UNIVERSITY OF
St.Thomas

School of Law

April 29, 2019

House Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
United States House of Representatives

Dear Members of the Subcommittee:

My name is Michael Stokes Paulsen. I am a law professor who writes and teaches in the area of U.S. Constitutional Law. I have been a law school professor for nearly twenty-eight years, first at the University of Minnesota Law School (1991-2007) and currently at the University of St. Thomas School of Law (2007-2019). I currently hold the position of Distinguished University Chair and Professor of Law at the University of St. Thomas School of Law, in Minneapolis. Before coming to St. Thomas, I taught for sixteen years at the University of Minnesota Law School, where I was the McKnight Presidential Professor of Law and Public Policy and Associate Dean for Faculty Research & Scholarship. I have taught as a visiting professor at universities in Sweden (2001), Kenya (2010), and Chile (2015, 2016) and most recently as a Visiting Professor of Politics at Princeton University (2018).

I have written and published in the field of Constitutional Law for more than thirty years. I am the author of more than ninety academic scholarly articles, on various topics of Constitutional Law and other subjects, published in leading law reviews and law journals, including the *Harvard Law Review,* the *Yale Law Journal*, the *Stanford Law Review*, the *University of Chicago Law Review,* and the *Michigan Law Review* (among others). I am the lead co-author of the academic casebook, ***The Constitution of the United States***, published by Foundation Press and now in its third edition. (Co-authored with professors Steven Calabresi, Michael McConnell, Samuel Bray, and Williams Baude.) I am co-author (with Luke Paulsen) of the book ***The Constitution: An Introduction*** (Basic Books 2015). My academic C.V. is separately provided with this letter.

I have studied and written specifically about the proper understanding of the constitutional amendment process under Article V of the U.S. Constitution. The most thorough exposition of my views is set forth in a lengthy academic article I wrote more than twenty-five years ago, published in the *Yale Law Journal*. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 Yale L.J. 677 (1993) (hereinafter "*A General Theory of Article V*"). In that article, I set forth a comprehensive treatment of the legal issues surrounding the interpretation and application of Article V of the Constitution. (I have submitted to the Subcommittee, electronically, a copy of that article.) I have addressed

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specific questions of constitutional law concerning the constitutional amendment process in other academic writing as well. *See* Michael Stokes Paulsen, *How to Count to Thirty-four: The Constitutional Case for a Constitutional Convention*, 34 Harv. J. L. & Pub. Pol'y 837 (2011); Michael Stokes Paulsen, *The Next Constitutional Convention: Rules for Congress and the Courts*, in M. Wilkey, ***Is it Time for a Second Constitutional Convention?*** (1995).

I am honored to have been invited to provide written testimony concerning the constitutional validity of legislative proposals seeking to revive the Equal Rights Amendment ("ERA"). I am unable personally to attend the scheduled hearing date because of a conflicting commitment.

The Equal Rights Amendment was proposed by Congress in March 1972 but did not obtain the constitutionally required number of state ratifications within the time deadline of seven years specified in Congress's enactment proposing the amendment. H.R. J. Res. 208, 92^{d} Cong., 1st Sess. (1972), 86 Stat. 1523. The amendment also failed to obtain the necessary number of state ratifications following a (purported) legislative "extension" of the time deadline contained in the original legislation by an additional three years and three months, until June 30, 1982. H.R. J. Res. 638, 95th Cong., 2d Sess. (1978), 92 Stat. 3799.

I understand that the Subcommittee is considering proposals that would purport retroactively to "extend" indefinitely – or eliminate entirely – the legislative time limit specified in Congress's enactment proposing the ERA to the States, and thereby seek (in effect) to "revive" the defeated amendment proposal. I understand that at least some members are proposing that Congress enact legislation that would purport to count ratifications of the earlier, defeated ERA proposed amendment along with new (post-rejection) ratifications of the ERA, so as to satisfy the constitutionally required threshold of ratification by three-fourths of the states.

With all due respect, such proposals are legally frivolous. They do not conform to the Constitution's requirements under a proper understanding of Article V of the Constitution. Consequently, an amendment "ratified" by such a process would be legally invalid. If Congress desires to re-propose the Equal Rights Amendment, the only constitutionally proper approach is to require new ratifications by three-fourths of the States. It is not proper to count old ratifications of a defeated proposal.

