62.

25. *Id.* at 162.

26. Though the court held that the 1989 Act was the "law" that authorized the annual COLAs, one might argue that each COLA is a separate appropriation that the Constitution requires to be made "by law." See U.S. Const., Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."). At any rate, the court provides no answer to the argument that allowing a congress prospectively to raise the salaries of future congresses in perpetuity (all of whom can thereafter disclaim responsibility for the salary increases) essentially guts the Twenty-Seventh Amendment.

27. Judge Sporkin's district court opinion in *Boehner v. Anderson* heaps scorn on the idea that the Twenty-Seventh Amendment in any way affected the validity of the COLAs and the Ethics Reform Act of 1989. See *Boehner*, 809 F. Supp. at 140. Instead, Sporkin faulted the Founding Fathers for "not spell[ing] out with sufficient clarity how important it was to pay our government leaders a decent and adequate compensation." *Id.* "It clearly could not have been the concept of our founding fathers," Sporkin wrote, "to provide government 'on the cheap.'" *Id.* These observations culminated in a paean to the wisdom and courage of the Congress for passing and the President for signing the 1989 Act. See *id.* at 141-42. Judge Sporkin then concluded, without much explanation, that the argument that the Amendment requires the separate passage of each COLA was

The likelihood that the judiciary would ignore the ERA, or at least interpret it narrowly, raises a more fundamental question about efforts to resurrect it: is it really a good idea to ornament the Constitution with amendments that guarantee "rights" in high-sounding rhetoric, but that contain little judicially-enforceable substance?<sup>28</sup> The specter of unenforceability has often been invoked to defeat hortatory amendments whose meaningful enforcement by the judiciary would either prove mischievous or impossible—the balanced budget amendment and the so-called victims' rights amendment are two recent examples.<sup>29</sup> State constitutions, by contrast, are often replete with such constitutional graffiti, which state courts have deemed aspirational and thus unenforceable, at least by the judiciary.<sup>30</sup> Too many such provisions can leave a constitution, in the words of Chief Justice John Marshall, "a magnificent structure, indeed, to look

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"an extremely strained reading of the 27th Amendment—a reading for which the plain language of the amendment provides no support." *Id.* at 142. Judge Sporkin went on to cite a case from the D.C. Circuit, decided *before* the ratification of the Amendment, which rejected a challenge to an act allowing congressional delegation of responsibility for setting congressional salaries to the President. See *id.* at 142-43 (discussing *Humphrey v. Baker*, 848 F.2d 211 (D.C. Cir. 1988)). "The 27th amendment," Sporkin wrote, "does nothing to alter Congress' legitimate delegation of responsibilities to implement a duly enacted salary structure and adjustment mechanism." *Id.* at 143.

Sporkin's observation merely begs the question whether an amendment obviously designed to render accountable members of Congress who raise their own pay has anything to say about the ability of Congress to avoid the very accountability the Amendment tries to ensure by delegating that responsibility to the executive branch. There is at least a plausible argument that it does. That Judge Sporkin seemed unwilling even to consider those arguments suggests that he did not take the Twenty-Seventh Amendment very seriously.

28. See generally Citizens for the Constitution, *"Great and Extraordinary Occasions": Developing Guidelines for Constitutional Change* 7, 19-20 (Century Foundation Press, 1999) ("The addition of purely aspirational statements, designed solely for symbolic effect, would lead interest groups to attempt to write their own special concerns into the Constitution."); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 *Notre Dame L. Rev.* 245, 275-77 (1999) (cautioning against writing aspirational, symbolic measures into a constitution); Brannon P. Denning, *This Amendment Would be Constitutional Graffiti*, *L.A. Times* B9 (Feb. 5, 1997) (pointing out problems of enforceability inherent in the proposed Balanced Budget Amendment). Proponents of ERA's ratification often speak of its symbolic importance. See generally Held, Herndon and Stager, 3 *Wm. & Mary J. Women & L.* at 135 (cited in note 7); Baker, 85 *A.B.A. J.* at 55 (cited in note 7); Editorial, *St. Louis Post-Dispatch* at B6 (cited in note 7); Scott, *K.C. Star* at B7 (cited in note 7); Sefton, *USA Today* at 3A (cited in note 7); Simon, *L.A. Times* at A5 (cited in note 7).

29. For commentary on various symbolic or aspirational amendments, see Ruhl, 74 *Notre Dame L. Rev.* at 246 n.5 (cited in note 28).

30. For a somewhat dated discussion of such provisions, see generally Walter F. Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 *U. Pa. L. Rev.* 54 (1931).

at, but totally unfit for use"<sup>31</sup>—an apt description of some state constitutions.<sup>32</sup>

Finally, those pursuing the Madison Amendment model of ratification for the ERA do not seem troubled by the effect that a successful effort would have on the constitutional amending process. If, as scholars suggest,<sup>33</sup> ratification of the Twenty-Seventh Amendment was dubious, at best, should we even contemplate compounding error by pressuring Congress to approve yet another product of such an irregular process?<sup>34</sup> Are proponents of ratification willing to devote the time and energy necessary to resolve all of the legal controversies swirling around the ERA—validity of rescissions, the constitutionality of the 1979 extension, and the like? What of other proposed amendments that have lain dormant? Will we have to deal with them soon, too? And what of the various proposals to call constitutional conventions of one sort or another? Have enough states called for a convention at one time or another to meet Article V's requirements?<sup>35</sup> If so, must Congress call one? The presence of these and other serious questions should at least give supporters pause.

Of course, supporters of the ERA could always reintroduce the Amendment in Congress, get the required two-thirds vote in both houses, and then seek ratification by three-fourths of the states, just as the Constitution requires. We do not know whether there is sufficient support for the ERA to gain such constitutional supermajorities or not, but the fact that supporters

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31. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824).

32. See, e.g., G. Alan Tarr, *Understanding State Constitutions* 143 (Princeton U. Press, 1998) (noting tendency of twentieth-century "interest groups and factions within the legislature [to] champion[] constitutional amendments to enshrine policy decisions in the fundamental law, hoping thereby to make it more difficult for them to be overturned") (footnote omitted); cf. Cass R. Sunstein, *Against Positive Rights*, in Andras Sajó, ed., *Western Rights?: Post-Communist Application* (Kluwer Law International, 1996) (warning emerging democracies that the use of new constitutions to enshrine a "chaotic catalogue of abstractions" would be "a large mistake, possibly a disaster").

33. See, for example, Paulsen, 103 Yale L.J. at 678-81, 722 (cited in note 17); William Van Alstyne, *What Do You Think About the Twenty-Seventh Amendment?*, 10 Const. Comm. 9 (1993).

34. Again, the haste with which Congress approved the Madison Amendment, despite questions from legal scholars, is perhaps itself evidence that questions regarding the amendment process should *not* be regarded as nonjusticiable political questions and left to the discretion of Congress, as some scholars have suggested. See, e.g., Tribe, 97 Harv. L. Rev. (cited in note 14).

35. For a thoughtful discussion of these issues, and a plausible argument that a sufficient number of states have "live" petitions for an Article V constitutional convention before Congress, see Paulsen, 103 Yale L.J. at 733-35 (cited in note 17).

have resorted to constitutional necromancy in their efforts to revive the ERA suggests that even ERA's backers have their doubts. If this is the case, then that alone is probably the best reason not to short circuit the Constitution's demanding amendment process.