The issue is, if anything, easier even than that of a mid-stream "extension" such as was at issue in the late 1970s and early 1980s. That earlier extension was invalid, for reasons I explained, briefly, in my 1993 article in the *Yale Law Journal*: The initial proposal contained a seven-year legislative "sunset" as part of the enactment proposing the amendment. As a matter of law:

> Any change in the terms of the original amendment proposal logically invalidates the ratifications of states that had voted for the earlier version. By changing the terms of the earlier amendment proposal – by adopting *new* legislation – Congress in effect proposes an entirely new constitutional amendment (albeit largely identical in substance), requiring the states to start all over again with new ratifications.

A General Theory of Article V, 103 Yale L.J. at 726.

The original ERA extension thus was legally improper and ineffective. But at all events, the proposed ERA failed of ratification even within that purported extended time deadline. Thus, even if it might have been open to argument that Congress could extend a time deadline for ratification before an initial deadline had expired (an argument that, as noted, was itself logically and legally flawed), such a position surely is untenable as applied to a constitutional amendment proposal whose initial time period for ratification expired forty years ago and that failed of ratification *at least* thirty-five years ago.

Simply put, the question of whether Congress can now, constitutionally, retroactively both "extend" the deadline and count old ratifications for an expired amendment proposal has a simple and obvious answer: *No.*

It may be useful to explain and illustrate this conclusion by setting forth a series of distinct propositions about the constitutional amendment process under Article V of the Constitution:

1. Article V of the Constitution does not itself impose a time deadline for ratification of amendment proposals enacted by Congress. (Nonetheless, dictum in an old Supreme Court decision, *Dillon v. Gloss*, 256 U.S. 368 (1921), asserted, incorrectly I believe, that ratification requires a "contemporaneous consensus" and thus there is an *implicit constitutional* time limit to any amendment proposal. That proposition is textually and practically indefensible and appears to have been abandoned by the U.S. Supreme Court. *A General Theory of Article V*, 103 Yale L.J. at 684-704, *see id.* at 706-721.)

2. Though the Constitution does not itself impose a time deadline for state ratification of amendment proposals, Congress certainly *can* impose one. And it may do so *either* as part of the text of the proposed amendment itself (as is the case with several amendments that have been ratified) *or*, more simply, as part of Congress's enactment legislation proposing the amendment but not part of the text of the proposed amendment. I understand that some persons now might be suggesting that Congress is *constitutionally barred* from imposing *any* time limit as a condition of an amendment proposal. If so, I this position is legally preposterous – utterly meritless to the point of foolishness. The constitutional validity of the Twenty-seventh Amendment (which was the major point of my article twenty-five years ago, *A General Theory of Article V, supra*) is a consequence of ratifications, over the course of a great many years, *where the amendment proposal by Congress did not contain a time limitation*. This provides no support at all for the proposition that Congress constitutionally cannot attach a time-for-ratification condition to the proposal. With respect, such an assertion would border on the absurd.

3. Whether a time-of-ratification limitation is part of the text of a proposed amendment or part of Congress's legislative enactment proposing the amendment, States seeking to ratify the proposed amendment plainly must do so within the time period prescribed by Congress's enactment of the amendment proposal. See *A General Theory of Article V*, 103 Yale L.J. at 721-733. Simply put, States can only ratify an amendment proposed by Congress in accordance with the terms of Congress's enactment proposing the amendment. If the legislation (or amendment itself) specifies a time period for ratification, and the requisite number of states has not ratified the amendment proposal within that specified time period, the amendment fails of adoption.

Ratifications occurring outside a legislatively prescribed time period are simply ineffective and legally invalid. They purport to "ratify" an expired amendment proposal.

To employ a simple illustration: Suppose Congress proposed a Balanced Budget Amendment but prescribed that its proposal would cease to be eligible for ratification after seven years – a familiar legislative "sunset" proviso. Suppose that, after seven years, there are insufficient state ratifications. The proposal failed of adoption and, by its own terms, lapsed. Suppose, then, that a state, say my home state of Minnesota, purports to ratify the lapsed proposal. Minnesota's ratification would be invalid, for the simple reason that it did not occur within the time period specified by Congress's proposal of the amendment. The proposal was no longer legally operative. Put colloquially, the proposed amendment was dead, because not ratified by the requisite number of states by the end of the prescribed time period for which the proposal was alive. Minnesota cannot ratify a dead constitutional amendment proposal.

4. Can Congress resuscitate a dead constitutional amendment proposal? No. But Congress certainly can *re-propose* a formerly rejected proposal, by a two-thirds majority vote of both houses – Article V's specified supermajority requirement for congressionally proposed constitutional amendments. And in so doing, Congress can designate whatever time period it wishes for ratification, including no time limit at all, for its *new* proposal or re-proposal.

5. Can Congress, by re-proposing a constitutional amendment of identical or similar substance to a rejected proposal, *count* state ratifications of the old, defeated, *dead* former proposal as ratifications of the *new* (albeit substantively identical) proposal? No. That should be clear from paragraph #3 above. Such a maneuver would be a transparent, illegal ruse. The new proposal requires three-fourths of the states to ratify the *new, live* proposal. Congress can no more circumvent this constitutional requirement by declaring ratifications of an earlier, rejected proposal to count as ratifications of the new one than it could dispense with the requirement of ratifications by three-fourths of the states altogether. Obviously, Congress could not decide that ratification by one-fourth of the states is enough. That would plainly violate Article V of the Constitution. Using old ratifications of a former proposal as substitutes is just a different version of the same constitutional violation: the Constitution specifies a rule, and Congress cannot violate or evade this rule simply by declaring something to count that does not count.

6. The conclusion would be different *only* if Congress can do (literally) *whatever it wants* with respect to the ratification process. There are some odd hints to this effect in the plurality opinion (or dicta within such opinion) in the Supreme Court's 1939 case of *Coleman v. Miller*. But that opinion is much-criticized and of doubtful authority or validity. No opinion in the *Coleman* case obtained a majority of justices in support of its analysis. Indeed, it is unclear whether any distinct legal proposition commanded the assent of a majority of the justices. *A General Theory of Article V*, 103 Yale L.J. at 707-709, 713-718.

It is unlikely in the extreme that courts today would find in *Coleman* justification for the proposition that Congress can retroactively resuscitate an expired amendment proposal and cumulate ratifications of the expired proposal with new ratifications of a re-proposed amendment, in order to satisfy Article V's counting requirement. The suggestion that Congress has "plenary power" over the amendment process is simply not consistent with the Constitution's

text. Nor did it command the support of a majority of the Court even in *Coleman* itself. *See id.* at 713-718. Indeed, such a theory would be manifestly absurd: it would suggest that Congress could "deem" the Equal Rights Amendment ratified simply by its say-so, even though the amendment failed to obtain the ratification of three-fourths of the States. Even those who supported the purported time-deadline-extension maneuver in 1982 have rejected such a reading as ludicrous. *See id.* at 719. In short, the *Coleman* case provides no proper justification for the types of proposals discussed above.

7. Finally, I note that the Supreme Court itself has treated the Equal Rights Amendment proposal as dead and thus incapable of state ratification. In *National Organization for Women v. Idaho*, 459 U.S. 809 (1982), the Court dismissed as moot a case raising the question whether Idaho's rescission of its earlier ratification of the ERA was valid. The case was moot because nothing of legal consequence turned on any answer to the question of the validity of rescission, due to the fact that even the ratification-extension deadline had passed and the ERA proposal was no longer legally capable of being ratified. Whether Idaho had or had not ratified the ERA made no legal difference because the ERA proposal had been defeated – and was thus extinguished – no matter the legal validity of Idaho's action.

The Solicitor General's "Memorandum for the Administrator of General Services Suggesting Mootness" noted for the Court's attention that "the extended period for ratifying the Amendment expired" and that "the Amendment has failed of adoption no matter what the resolution of the legal issues presented here." Memorandum in Nos. 81-1282 and 81-1283, and in Nos. 81-1312 and 81-1313. The Supreme Court, in its opinion dismissing the case as moot, embraced that position in its one sentence disposition: "Upon consideration of the memorandum for the Administrator of General Services suggesting mootness, filed July 9, 1982, and the responses thereto, the judgment of the United States District Court for the District of Idaho is vacated and the cases are remanded to that court with instructions to dismiss the complaint as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)." The Supreme Court's disposition of the case on mootness grounds logically entails the predicate conclusion that the proposed Equal Rights Amendment had failed of ratification and was no longer legally capable of being ratified.

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For these reasons, it is my conclusion that the former proposed Equal Rights Amendment is no longer capable of being ratified by the States; that the proposal has expired; that former ratifications are thus no longer operative; that post-rejection "ratifications" are ineffective; and that Congress cannot resuscitate an expired constitutional amendment proposal. The only avenue constitutionally available to Congress would be to re-propose an amendment of the same substance of the rejected ERA (or one of similar substance) by the constitutionally required two-thirds majority votes of both houses and submit such a re-proposed (or new) amendment for ratification by three-fourths of the States.

Please let me know if I can be of further assistance.

Respectfully submitted,

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Distinguished University Chair & Professor of Law
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